

Home Confinement under the CARES Act

Issues concern whether the Federal Bureau of Prisons (Bureau) should expand existing use of authority under Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and implementation of Office of Legal Counsel (OLC) opinion requiring the return of offenders to custody after the pandemic emergency has ended.

Background

- In general, the ability of the Federal Bureau of Prisons (Bureau) to place inmates on home confinement is limited by statute, 18 U.S.C. § 3621(c)(2):

“Home confinement authority.--The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”

- An exception to these general limitations is the Elderly Offender Home Confinement Program, which was modified by the First Step Act. This allows the Bureau to place inmates on home confinement, if they are at least 60 years of age, and have has served 2/3 of the term of imprisonment to which the offender was sentenced, among other criteria. See <https://www.bop.gov/policy/om/001-2020.pdf>
- The Bureau’s general policy concerning home confinement can be found at: https://www.bop.gov/policy/progstat/7320_001_CN-2.pdf In general, inmates on home confinement are managed under agreement with the United States Probation Office, or through a private contract provider.

CARES Act Authority

- The CARES Act expanded the Bureau’s authority to place potentially all inmates on home confinement in response to the COVID 19 pandemic, stating:

“During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau of Prisons may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director deems appropriate.”
- The term “covered emergency period” means the period beginning on the date on which the President declared a national emergency under the National Emergencies Act (50 U.S.C. § 1601, et seq.) with respect COVID-19 and ending on the date that is 30 days after the date on which the national emergency declaration terminates.

- As a result of the CARES Act, the former Attorney General issued two memoranda which authorized the Bureau to use this authority, and instructed on how to prioritize inmates for home confinement consideration. See:

https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf

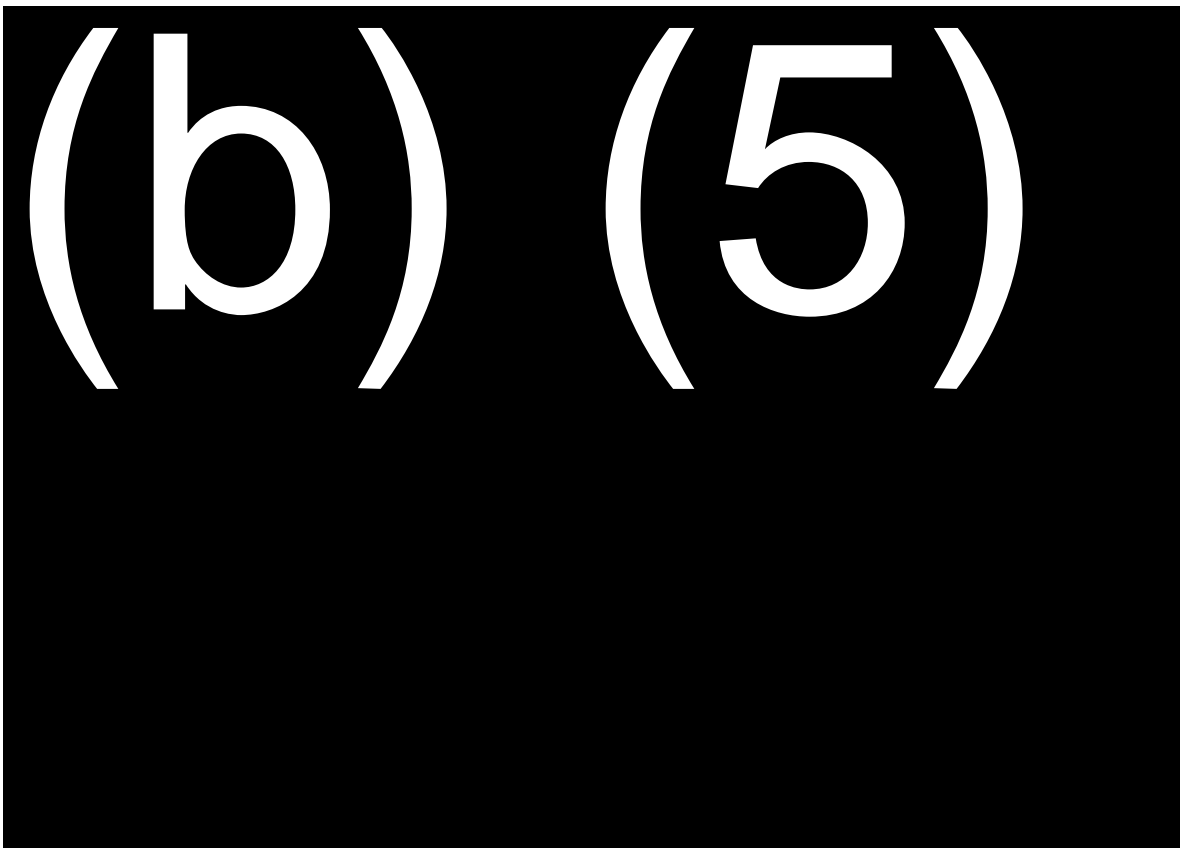
https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf

- The Bureau's efforts to place inmates on home confinement are further described here:

<https://www.bop.gov/coronavirus/faq.jsp>

Possible Expanded Use of Home Confinement Authorities

- In addition to the above referenced memoranda, former Department of Justice staff directed the Bureau to apply certain criteria to ensure appropriate inmates were placed on home confinement.

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Authority to Return Inmates to BOP Facilities

- OLC issued an opinion finding that CARES Act only authorizes the Bureau to place prisoners in home confinement during the Act's covered emergency period and when the Attorney General finds that the emergency conditions are materially affecting BOP's functioning.
- OLC stated that should the period end, or should the Attorney General revoke the finding, the Bureau would be required to recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2).
- OLC further found that the Bureau's authority under 18 U.S.C. § 3621(a) and (b) does not provide an alternative basis for authorizing continued home confinement for prisoners ineligible for continuing home confinement under section 3624(c)(2). See:

<https://www.justice.gov/olc/file/1355886/download>

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE OFFICE OF THE DEPUTY ATTORNEY GENERAL

FROM: Ryan Underwood
Office of Legislative Affairs

SUBJECT: Summary of April 15, 2021 House Appropriations Subcommittee Hearing

PURPOSE: To provide an overview of Bureau of Prisons (BOP) Director Michael Carvajal's appearance before the Senate Judiciary Committee (Full Committee)

DATE: April 15, 2021

As anticipated, the major topics covered during the hearing were the BOP's response to COVID-19 (including vaccination), the use of home confinement, First Step Act implementation, and private prisons:

Topline Hearing Topics

- COVID-19 Response and Vaccination Rollout

Members were very concerned with vaccine acceptance rates (i.e., the percentage of individuals willing to be vaccinated) among both inmates and staff. The Director reported that, currently, 51% of staff were willing to be vaccinated and have received a vaccine, and approximately 60% of inmates were willing to be vaccinated with about 40% of inmates having received at least one dose. The BOP has taken several actions to promote vaccine acceptance including two video campaigns by the Director and garnering support from the Union in encouraging vaccination. The Director noted, however, that the BOP cannot mandate that staff be vaccinated as the vaccines available were approved subject to an Emergency Use Authorization (EUA) and, further, the Director respects his employees' right to choose whether they are vaccinated. The Director reported that by mid-May, all inmates who want a vaccine will have been administered at least one dose. Currently, the BOP is administering all of the doses it receives from the COVID-19 Vaccine/Therapeutics Task Force as it receives them and is ensuring that no doses are wasted.

The Director also received questions with respect to testing, masking, and social distancing. Mask mandates and social distancing protocols remain in place and testing is widely available and utilized in accordance with CDC guidance. The BOP has administered over 500,000 tests to a population of approximately 150,000 inmates and detainees. Some members expressed concern about the use of solitary confinement or restrictive housing for quarantine and isolation purposes. The Director explained that, while it has attempted to limit its use, the practice of "isolation", as indicated by the CDC for symptomatic and COVID-19-positive inmates, requires that they be totally separated from other individuals and the use of secure housing units was necessary to

effectively isolate infected individuals. The BOP has employed measures to mitigate the negative effects of isolation on inmates, but the Director emphasized that there is a balance that must be achieved between those effects and the emergent need to protect other inmates and staff from infection and to slow the spread of COVID-19 in federal prisons.

Some members expressed concerns about specific institutions within their states, which included the early-pandemic outbreak at FCI Terminal Island (Sen. Feinstein), the outbreak at FCI Ft. Dix (Sen. Booker), vaccination and staffing at FCI Danbury (Sen. Blumenthal), and vaccination uptake at USP Atlanta (Sen. Ossoff).

- Home Confinement

Many members were concerned with the BOP's use of the home confinement authority provided under the CARES Act and accompanying Attorney General memoranda. The Director explained that, upon passage of the CARES Act, it determined that approximately 27,000 inmates were eligible based on medical vulnerability alone. After application of the criteria under the Attorney General memoranda, approximately 4,000 of those inmates were eligible for immediate transfer to home confinement. However, through application of the discretion afforded to the BOP to make home confinement transfer determinations, the BOP has now transferred over 24,000 inmates to home confinement. The most common disqualifying factor for home confinement were the non-discretionary offense-based criteria (i.e., inmates convicted of violent, sexual, or terroristic offenses are ineligible). Sens. Booker and Klobuchar expressed concern about the BOP's use of the PATTERN tool for determining inmate risk-levels for home confinement consideration. The Director confirmed that the PATTERN tool was shown to be the most predictive in terms of assessing recidivism risk and had been appropriately vetted by independent authorities that considered perceived racial bias. The Director also reported that the BOP has now received guidance that it can begin considering inmates with a "low" risk score for transfer to home confinement.

Members also expressed concern about the legal interpretation of CARES Act authority in the January 15, 2021 OLC opinion. The Director explained that he must operate within the legal boundaries set out by the CARES Act and the Department's interpretation thereof. As such, the BOP has begun planning to recall inmates currently on home confinement should the end of the emergency period be declared, however, he reiterated that he does not believe that the end of the emergency period is imminent. During the hearing, Chairman Durbin clarified that he understands that the CARES Act can be, and has been, interpreted to require the BOP to recall inmates on home confinement who would not qualify under 18 U.S.C. § 3624(c)(2), and that he understands that BOP must comply with both the law and the Department's interpretation of it. Chairman Durbin expects that he will write a letter to the Attorney General requesting reconsideration of the OLC opinion and, if doing so does not provide a satisfactory resolution, the committee may seek a legislative solution.

There are approximately 7,500 inmates currently serving sentences on home confinement and approximately 4,500 of those inmates would currently only be eligible under the expanded home confinement authority under the CARES Act. Of those 4,500 inmates, approximately 2,400 have remaining sentences of over one year and about 310 have 5 or more years remaining on their sentences.

- **First Step Act Implementation**

Both Chairman Durbin, Ranking Member Grassley, and other members expressed concerns about implementation of the First Step Act (FSA). Chairman Durbin referenced a December 2020 Independent Review Committee (IRC) report and stated that the Department and the BOP had, quoting from the report, “failed to develop a fully integrated and comprehensive needs assessment system”. Chairman Durbin also mentioned concerns that the PATTERN tool was deeply flawed and could result in racial bias in the assignment of inmate security levels.

The Director confirmed that the BOP is on track to meet all FSA requirements and that, despite the constraints imposed by the pandemic, over 50,000 inmates had enrolled in FSA programs and over 25,000 inmates had completed those programs and earned time credits. Rebutting remarks by Ranking Member Grassley, the Director confirmed that the Department had fully developed and implemented a risk and needs assessment system in January 2020 and that the BOP has been successfully deploying that system. The Director also noted that the PATTERN tool had undergone a rigorous development process and was determined to be highly predictive of recidivism risk. In response to Senator Booker, the Director also noted that the PATTERN tool had been modified to remove two data points – age of first arrest/first conviction and voluntary surrender – to address racial bias concerns. The Director noted that the BOP did not make the decision to select this tool, but that it does undergo regularly review by an independent committee.

With respect to programming, the Director confirmed that the BOP now offers over 80 EBRR and PA programs covering a variety of needs including vocational, mental health, life skills, substance abuse, and religion-based programs. The BOP is working to safely ramp up programming and get the instructors and volunteers that administer these programs back into BOP institutions. Sen. Klobuchar cited the December 2020 IRC report in questioning whether the BOP was doing enough to ensure inmate access to programming and drug treatment. The Director stated that, to date, over 25,000 inmates had completed programming and earned time credits and over 41,000 inmates had participated in drug treatment programs. The Director noted that the BOP had expanded access to drug treatment programs, even throughout the pandemic.

- **Private Prisons**

The issue of private prisons was briefly raised by Sen. Cornyn and Sen. Lee. The Director stated that the decision to end private prison contracts has been under consideration since before the Executive Order (EO) requiring non-renewal of private detention contracts was issued as the BOP’s inmate population has been steadily declining for years. The Director stated that the BOP currently has 125,000 inmates and 55,000 open beds and can fully absorb the population of inmates currently housed in contract facilities into BOP institutions, and that the non-renewal of these contracts represents good stewardship of taxpayer dollars. The Director did not comment on the U.S. Marshals Service’s detention bedspace needs or use of contract facilities.

Other Topics

The topics below were only briefly discussed and require no further follow-up:

- Stimulus checks for inmates (Durbin, Cornyn)
- Sexual abuse hotline services for inmates (Coryny)
- Staffing and augmentation (Durbin, Blumenthal)

- Jeffrey Epstein Death Investigation (Sasse)
- Non-working security cameras (Ossoff)
- Technology services contractors (Hawley)
- Contraband cell phones/interdiction pilot (Cotton)

Members in Attendance

Sen. Richard Durbin, *Chairman*

Sen. Diane Feinstein

Sen. Cory Booker

Sen. Amy Klobuchar

Sen. Alex Padilla

Sen. Jon Ossoff

Sen. Richard Blumenthal

Sen. Chuck Grassley, *Ranking Member*

Sen. John Cornyn

Sen. Mike Lee

Sen. Ted Cruz

Sen. Ben Sasse

Sen. Josh Hawley

Sen. Tom Cotton

From: [USAE0-Legal Programs](#)
To: [USAE0-CivChiefs](#)
Cc: [Burch, Alan \(USAE0\)](#); [Bowen, Brigham \(CIV\)](#)
Subject: BOP Home Confinement Litigation
Date: Friday, July 30, 2021 3:47:09 PM
Attachments: [BOP Home Confinement.pdf](#)

TO: ALL CIVIL CHIEFS

FROM: David L. Smith
Counsel for Legal Initiatives
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Civil Chiefs,

There is keen interest within the Department in any litigation concerning the attached OLC opinion regarding BOP home confinement. OLC opined that in the event that the emergency period outlined in the CARES Act comes to an end, or should the Attorney General revoke the finding that the emergency conditions are materially affecting BOP's functioning, then BOP must return to correctional facilities those prisoners who were sent to home confinement under the CARES ACT's expanded authority, unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2).

If your office has any litigation that touches on this issue, **please notify Brigham J. Bowen**, Assistant Director, Civil Division, Federal Programs Branch, (b) (6), (b) (6).

Thank you.

MEMORANDUM FOR THE ATTORNEY GENERAL
DEPUTY ATTORNEY GENERAL
ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION

FROM: TAMARRA MATTHEWS JOHNSON
SARA SOLOW
JONATHAN WROBLEWSKI

SUBJECT: Upcoming Meeting with the American Bar Association
President, President-Elect, and the ABA Criminal Justice Section
DOJ Dialogue Group

DATE: Thursday, July 29, 2021, 11 am to 12 pm

OVERVIEW:

On July 29, the Attorney General, Deputy Attorney General, and the Assistant Attorney General for the Criminal Division will attend a meeting with the American Bar Association (ABA) President, Patricia Lee (“Trish”) Refo, President-Elect Reginald (“Reggie”) Turner, and the ABA Criminal Justice Section’s DOJ Dialogue Group, which is composed of federal and state judges, professors, and practitioners. The meeting will begin with introductions; next, the President and President-Elect will offer some remarks on priorities for the ABA; and finally, the DOJ Dialogue Group will present on three criminal justice issues: 1) mandatory minimum penalties; 2) finality of sentencing and opportunities for a second look at terms of imprisonment; and 3) issues related to the BOP, including the First Step Act and compassionate release under the CARES Act. The Dialogue Group meets regularly to discuss important criminal justice matters, and maintains regular communication with the Department. The ABA, in particular its leadership and the Criminal Justice Section Dialogue Group, requested a meeting with Department leadership on the issues slated for the latter part of the meeting.

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Subject: ABA Meeting July 29, 2021

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ATTENDEES¹:

ABA President Trish Refo

ABA President-Elect Reggie Turner

Holly Cook – Associate Executive Director Governmental Affairs

ABA Criminal Justice Section (CJS) DOJ Dialogue Group:

Jim Felman (Chair) – Kynes, Markman & Felman, Tampa, FL

Judge Bernice Donald – U.S. Court of Appeals for the Sixth Circuit,
Memphis, TN

Chief Judge John Tunheim – U.S. District Court for the District of
Minnesota, Minneapolis, MN

Judge Sydney Butcher – Trial Court Judge, Baltimore, MD

April Frazier-Camara – National Legal Aid and Defender Organization,
Washington, DC

Michael Leotta – WilmerHale, Washington, DC

Wayne McKenzie – General Counsel, New York City Department of
Probation, New York, NY

Matt Redle – Former Prosecuting Attorney for Sheridan County, Sheridan,
WY

Steve Saltzburg – Professor of Law, George Washington University School
of Law, Washington, DC

DISCUSSION:

I. Opening Comments and Introductions

Talking Points:

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¹ Biographies of all attendees are attached (Tab 1).

² Trish's term ends, and Reggie's term begins, on August 10, 2021.

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II. President and President-Elect Discussion

The President and President-Elect will take about 20 minutes to present the ABA's priority issues with the Department, aside from criminal justice issues, which the Dialogue Group will cover. Those additional priorities are:

- A. Access to Justice
- B. Immigration issues – Article I Courts and access to counsel
- C. ABA Law Schools Policing Consortium (new initiative)

³ The ABA does not have a traditional organizational chart, but attached are a one-page summary and an index of its various committees and sections (Tab 2).

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A. Access to Justice

Access to pro bono and low-cost legal services for vulnerable persons is essential for an equitable legal system. The ABA is working to remove barriers to civil justice for low-income and disadvantaged people. The ABA advances its priorities through five primary activities: (1) promoting low- or no-cost legal assistance; (2) education and training to the profession and the public; (3) special initiatives or pilots; (4) advocacy to improve or lift legal barriers to access to justice; and (5) collaboration or convenings.

The core of the ABA's work in promoting Access to Justice is housed within its Legal Services Division. Several other key initiatives are organized under the ABA's Center for Public Interest Law, including the ABA's South Texas Pro Bono Asylum Representation Project (ProBAR).

The ABA supports recent administration actions, including President Biden's May 2021 directive to the Department to reinvigorate its Access to Justice function (Tab 3), and the Attorney General's May 2021 memorandum to the Department on Access to Justice (Tab 4).⁴

Talking Points:

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⁴ The ABA has provided suggested priority actions for the Department's Office for Access to Justice (Tab 5).

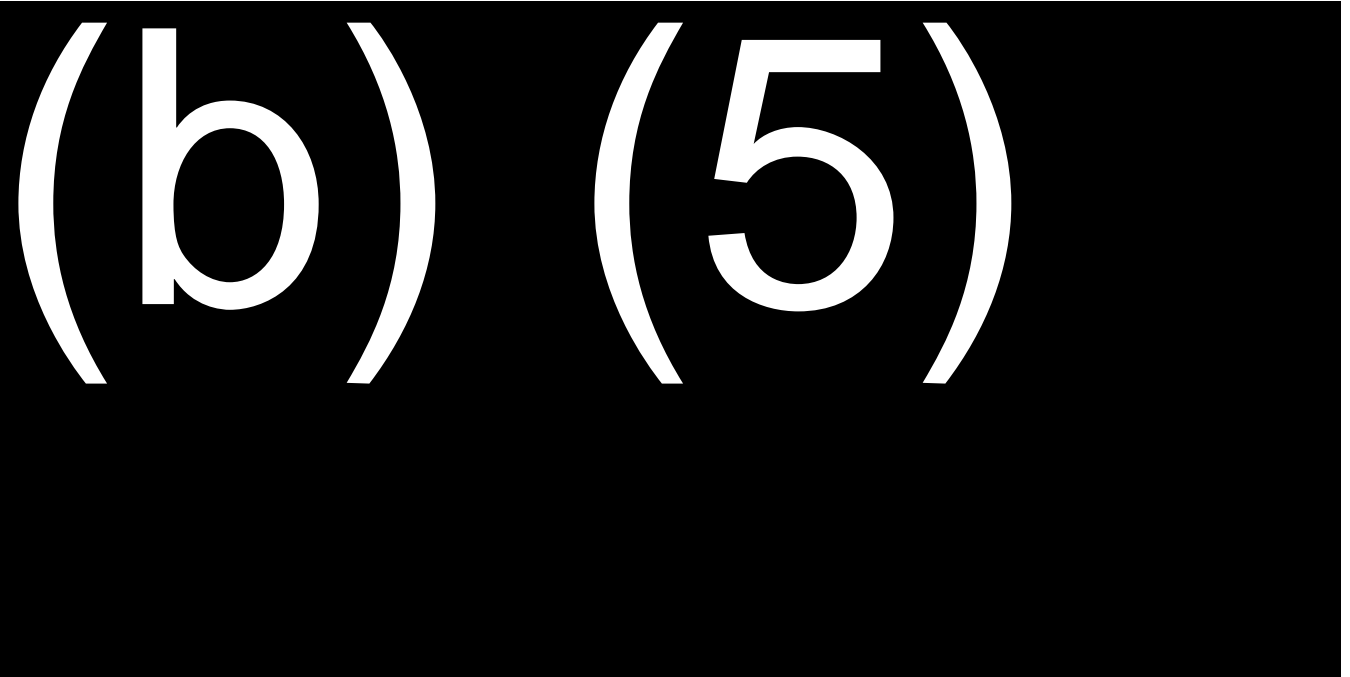
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B. Immigration issues – Article I Courts and access to counsel

We expect the ABA to highlight two immigration-related priorities during the meeting: the general topic of access to counsel, and the ABA's proposal to make the immigration courts an independent Article I tribunal like the Tax Court (Tab 6). The Department is likewise concerned about access to counsel issues. The ABA's immigration courts proposal would require careful study and consultation.⁵

Talking Points:



C. ABA Law Schools Policing Consortium

In October 2020, the ABA launched the “Legal Education Police Practices Consortium,” a partnership between the ABA’s Criminal Justice Section and over fifty law schools that aims to collaborate on projects to advance the widespread adoption of better police practices throughout the United States. The goal of the

⁵ Additional background on the ABA’s immigration priorities is attached (Tab 7).

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Consortium is to contribute to the national effort to examine and address legal issues in policing and public safety, including conduct, oversight, and the evolving nature of police work.

The Consortium will leverage the ABA's expertise in developing model police practices and that of interested ABA-accredited law schools to collaborate on projects to develop and implement better police practices throughout the United States. Fifty-two law schools so far have agreed to participate in the consortium for the next five years.⁶

Talking Points:

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Finally, Holly Cook, the ABA's Associate Executive Director, explained that Trish will return from a trip to Colombia the night before our meeting.

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Talking Points:

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⁶ More information on the consortium is attached (Tab 8).

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III. Criminal Justice Section DOJ Dialogue Group Discussion

Jim Felman serves as the chair of the CJS DOJ Dialogue Group. He has explained that after the Presidents' presentation, he and the Dialogue Group will address the below topics with the following "asks":

- A. **Mandatory Minimums.** The ABA hopes that the Department will end the use of existing mandatory minimums through revisions to charging and plea-bargaining policies, as well as support legislative measures to address the lingering impacts of their use in the past.
- B. **Second Look Authority.** The ABA hopes that the Department will support the use and continuation of second look authority in DOJ policy as well as in advocacy before the Sentencing Commission and the Congress.
- C. **BOP issues.** The ABA would like to share its thoughts regarding the disposition of prisoners released under CARES Act authority as well as First Step Act Implementation issues as outlined in the Report of our Section's FSA Implementation Task Force.

Jim (who is also a partner at a Tampa Bay law firm) has explained that the ABA advocates "allowing judge to be judges," with the ability to make individualized assessments to impose sentences without the strictures of mandatory minimums, and to exercise discretion to determine if a previously-imposed sentences should be reduced.

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A. Statutes with Mandatory Minimum Penalties

The ABA's opposition to mandatory minimum penalties is longstanding. In 2010, Jim offered testimony to the United States Sentencing Commission:

There is no question that criminals must be punished, and that prison serves legitimate retributive and incapacitative purposes, but punishments must be proportionate to the circumstances of the crime and the offender as well as the gravity of the underlying offense.

Unduly long and punitive sentences are counterproductive, and many of our mandatory minimums approach the cruel and unusual level as compared to other countries as well as our own past practices. On behalf of the American Bar Association, we urge the Commission to continue its unwavering opposition to mandatory minimums and to report the many and serious flaws of such statutes to Congress.

Hearing on Mandatory Minimums before the U.S. Sent. Comm'n, May 27, 2010 (Testimony of Jim Felman on behalf of the American Bar Association) (Tab 10 at 19). (b) (5)

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[REDACTED] A chart of frequently-charged federal statutes with mandatory-minimum penalties is attached (Tab 11).

Talking Points:

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B. “Second Look” at Federal Sentences

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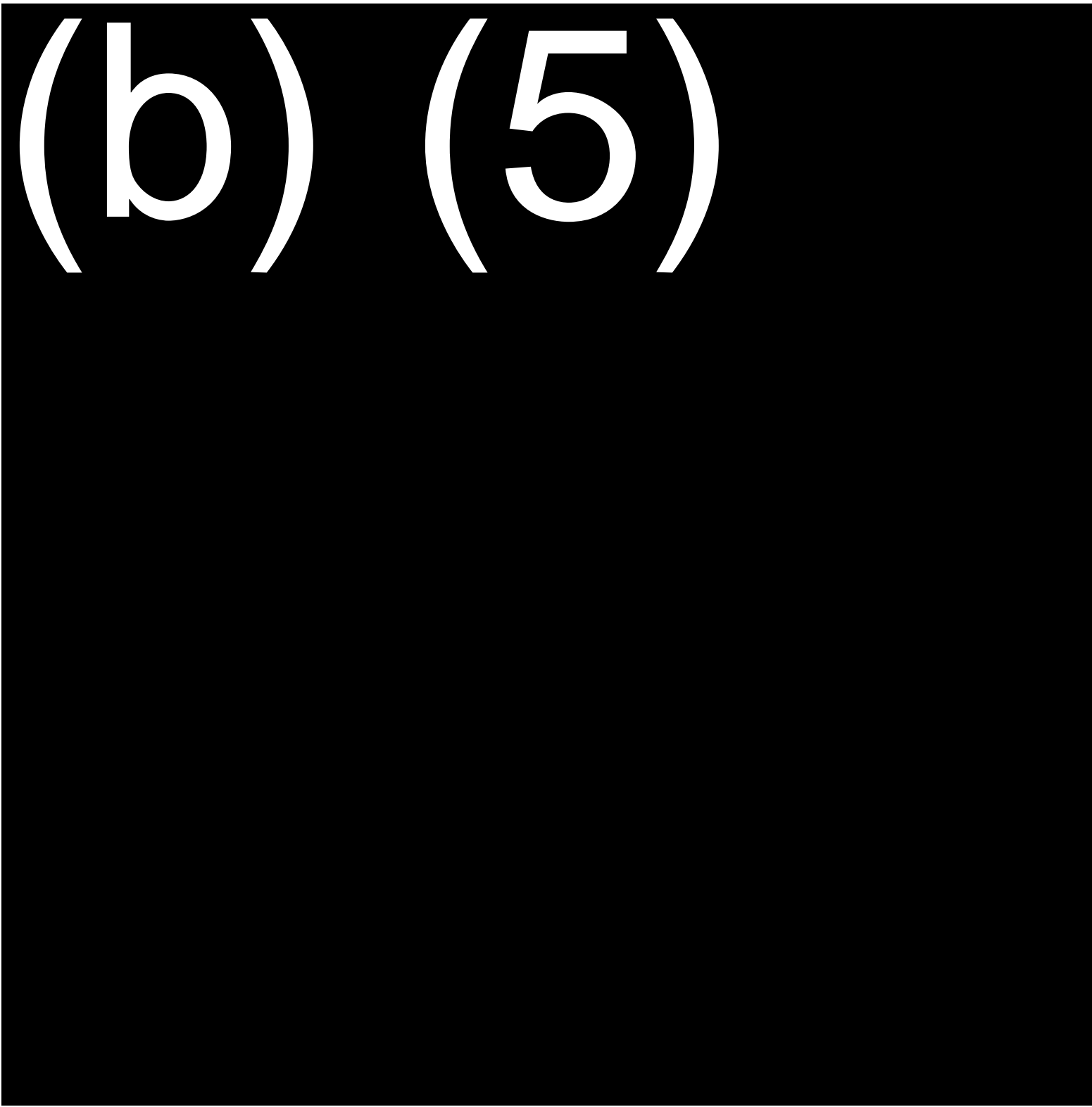
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C. BOP Issues

1. The First Step Act

The Criminal Justice Section of the ABA created a Task Force on the Implementation of the First Step Act shortly after its passage to monitor the progress of realizing the goals of the Act. The ABA Task Force has followed the implementation of the First Step Act and has many unanswered questions and continuing concerns. The March 2021 ABA Task Force report (Tab 14) detailed those concerns:

- i) The need for greater transparency: The data underlying the development and validation of the risk and needs assessment system should be disclosed.
- ii) The need for a needs assessment tool: Measuring risk is only the first step; the critical next step is to evaluate the needs of our prisoners and develop and provide programs and activities to meet those needs.
- iii) The need to remove obstacles and end parsimonious implementation choices: Too many prisoners are disqualified from eligibility based on their offense of conviction. There are not enough eligible programs available, and the BOP's proposed time credits rule would dramatically reduce the benefits for participation in the programming and activities that are available. The PATTERN tool lacks sufficient dynamic factors, uses an unnecessarily broad definition of recidivism, and then deploys parsimonious cut points that eliminate a further swath of prisoners from having any early release benefits to show for their rehabilitative efforts.

The ABA participated in the second of our two-hour First Step Act listening sessions that Department personnel held on July 15 and July 21 with outside

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stakeholders. The Department representatives highlighted a number of our efforts in the corrections space (b) (5),
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In addition, there are several developments this week. The Independent Review Committee has begun site visits at BOP facilities, in an effort to address the transparency concerns and allow third-party access to see the Act's implementation on the ground. The National Institute for Justice also convened a meeting on Tuesday on the annual reevaluation of PATTERN.

Talking Points (b) (5):

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2. The OLC Memorandum

The OLC memorandum on the CARES Act authority (Tab 15), and the requirement that inmates on home confinement return to correctional institutions at the conclusion of the pandemic, (b) (5)

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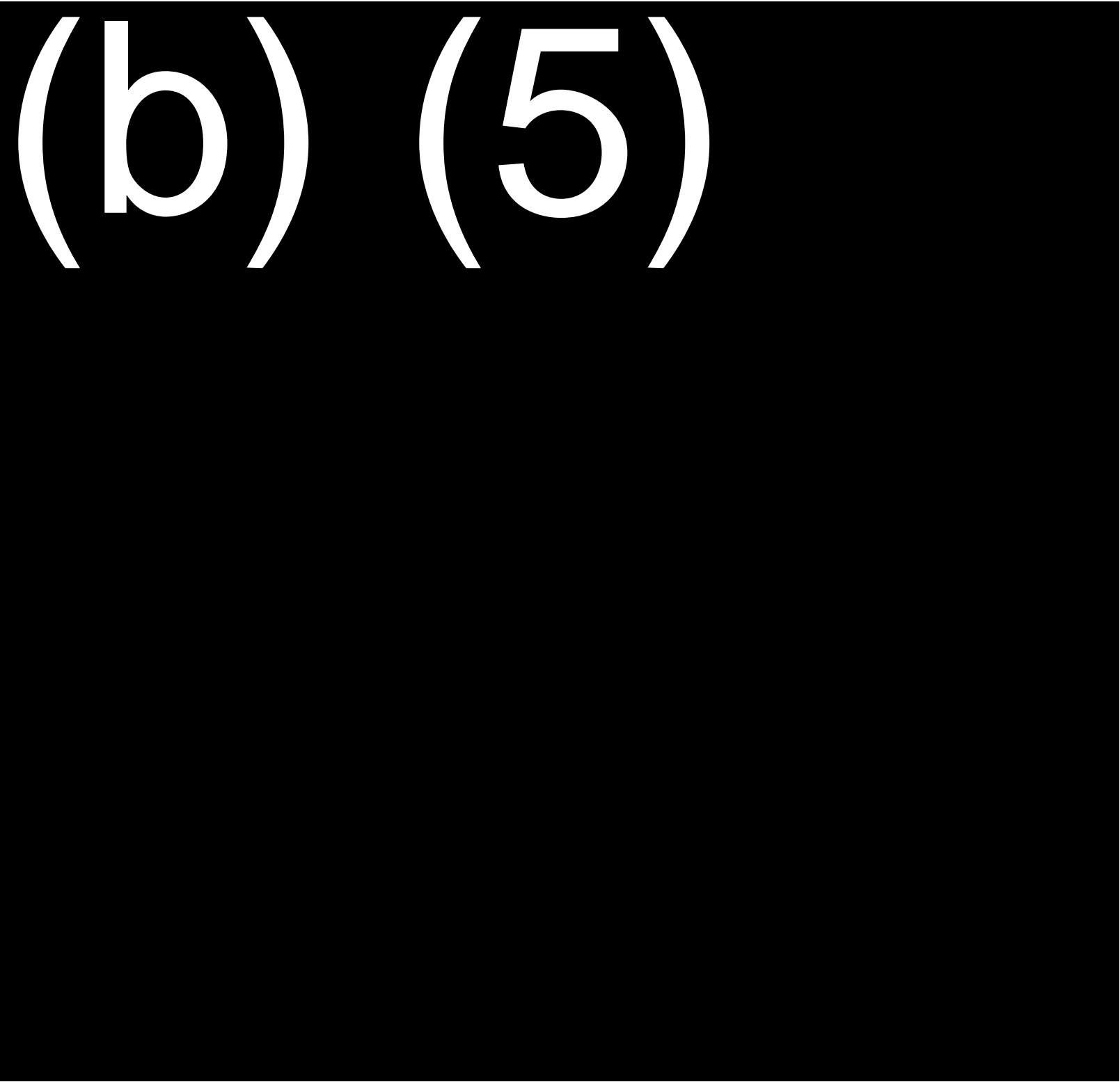
Talking Points:

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ATTACHMENTS:

Tab	Document
1	Biographies of Attendees
2	ABA overview of Committees and Sections
3	May 2021 President Biden Memorandum on Access to Justice
4	May 2021 Attorney General Memorandum on Access to Justice
5	ABA Priorities for the Department's Office for Access to Justice
6	February 2010 ABA Immigration Court Proposal
7	Background on ABA Immigration Priorities
8	Background on ABA Law School Consortium
9	(b) (5)
10	May 2010 ABA Testimony before the U S Sentencing Commission on Mandatory Minimums
11	Chart of frequently-charged statutes with mandatory minimum penalties
12	(b) (5)
13	(b) (5)
14	March 2021 ABA Task Force Report on the First Step Act
15	January 2021 OLC Memorandum on CARES Act release

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STAFF SECTION

PROPOSED DOJ ATTENDEES:

The Attorney General
The Deputy Attorney General
The Assistant Attorney General for the Criminal Division
Matt Klapper (OAG)
Kate Heinzelman (OAG)
Tamarra Matthews Johnson (OAG)
Tim Visser (OAG)
Maggie Goodlander (OAG)
Sara Solow (ODAG)
Eric Nguyen (ODAG)
Nicholas McQuaid (CRM)
Gwen Stamper (CRM)
Jonathan Wroblewski (CRM)

TECHNICAL REQUIREMENTS:

We would like to conduct this briefing in person in the seventh-floor conference room and via WebEx.



FIRST STEP ACT

Listening Sessions Materials

Office of Policy and Legislation
Criminal Division

FIRST STEP Act Listening Sessions

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U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

July 30, 2021

MEMORANDUM

TO: Tamarra Matthews-Johnson
Senior Counsel, Office of the Attorney General

Sara Solow
Senior Counsel, Office of the Deputy Attorney General

Eric Nguyen
Senior Counsel, Office of the Deputy Attorney General

FROM: (b) (6)
Legal Intern, Office of Policy and Legislation

SUBJECT: FIRST STEP Act Listening Sessions

I. Introduction

On Thursday, July 15 and Wednesday, July 21, 2021, the Department of Justice hosted two listening sessions via the Webex Conference platform as part of U.S. Department of Justice's review of the ongoing implementation of the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, or the FIRST STEP Act, (Public Law No. 115-139). In order to promote all of the goals of the Act, the Department sought input from stakeholders about the law's implementation. Ten organizations were invited to participate in each session for a total of twenty organizations; seventeen attended.

Each of the listening sessions took place over the course of two hours, with the first hour focused on implementation of the corrections reforms made by the Act (including PATTERN, programming, and incentives for participation) and the second focused on implementation of the Act's sentencing reforms (including changes to mandatory minimums, compassionate release, and home confinement). Participants from each organization were invited to speak for five minutes on each topic and respond to follow-up questions from Department representatives. Organizations were also invited to submit written statements summarizing or elaborating on issues raised during the sessions.

This memo summarizes concerns raised by the participating organizations, arranged by topic. Attached are the agendas outlining the structure of each session and the written statements submitted.

II. Participants

- **American Bar Association Criminal Justice Section**, Jim Felman.
- **Americans for Prosperity**, Jeremiah Mosteller, Senior Policy Analyst for Criminal Justice.
- **Arnold Ventures**, James Williams, Vice President of Criminal Justice Advocacy.
- **Brennan Center for Justice**, Ames Grawert, Senior Counsel, Justice Program.
- **Due Process Institute**, Jason Pye, Director of the Rule of Law Initiatives.
- **Families Against Mandatory Minimums (FAMM)**, Mary Price, General Counsel.
- **Federal Public and Community Defenders**, Patricia Richman, National Sentencing Resource Counsel.
- **Georgetown University Law Center**, Professor Shon Hopwood, Associate Professor of Law.
- **Justice Action Network**, Allison Fantz, Coalition and Program Coordinator.
- **The Leadership Conference on Civil and Human Rights**, Chloé White, Policy Counsel.
- **National Association of Criminal Defense Lawyers (NACDL)**, Elizabeth Blackwood, Counsel & Director of the First Step Act Resource Center.
- **Prison Fellowship**, Heather Rice-Minus, Senior Vice President of Advocacy and Church Mobilization.
- **The Sentencing Project**, Kara Gotsch, Deputy Director.
- **Tzedek Association**, Rabbi Jacob Weiss, Executive Director.
- **Urban Institute**, Julie Samuels, Senior Fellow in the Justice Policy Center.
- **Vera Institute of Justice**, Marta Nelson, Director of Government Strategy.

III. Feedback as to FIRST STEP Corrections Issues

Eric Nguyen began the first half of the sessions by acknowledging stakeholder concerns regarding the Bureau of Prisons' (BOP) proposed rule on ETC under the Act. He asked that stakeholders avoid discussing this issue at length, given the rule is still pending. Finally, he spoke to the Department's willingness to work with stakeholders to ensure the Act is implemented fully and fairly.

PATTERN

PATTERN generally. The stakeholders' main concerns with PATTERN were transparency, racial equity, and fairness. They were also concerned about errors in its implementation, flagging the mis-categorization of around 10% of incarcerated men and women as "shameful." They noted they had voiced concerns in the past, including participating in listening sessions with the prior administration; the ABA Criminal Justice Section had also sent a letter in 2019 to Attorney General Barr and received no response. In addition, because PATTERN became one of main assessments used for home confinement determinations under the CARES Act, problems with the tool and BOP errors unnecessarily placed inmates at risk for

COVID. In sum, several stakeholders recommended wholly abandoning PATTERN and any other type of risk assessment tools due to bias that will inherently be present in the calculus.

Risk assessments. The stakeholders asserted PATTERN’s statutory exclusions are too expansive, resulting in too few people categorized as minimum or low risk under current risk/recidivism thresholds and too many people in high risk categories. They believe “risk” labels are misplaced and even suggested that convictions for violent crimes do not necessarily equal a dangerous person. They argued the risk assessment calculation is “petty” and “mean-spirited,” and would benefit from individualized assessments. The Brennan Center recommended exploring the possibility of including rearrest in calculating risk, calibrating the tool based on those who are released.

Transparency issues. Stakeholders generally want more transparency in the way PATTERN operates, noting that NIJ has been unable to validate information used in PATTERN determinations. They want clear information about the way PATTERN works, especially what if anything it does to minimize racial disparities. They also note that BOP will not provide PATTERN scores or documents in compassionate release hearings, despite the government relying on them to oppose compassionate release motions. NACDL specifically asked that BOP make available PATTERN scores and scoring sheets, and any changes to those scores. Although inmates know their scores, they cannot get the scoring sheets. Providing worksheets is especially important because there have been instances where miscalculations were made, but errors are impossible to determine if defendants cannot see the information upon which scores are based. NACDL asserted the scoring sheets do not contain any sensitive information, but are critical to ensuring defendants are being treated fairly. They recommended giving the worksheets to the prisoners directly to avoid any discovery issues, noting discovery is a “weird beast” in relation to compassionate release hearings.

Racial disparity. Stakeholders asserted that PATTERN exacerbates racial disparities, noting that approximately 50% fewer Black males were categorized under low and minimal risk categories, although it is unclear if these figures were calculated before or after updates to PATTERN. They argued that the discriminatory impact of PATTERN only furthers racial inequities in the criminal justice system.

EARNED TIME CREDIT (ETC)

Generally. Stakeholders noted that the purpose of this bill was to improve programming and incentivize participation based on ETC and other perks, but argued that has not happened, and as such, the legislation has not lived up to its potential. They raised concerns that Attorney General Barr proactively acted to make more people ineligible for ETC; they want current leadership to rescind or correct such actions or statements. They noted that “productive activity” is defined in a very broad manner in FIRST STEP Act because Congress wanted it interpreted and implemented broadly. They said members of Congress have expressed that COVID-19 is not a sufficient excuse for the slow implementation of the Act and that rehabilitative programming has never been done in any kind of meaningful or even adequate way. Tzedek called the resulting “warehousing” of individuals, who are not allowed to contribute to society, “inhumane.” Others suggested asking incarcerated people what kind of incentives the program

should provide, remarking the “smallest things make the world of difference for incarcerated people.”

Tzedek also stated they work very closely with BOP and has heard from them time and time again that their hands are tied with respect to the FIRST STEP Act due to the Department’s implementation of the law. They have also been told by BOP that the Department does not listen to recommendations of BOP and/or does not involve BOP at all in policy determinations under the law.

ETC time formulation. Stakeholders call the current formulation of the BOP rule for hours per credit “excessive,” arguing that it does not make sense and that it “guts incentives” for programming due to an unduly burdensome definition of “day of participation.” They believe the BOP rule defining day of programming participation as 8 hours is an incorrect reading of the law, as the law speaks of “days,” not “hours,” and that as result, regulation should be based upon days.

ETC eligibility. Stakeholders asserted there is no meaningful distinction between the statutory list of offenders deemed ineligible for participation in ETC programming and those that are eligible under the Act. They also note that under the proposed rule, the best-behaved inmates have the fewest options for ETC because they’re assessed as having fewest needs, and ETC is only provided if inmates are assessed to have a work need. Too many inmates are not eligible to use ETC for early release and would appreciate more work on developing other benefits. Stakeholders pointed to a provision in Title I of Act which states that BOP should develop additional policies for appropriate incentives, including “incentives solicited from prisoners and determined appropriate by the Director.” Finally, the ABA called attention to *Goodman v. Ortiz*, current litigation related to ETC program, with the New Jersey District Court reading the law as applying ETC now, rather than the end of the phase-in period (January 15, 2022).

ETC programming. Stakeholders stated that programming options qualified for ETC under the Act need to be substantially increased as there is currently a severe lack of such programming. For example, The Sentencing Project discussed one inmate that had spent years working in prison as a GED and literacy instructor, but was told that programming is not considered “productive” under the Act. They raised “systemic” concerns about inequitable treatment of BOP program providers, suggesting there is no indication that internal BOP programming is subject to same scrutiny as third-party providers. They pointed to Texas as a good model for a process to approve prison programming, as the state proactively evaluates its programming every two years.

Specific programs. The Sentencing Project highlighted **UNICOR** as a program that consistently receives good reviews and should be expanded; inmates are paid a fair wage and feel like the program was a productive use of their time. On the other hand, Prison Fellowship (“PF”) announced they have not been able to launch **Prison Fellowship Academy** (“PFA”) in federal prisons. They recounted that in August 2018, they applied to make PFA programming available as a qualifying Evidence-Based Recidivism Reduction Program in federal prisons and it took 6 months to receive a reply with a denial; they were told that PFA did not meet the definition of productive under the Act and recidivism reduction was not established. PF asserts

that studies conducted on PFA recidivism show that PFA lowers recidivism rates of PFA graduates (e.g. study done by TX state corrections department). PF followed up on the BOP's denial with a letter requesting more information about the denial and including studies on the recidivism rates, but they have not received any response to date. As such, they are seeking clarity about whether BOP will refuse faith-based programs that are based on a particular faith tradition.

Arnold Ventures also remarked that that the Act calls for dyslexia screening and appropriate programming for those found to have dyslexia, and that Sen. Cassidy had asked Arnold Ventures about the screening requirement during a recent meeting.

Independent Review Committee

Lack of engagement. Stakeholders stated that the Independent Review Committee (IRC) has not engaged with stakeholders in any meaningful way, calling it the “*Invisible Review Committee*.” They would appreciate more opportunities to engage with the IRC, and commented that they hoped the expertise of the people on the IRC is being used, because the body is made up of great people. The Sentencing Project, for example, described difficulties that they have in advising clients and incarcerated people about their options for ETC and other reforms under the Act, because they still do not have sufficient information. In spite of that frustration, at least one organization applauded the IRC's open announcement regarding calculation errors with PATTERN.

IV. Feedback as to FIRST STEP Sentencing Issues

Sara Solow began the second half of the session by summarizing the Department's recent litigation positions under the FIRST STEP Act, including the Department's changed positions in *Terry v. United States* and *United States v. Carter*. She also discussed recent guidance issued as to § 401 of the FIRST STEP Act, which defined “prior felony drug offense” although the phrase was changed in 21 U.S.C. § 841(b)(1)(A) and (b)(1)(B) to “serious drug felony or serious violent felony,” the Act did not change the text of (b)(1)(C). The Department has now issued guidance that federal prosecutors should not seek the recidivist enhancement if the prior drug felony offense did not qualify as a serious offense for (b)(1)(C) offenses.

Sara also touched on a few compassion release-related issues. She noted that the Department has taken a more expansive view of COVID-19 risk factors, per CDC guidance, granting more inmates eligibility for compassionate release. She also expressed concerns about the current compassionate release provisions in the Sentencing Reform Act, as there were no procedural guardrails put in place in the Act for inmate-initiated motions. In addition to stakeholder comments about compassionate release, Sara encouraged stakeholders to present some alternative proposals, other than clemency, e.g. ALI's suggested second-look provisions. Finally, she discussed possible inequities regarding the population granted home confinement under the CARES Act, and asked stakeholders to speak to those concerns.

CARES ACT Home Confinement/OLC Memorandum

OLC memo reversal. There was a general consensus among the stakeholders that the OLC memo on home confinement should be reversed. They want to see some way to address the populations that were released to home confinement under the CARES Act and ensure they are not placed back in prison. They asserted that only approximately 20 out of 4,000 released have reoffended, and that such a figure should serve as a wake-up call that more people can be released. They argue the releasees should be considered as success stories of FIRST STEP Act and highlighted, rather than the Department not acting out of fear of stories about reoffenders. They argued that the way to restore public faith in the clemency power is not to let it go unused, but to use it for proper purposes, i.e. as a tool for justice and equality.

Alternative solutions. Prof. Hopwood advocated for a two-step process to achieve the wide release: release people to home confinement, and when they have adequately demonstrated a lack of risk, then allow compassionate release. He believed the pilot program for elderly and terminally ill offenders is a good model. Stakeholders also proposed potential solutions in lieu of rescinding memo, including: granting mass clemency for people on home confinement; expediting a significant batch of clemency review expedited to the administration; allowing BOP to make motions on behalf of all affected individuals, as per the discretion given to BOP in the guidelines; and/or allowing for lawyers to make individually initiated motions for compassionate release of everyone granted home confinement. Under the latter approach, the Department of Justice would need to provide lists of affected individuals and USAOs would need to be directed to join compassionate release motions. If the Department agreed to those conditions, the NACDL, FAMM, the ABA, and others would stand up a pro bono practice to file compassionate release motions on behalf of these people. Stakeholders vouched that there were many lawyers willing to step up and help efforts supporting release. For example, Arnold Ventures would be happy to work with the Department and other philanthropic funders on efforts to increase the capacity and services available to assist the population on home confinement.

The stakeholders were asked whether they believed home confinement resulted in further disparities and inequality, but the stakeholders stated they could not answer that without demographic data. However, they noted that even if there is inequity “baked into” the population released on home confinement, they argued “two wrongs don’t make a right” and that locking up people who got out and did not reoffend is unfair.

Compassionate Release Petitions

BOP approval. Many of the participating organizations expressed concern about the low BOP approval rate of compassionate release petitions. FAMM, for example, asserted that they have been part of the drive to bring sick and aging people before judges, despite BOP reluctance both before and after the FIRST STEP Act’s passage. They suggested BOP go beyond simply approving compassionate release petitions by proactively identifying those currently eligible for compassionate release. Prof. Hopwood claimed that despite BOP’s authority per the Guidelines to release inmates under the compassionate release provision, the agency, to his knowledge, has never done so. Stakeholders also suggested BOP use the compassionate release process to manage prison populations and control costs, and possibly use home confinement for inmates

ineligible for compassionate release. As it stands, many argued that BOP has not been approaching the compassionate release process in the spirit called for by the FIRST STEP Act.

Department opposition. In addition to resistance from the BOP, stakeholders were also critical of the Department's high rate of opposition to compassionate release motions, arguing that the interest of justice is not served by keeping aging people and people who have served long sentences in prison. Organizations like NACDL asserted that they have been facing fierce oppositions on these motions and believed the government has only supported about 70 of the thousands of compassionate release petitions filed during COVID. NACDL further noted that the government opposition is the likely cause of the high rate of denial for compassionate release petitions. As a particularly distressing example, they pointed to a case in the Eastern District of Kentucky where a 90-year-old serving a mandatory life sentence for a nonviolent marijuana conviction was denied compassionate release. Stakeholders asked that the Department support, or at a minimum not oppose, compassionate release petitions unless petitioners pose a substantial risk to public safety.

Judicial discretion. Stakeholders also attempted to address concerns that the Department may have regarding the compassionate release process. Pushing back against the notion that district courts are "rubberstamping" compassionate release petitions, NACDL cited the 80% denial rate of motions filed since 2020 as evidence that judges are critically reviewing petitions. They also noted that judges look at all the records in these hearings, including BOP records, disciplinary history, and educational history. Stakeholders are strongly supportive of judicial discretion in these hearings, asserting that there *are* procedural guardrails in place for the compassionate release process, namely an Article III judge. Nine out of ten appellate courts to address the issue have said district courts have discretion to determine what constitutes "extraordinary and compelling" circumstances. FAMM and NACDL asked that when the Sentencing Commission regains a quorum, they also support judicial discretion by broadly defining what constitutes "extraordinary and compelling" circumstances.

Mandatory Minimums

Prosecutorial conduct. Stakeholders were critical of the fact that prosecutors continue to seek maximum charges to trigger mandatory minimums despite the reduced crack/powder disparity and its retroactive application via the FIRST STEP Act. They urged the Department to charge as little as possible to avoid mandatory minimums. Many appreciated this administration's interest in eliminating mandatory minimums, but believe more can be done now to avoid them, e.g. instructing prosecutors to deprioritize low-level crack offenses among crack offenders. In preparation for the session, the Sentencing Project looked at Sentencing Commission data post-FIRST STEP Act and said they found the results to be disappointing the average sentence length reduction for drug offenses was insubstantial in a lot of cases and was heavily dependent on the drug type, ranging from thirteen month reductions to no change in average sentence length for marijuana trafficking.

Drug-quantity determinations. Stakeholders also spoke to lingering issues with mandatory minimum determinations. Federal Defenders, for example, touched on the "contentious" issue of what governs the trigger for mandatory minimums: either the underlying

conduct or the amount indicted and found by a jury. They do not believe conduct should govern the sentencing reduction, and claimed that the Eleventh Circuit has been particularly bad on this issue, also refusing to approve sentencing reduction petitions for sentences handed down prior to *Apprendi*. As example, Federal Defenders cited the case of *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020).

Sentencing Reform

Legislative Initiatives. A number of organizations spoke to sentencing reform legislation that they support and hope the Department will also support. Stakeholders like Due Process Institute, Prison Fellowship, and Tzedek Association were glad that the Department has shown support for the EQUAL Act, and urged them to extend the same level of support to other bills the organizations are following. Specifically, stakeholders were supportive of the FIRST STEP Implementation Act, Prohibiting Punishment of Acquitted Conduct Act, and the COVID-19 Safer Detention Act. The Sentencing Project also encouraged the Department to pursue and support “second look” legislation. Vera noted that they will be releasing a paper in the fall detailing seven discrete reforms for decarceration, including eliminating mandatory minimums and implementing second look legislation.

V. Miscellaneous Issues Raised

General FIRST STEP Implementation

“Unfaithful” implementation. Many stakeholders were generally critical of the way the FIRST STEP Act has been implemented, which they do not believe has been faithful to the intent of Congress in passing the law. Vera, for example, argued that the FIRST STEP Act is just that a first step and the few tools that were given to the government to decarcerate are not being taken advantage of. They encouraged the Department to use the tools granted under the Act to show what kind of reform is feasible and to encourage even more expansive progressive reforms. In addition, stakeholders noted that the reforms created by the Act are incredible tools to reach the current administration’s goals for criminal justice reform and cut the incarceration population in half. They encourage the Department to join conversations about how to best use the decarceral powers of the FIRST STEP Act. Brennan Center added that the corrections reforms were central to the (bipartisan) appeal of the bill and faithfully implementing them is therefore central to faithfully implementing the Act.

Department difficulties. Stakeholders were, however, sympathetic to the issues the Department was facing in implementing the bill, including COVID-19 and the previous administration’s attitude toward the reforms. Tzedek Association, for example, discussed their experience working with the previous administration, claiming they pushed back against implanting the bill faithfully to congressional intent and that definitions in bill were seemingly narrowed as much as possible. They ask that despite past reluctance, the Department now interpret the law in the broadest, boldest way possible.

COVID-19 Related Issues

Prof. Hopwood was concerned by visitation issues during the pandemic. He discussed how incredibly difficult visitation has been during the pandemic, which is demonstrably harmful to affected families. Another COVID-19 related issue was raised by Arnold Ventures, who were curious about the state of HHS guidance regarding funding for COVID mitigation authorized by the CARES Act. From their perspective, the guidance seems to have stalled.

Inmate Contact with Counsel

Prof. Hopwood encouraged BOP to devise better ways for lawyers to contact clients. In his experience, prisons normally do not answer phones, which is the main way lawyers currently seek contact. Once they do reach prison officials by phone, it is often difficult and time-intensive to set up confidential communication channels. Occasionally, he has had to contact clients by fax. In response to questions about preferred communication channels, he suggested an updated, secure email system or online portal. The Due Process Institute noted that there is a bill that would ameliorate issues with communication between counsel and inmates, H.R. 5546, the Effective Assistance of Counsel in the Digital Era Act. The legislation requires BOP to set up privileged email system.



FIRST STEP Act Implementation Stakeholder Listening Session

Your organization is invited to participate in a listening session to be held via the Webex Conference platform on **Thursday, July 15, 2021, from 1 pm to 3 pm** as part of the U.S. Department of Justice's review of the ongoing implementation of the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, or the FIRST STEP Act, (Public Law No. 115-139).

* * *

The FIRST STEP Act reformed federal sentencing policy in a number of ways. It also directed the Department of Justice to establish a risk and needs assessment system to assess and classify the recidivism risk of prisoners, and to incentivize and reward participation in and completion of evidence-based recidivism reduction programs and productive activities. The Department is committed to ensuring that FIRST STEP Act provisions work as intended to make our justice system fairer and our communities safer, including by providing opportunities for those who are incarcerated to prepare to reenter society successfully. To promote all of the goals of the Act, the Department would like to hear from stakeholders about the law's implementation.

In order to accommodate more interested stakeholders, we will be holding two 2-hour listening sessions. Each will follow the same format, with the first hour focused on implementation of the corrections reforms made by the Act (including PATTERN, programming, and incentives for participation) and the second focused on implementation of the Act's sentencing reforms (including changes to mandatory minimums, compassionate release, and home confinement).

The listening sessions are an opportunity for Department officials to hear from you and your colleagues, but time will necessarily be limited. Please send the person who can best crystallize and share your organization's perspectives on FIRST STEP Act implementation and to ensure comments on each part can be delivered in no more than 5 minutes per part (ten minutes total). You may also submit a statement, no longer than 15 double-spaced pages, addressing the topics of greatest concern.

* * *

Please RSVP **(b) (6)** by **July 5, 2021**. Upon acceptance of this invitation, we will provide a link to the conference line and other dial-in information.



FIRST STEP Act Implementation Stakeholder Listening Session

Your organization is invited to participate in a listening session to be held via the Webex Conference platform on **Wednesday, July 21, 2021, from 2 pm to 4 pm** as part of the U.S. Department of Justice's review of the ongoing implementation of the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, or the FIRST STEP Act, (Public Law No. 115-139).

* * *

The FIRST STEP Act reformed federal sentencing policy in a number of ways. It also directed the Department of Justice to establish a risk and needs assessment system to assess and classify the recidivism risk of prisoners, and to incentivize and reward participation in and completion of evidence-based recidivism reduction programs and productive activities. The Department is committed to ensuring that FIRST STEP Act provisions work as intended to make our justice system fairer and our communities safer, including by providing opportunities for those who are incarcerated to prepare to reenter society successfully. To promote all of the goals of the Act, the Department would like to hear from stakeholders about the law's implementation.

In order to accommodate more interested stakeholders, we will be holding two 2-hour listening sessions. Each will follow the same format, with the first hour focused on implementation of the corrections reforms made by the Act (including PATTERN, programming, and incentives for participation) and the second focused on implementation of the Act's sentencing reforms (including changes to mandatory minimums, compassionate release, and home confinement).

The listening sessions are an opportunity for Department officials to hear from you and your colleagues, but time will necessarily be limited. Please send the person who can best crystallize and share your organization's perspectives on FIRST STEP Act implementation and to ensure comments on each part can be delivered in no more than 5 minutes per part (ten minutes total). You may also submit a statement, no longer than 15 double-spaced pages, addressing the topics of greatest concern.

* * *

Please RSVP to (b) (6) by **July 12, 2021**. Upon acceptance of this invitation, we will provide a link to the conference line and other dial-in information.



FIRST STEP Act Implementation Stakeholder Listening Session I – July 15th ‘SCRIPT’

- I. WELCOME – **TAMARRA** *3-5 minutes*
- Welcomes stakeholders to the listening session, thanks everyone for joining, expresses our commitment to full and fair implementation of Act and the intent behind these sessions. Notes this is the first of two sessions, with a second one to follow next week.
 - Introduces Department of Justice Presenters:
 - **Tamarra Matthews-Johnson**, Counsel, OAG
 - **Eric Nguyen**, Senior Counsel, ODAG
 - **Sara Solow**, Senior Counsel, ODAG
 - Acknowledges DOJ officials ‘also in attendance’:
 - **Jonathan Wroblewski**, Director, Criminal Division’s Office of Policy and Legislation and DOJ Ex-Officio to U.S. Sentencing Commission
 - **Michelle Morales**, Deputy Director, Criminal Division’s Office of Policy and Legislation
 - **Rachel Rossi**, Office of the Solicitor General
 - **Theron Pride**, Office of the Solicitor General (RSVP pending)
 - Introduces Stakeholders Present:
 - **Jason Pye**, Director of the Rule of Law Initiatives, Due Process Institute
 - **Mary Price**, General Counsel, Families Against Mandatory Minimums (FAMM)
 - **Patricia Richman**, National Sentencing Resource Counsel, Federal Public and Community Defenders
 - **Professor Shon Hopwood**, Associate Professor of Law, Georgetown University Law Center
 - **Chloé White**, Policy Counsel, The Leadership Conference on Civil and Human Rights
 - **Kara Gotsch**, Deputy Director, The Sentencing Project
 - **Marta Nelson**, Director of Government Strategy, Vera Institute of Justice
 - **Allison Fantz**, Coalition and Program Coordinator, Justice Action Network
 - Establishes session format. As noted in invitations, the session will be divided in two parts: Part I will address the corrections provisions of the Act; Part II will address the sentencing provisions. Eric will introduce and moderate the Corrections part, calling on stakeholders in alphabetical order based on the organization’s name. Each organization will have 5 minutes to present and will get a private warning through the chat function at 30 second mark. Eric will sum up with final comments and the issues and turn it to Sara, who will introduce and moderate the Sentencing issues, call on stakeholders, sum up Part II with final comments, and turn it back to you to close the session with some final remarks.

II. CORRECTIONS ISSUES **ERIC**

- Flags specific issues to be discussed, specifically: earned time credits, PATTERN risk assessment tool, needs assessment tool, status of expanded prison programming; provides updates as to rules and/or changes in policy that can be announced. *2-3 minutes*
- Calls on each presenter. *5 mins x 7 = 35 minutes*
 - **Jason Pye**, Director of the Rule of Law Initiatives, Due Process Institute
 - **Mary Price**, General Counsel, Families Against Mandatory Minimums (FAMM)
 - **Patricia Richman**, National Sentencing Resource Counsel, Federal Public and Community Defenders
 - **Professor Shon Hopwood**, Associate Professor of Law, Georgetown University Law Center
 - **Chloé White**, Policy Counsel, The Leadership Conference on Civil and Human Rights
 - **Kara Gotsch**, Deputy Director, The Sentencing Project
 - **Marta Nelson**, Director of Government Strategy, Vera Institute of Justice
 - Allison Fantz, of the Justice Action Network will not be speaking.
- Responds to stakeholder comments as appropriate, sums up. *3-5 minutes*

III. SENTENCING ISSUES **SARA**

- Flags specific issues to be discussed, specifically: compassionate release, retroactivity, and OLC memorandum on home confinement and the end of the pandemic. Briefly mentions prominent cases and/or litigating positions that can be announced. *2 minutes*
- Calls on each presenter. *5 mins x 6 = 30 minutes*
 - **Jason Pye**, Director of the Rule of Law Initiatives, Due Process Institute
 - **Mary Price**, General Counsel, Families Against Mandatory Minimums (FAMM)
 - **Patricia Richman**, National Sentencing Resource Counsel, Federal Public and Community Defenders
 - **Professor Shon Hopwood**, Associate Professor of Law, Georgetown University Law Center
 - **Kara Gotsch**, Deputy Director, The Sentencing Project
 - **Marta Nelson**, Director of Government Strategy, Vera Institute of Justice
 - Chloé White, of The Leadership Conference will not be speaking on sentencing issues.
 - Allison Fantz, of the Justice Action Network will not be speaking.
- Responds to stakeholder comments as appropriate, sums up. *3-5 minutes*

IV. CLOSING -- **TAMARRA**

- Thanks stakeholders for their participation and feedback, asks any questions or makes any final announcements as appropriate. Reminds stakeholders that we will be collecting written submissions until July 20th. Reiterates Department's commitment to addressing concerns and fully implementing the Act. *2 minutes*



FIRST STEP Act Implementation Stakeholder Listening Session II – July 21st ‘SCRIPT’

- I. WELCOME – **JONATHAN** *3-5 minutes*
- Welcomes stakeholders to the listening session, thanks everyone for joining, expresses our commitment to full and fair implementation of Act and the intent behind these sessions. Notes this is the first of two sessions, with a second one to follow next week.
 - Introduces Department of Justice Presenters:
 - **Jonathan Wroblewski**, Director, Criminal Division’s Office of Policy and Legislation and DOJ Ex-Officio to U.S. Sentencing Commission
 - **Eric Nguyen**, Senior Counsel, ODAG
 - **Sara Solow**, Senior Counsel, ODAG
 - Acknowledges DOJ officials ‘also in attendance’:
 - **Tamarra Matthews-Johnson**, Counsel, OAG
 - **Michelle Morales**, Deputy Director, Criminal Division’s Office of Policy and Legislation
 - **Rachel Rossi**, Office of the Solicitor General
 - **Theron Pride**, Office of the Solicitor General
 - Introduces Stakeholders Present:
 - **Jim Felman**, American Bar Association Criminal Justice Section
 - **Jeremiah Mosteller**, Senior Policy Analyst for Criminal Justice, Americans for Prosperity
 - **James Williams**, Vice President of Criminal Justice Advocacy, Arnold Ventures
 - **Ames Grawert**, Senior Counsel, Justice Program, Brennan Center for Justice
 - **Elizabeth Blackwood**, Counsel & Director of the First Step Act Resource Center, National Association of Criminal Defense Lawyers (NACDL)
 - **Heather Rice-Minus**, Senior Vice President of Advocacy and Church Mobilization, Prison Fellowship
 - **Rabbi Jacob Weiss**, Executive Director, Tzedek Association
 - **Julie Samuels**, Senior Fellow in the Justice Policy Center, Urban Institute
 - Establishes session format. As noted in invitations, the session will be divided in two parts: Part I will address the corrections provisions of the Act; Part II will address the sentencing provisions. Eric will introduce and moderate the Corrections part, calling on stakeholders in alphabetical order based on the organization’s name. Each organization will have 5 minutes to present and will get a private warning through the chat function at 30 second mark. Eric will sum up with final comments and the issues and turn it to Sara, who will introduce and moderate the Sentencing issues, call on stakeholders, sum up Part II with final comments, and turn it back to you to close the session with some final remarks.

II. CORRECTIONS ISSUES **ERIC**

- Flags specific issues to be discussed, specifically: earned time credits, PATTERN risk assessment tool, needs assessment tool, status of expanded prison programming; provides updates as to rules and/or changes in policy that can be announced. *2-3 minutes*
- Calls on each presenter. *5 mins x 6 = 30 minutes*
 - **Jim Felman**, American Bar Association Criminal Justice Section
 - **James Williams**, Vice President of Criminal Justice Advocacy, Arnold Ventures
 - **Ames Grawert**, Senior Counsel, Justice Program, Brennan Center for Justice
 - **Elizabeth Blackwood**, Counsel & Director of the First Step Act Resource Center, National Association of Criminal Defense Lawyers (NACDL)
 - **Heather Rice-Minus**, Senior Vice President of Advocacy and Church Mobilization, Prison Fellowship
 - **Rabbi Jacob Weiss**, Executive Director, Tzedek Association
 - Jeremiah Mosteller, of Americans for Prosperity, will not be speaking.
 - Julie Samuels, of Urban Institute, will not be speaking.
- Responds to stakeholder comments as appropriate, sums up. *3-5 minutes*

III. SENTENCING ISSUES **SARA**

- Flags specific issues to be discussed, specifically: compassionate release, retroactivity, and OLC memorandum on home confinement and the end of the pandemic. Briefly mentions prominent cases and/or litigating positions that can be announced. *2 minutes*
- Calls on each presenter. *5 mins x 5 = 25 minutes*
 - **Jim Felman**, American Bar Association Criminal Justice Section
 - **James Williams**, Vice President of Criminal Justice Advocacy, Arnold Ventures
 - **Elizabeth Blackwood**, Counsel & Director of the First Step Act Resource Center, National Association of Criminal Defense Lawyers (NACDL)
 - **Heather Rice-Minus**, Senior Vice President of Advocacy and Church Mobilization, Prison Fellowship
 - **Rabbi Jacob Weiss**, Executive Director, Tzedek Association
 - Jeremiah Mosteller, of Americans for Prosperity, will not be speaking.
 - Ames Grawert, of Brennan Center for Justice, will not be speaking.
 - Julie Samuels, of Urban Institute, will not be speaking.
- Responds to stakeholder comments as appropriate, sums up. *3-5 minutes*

IV. CLOSING -- **JONATHAN**

- Thanks stakeholders for their participation and feedback, asks any questions or makes any final announcements as appropriate. Reminds stakeholders that we will be collecting written submissions until July 26th. Reiterates Department's commitment to addressing concerns and fully implementing the Act. *2 minutes*

Stories of Note:

*Washington Post article on the DOJ China Initiative

The Washington Post is expected publish an article on the Department's China Initiative, taking a particularly critical look at the impact and efficacy of prosecutions involving academics. The article will cite critics in Congress and academia who say the initiative has had a discriminatory impact on academics and researchers of Chinese descent. Reuters ran an article today on a letter sent to the Department last week from Stanford University professors raising similar concerns. A department spokesperson provided the following statement and extensive background information on the department's efforts.

"The Department is dedicated to countering unlawful PRC government efforts to undermine America's national security and harm our economy. As we work to protect the United States against one serious threat – the sophisticated PRC targeting of our institutions and individuals whose political views pose a challenge to the regime – we are also mindful of our responsibility to combat another serious threat: the substantial rise in hate crimes and bias targeting the Asian American Pacific Islander community. We take seriously concerns about discrimination and are committed to working with affected communities to build upon and improve the Department's efforts." (Hornbuckle)

*NPR NewsHour request about home confinement

NPR is working on a story for NewsHour about prisoners who were released to home confinement during the pandemic and the possibility that they could return to custody once the emergency period is lifted. They asked what is likely to happen to prisoners whose sentences extend beyond the emergency period and requested an interview. The department declined to interview but provided the following information:

This is an important legal issue about the language Congress itself used in the CARES Act. It is important to recognize even under the Office of Legal Counsel's (OLC) reading of the statute, the Bureau of Prisons (BOP) will have discretion to keep inmates on home confinement after the pandemic if they're close to the end of their sentences. For the more difficult cases, where inmates still have years left to serve, this will be an issue only after the pandemic is over. The President extended the national emergency and the Department of Health and Human Services has said the public health crisis is likely to last for the rest of the year. The BOP is focused right now on the expanded criteria for home confinement and taking steps to ensure individualized review of more inmates who might be transferred. The BOP and the Department continue to explore all potential authorities that could be exercised after the end of the pandemic to help address this issue. (Mastropasqua)

*USA Today story about Ramirez v. Collier

USA Today asked about whether BOP has a policy regarding a spiritual adviser's ability to touch an inmate during their execution (such as holding their hand or placing a hand on their shoulder). The piece is about Ramirez v. Collier (21-5592) at the Supreme Court. While that case does not involve the Bureau of Prisons the reporter would like to understand how other jurisdictions handle this question, particularly in light of Alabama announcing last week it will allow a pastor to hold the hands of an

inmate. A department spokesperson declined to comment, (the reporter followed-up contesting the DTC; BOP recommended that they FOIA the manual about execution procedures.) (Mastropasqua)

*Associated Press inquiry about Kavanaugh rally

The Associated Press asked whether USMS is planning on providing support ahead of a rally scheduled for tonight at Justice Kavanaugh's home in Chevy Chase. (Mastropasqua)

Leading the Day:

*The department will issue a press release announcing the Attorney General and Deputy Attorney General issued department-wide policies explicitly prohibiting the use of "chokeholds" and "carotid restraints" unless deadly force is authorized, and limiting the circumstances in which the department's federal law enforcement components are authorized to use unannounced entries. (Read draft release [here](#))

*At 11:00 a.m. ET, AAG Kristen Clarke will host a virtual press conference with the three Georgia USAOs to announce a CRIPA investigation into the Georgia prison system.

*ASG Vanita Gupta will deliver a keynote speech and do a moderated Q&A at the 15th Annual Global Antitrust Enforcement Symposium at 1:30. It is open press and link will be tweeted.

*Elizabeth Prelogar will testify before the Senate Judiciary Committee on Tuesday on her nomination to be Solicitor General.

Other Events:

*Motion for TRO and Preliminary Injunction in Texas Abortion Case

The United States plans to file a motion for a temporary restraining order (TRO) and preliminary injunction in this case challenging Texas law S.B. 8, which prohibits nearly all abortions in the State of Texas after week six of pregnancy.

Expected Releases Tomorrow:

Division/Component: ATR

Topic/Summary The Justice Department and Federal Trade Commission will issue a statement on preserving competition in the wake of Hurricane Ida.

Division/Component: CIV

USAO: WDNY

Topic/Summary: The United States will file a complaint in the U.S. District Court for the Western District of New York under the False Claims Act against Independent Health Association, Independent Health Corporation, DxID LLC and Betsy Gaffney, former CEO of DxID. alleging they violated the False Claims Act by submitting or causing the submission of inaccurate information about the health status of beneficiaries enrolled in Medicare Advantage Plans in order to increase Independent Health's reimbursement.

Division/Component: CRM

USAO: CDCA

Topic/Summary: A man will plead guilty to fraudulently obtaining about \$9 million in COVID relief loans, some of which was gambled away.

Division/Component: CRM

USAO: EDMJ

Topic/Summary: A man will be sentenced for nearly \$1 million Paycheck Protection Plan (PPP) loan fraud. Bischoff sought \$931,772 in fraudulent Paycheck Protection Plan (PPP) loans for his pizza restaurant businesses using false information about payroll and employees, as well as fraudulent tax records. He obtained \$593,590 from those applications.

Division/Component: CRT

USAO: SDOH

Topic/Summary: A federal grand jury in Columbus, Ohio, will return an indictment charging an Ohio man for threatening a reproductive health services facility.

Division/Component: CRT

Topic/Summary: The Department of Justice will announce that it signed a settlement agreement with Challenger Sports Corporation (Challenger), a soccer instruction company based in Lenexa, Kansas, which runs soccer programs nationwide.

Division/Component: CRT

USAO: NDGA/SDGA

Topic/Summary: The Justice Department will announce that it has opened a statewide civil investigation into conditions of confinement of prisoners held in Georgia's prisons.

Division/Component: CRT

USAO: MDFL

Topic/Summary: The Division will announce a settlement to resolve an investigation that found the Seventh Judicial Circuit Court of Florida violated Title VI of the Civil Rights Act of 1964 when it fired a Supervising Court Interpreter in retaliation for her support of the court's compliance with Title VI and her involvement with a DOJ Title VI investigation of the Florida State court system. The timing of this announcement has been delayed because counsel for Florida has been out due to COVID-19.

Division/Component: NSD

USAO: DDC

Topic/Summary: Three U.S. citizens and former employees of the U.S. Intelligence Community (USIC) or the U.S. military, will enter into a deferred prosecution agreement (DPA) that restricts their future activities and employment and requires the payment of \$1,685,000 in penalties to resolve a Department of Justice investigation regarding violations of U.S. export control, computer fraud and access device fraud laws.

Division/Component: NSD

USAO: WDTX

Topic/Summary: An Iranian national will be sentenced to prison for violating the International Emergency Economic Powers.

DOCUMENT CONTAINS LAW ENFORCEMENT SENSITIVE AND/OR SEALED INFORMATION

DO NOT SHARE OUTSIDE OF ORIGINAL RECIPIENT LIST

**BRIEFING MEMORANDUM
FOR THE DEPUTY ATTORNEY GENERAL**

FROM: Emily Loeb/Meg Lewis

SUBJECT: VAWA Hearing Calls

DATE: October 4, 2021

On Monday, you will make several calls related to your upcoming testimony. We aren't sure (b) (5) but below we are providing you with relevant information for each potential call.

For several calls, information about (b) (5) may be relevant. Please see below. Background on the individual calls follows.

(b) (5)

1. Ranking Member Grassley

(b) (5)

- Grassley has put forward legislation intended to support survivors of sexual assault and help improve the preservation of evidence surrounding incidents of sexual assault. He's sought to encourage states to apply the same standards in evidence collection and preservation.

- Recently (Aug. 4, 2021), he and Sen. Shaheen introduced the *Survivors' Bill of Rights in the States Act*, a bi-partisan effort which builds upon earlier legislation, and incentivizes states to guarantee survivor rights by offering eligibility for 10% of their STOP formula grant funding, the largest Violence Against Women Act (VAWA) grant. Those funds would be eligible to be used to reduce the rape kit backlog, provide assistance and resources to survivors and preserve rape kits or their contents.
- In February 2017, Senator Grassley and Senator Leahy wrote a letter to President Trump asking him to include support for VAWA in his budget. Specific Issues of Interest:
 - Reducing backlogs of unanalyzed sexual assault evidence
 - Expanding victims' rights, including assistance for rape survivors, resources for victims of child pornography, and protections for young athletes from sexual abuse
 - Elder abuse prevention and prosecution
 - Trafficking Victims Protection Act
 - Office of Inspector General audits of grantees and mechanisms for ensuring proper use of grant funds

2. Ernst

- (b) (5)
- She is the lead Republican co-sponsor for this VAWA reauthorization and this a legacy issue for her. She is a survivor and volunteered in DV shelters in college. Senator Ernst's staffer told us her testimony would focus on the need for a reauthorization, the RPE program (summarized below) and the need to serve rural communities.
 - (b) (5)
- Talking points:

(b) (5)

(b) (5)

- She reached out to the White House in March asking to speak about VAWA. Jen Klein, co-chair and Executive Director of the Gender Policy Council, and Rosie Hidalgo, SAP and Senior Advisor on GBV, had a phone meeting with her in which she stressed her commitment to working on securing a bipartisan VAWA.
- She had expressed initial reservations on the Restorative Justice provisions (note her previous op-ed), but she was glad to hear that DOJ was funding a national resource center on Restorative Justice in Vermont and assurances that DOJ would make sure that any Restorative Justice initiative would be survivor-centered and trauma-informed with important protections for survivor autonomy, along with continuing to improve the criminal justice system response.
- Background: The Ernst VAWA bill during last term of Congress was only sponsored by Republicans after she failed to reach agreement with Feinstein's office to develop a bipartisan bill (b) (5)

Rape Prevention and Education (RPE)

- Originally authorized by the Violence Against Women Act (VAWA) of 1994, and recodified and strengthened by VAWA 2000, the Centers for Disease Control and Prevention (CDC) Rape Prevention and Education (RPE) program provides funding to state and territorial health departments for sexual violence prevention programs. RPE grantees are to work collaboratively with rape crisis centers, state, territorial, or tribal sexual assault coalitions, and other public and private nonprofit entities to carry out these prevention programs. By statute, such programs include educational seminars, hotlines, training programs for professionals, informational materials, programs at colleges and universities, programs to increase awareness about drug and alcohol-facilitated sexual assault, and other awareness programs to help prevent sexual assault, including in underserved communities and among individuals with disabilities. (See 42 U.S.C. 280-1b.)
- The RPE program was last reauthorized by VAWA 2013 at \$50 million annually (through FY 2018) and received an appropriation of \$51.75 million in FY 2021. The

President's FY 2022 budget requests \$101.75 million for the RPE program. H.R. 1620, the House VAWA reauthorization bill, would increase the RPE program's annual authorization of appropriations to \$110 million.

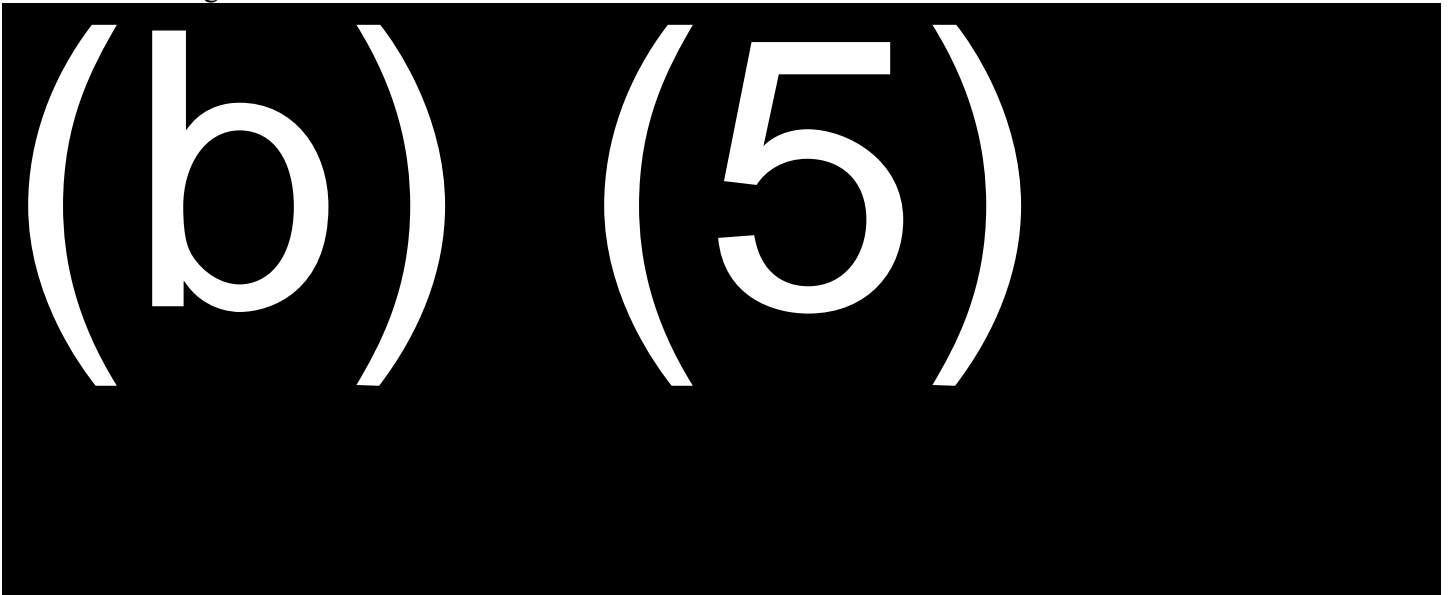
- The RPE program encourages the use of comprehensive prevention strategies that address the ways individual, relationship, community, and societal factors affect sexual violence, with the goals of maximizing impact and reducing sexual violence. CDC supports the implementation and evaluation of RPE-funded efforts and provides training and technical assistance on the best available evidence for sexual violence prevention. CDC currently requires RPE program recipients to work with their partners to plan, implement, and evaluate prevention strategies in alignment with their 2016 research and evaluation publication, "STOP SV: A Technical Package to Prevent Sexual Violence," available at: <https://www.cdc.gov/violenceprevention/pdf/SV-Prevention-Technical-Package.pdf>.

3. Durbin

Joe Zogby told Emily that Chairman Durbin will very likely raise with BOP issues with you including Carvajal. (b) (5)

As you know, he also wants the DOJ to change OLC opinion on home confinement. We have included the transcript of your remarks at the DEA Press conference below for reference. Zogby said he is aware your team has been meeting with his team on BOP issues.

Talking Points:



(b) (5)

Transcript from DEA Press Conference

MB: First for the administrator how would you characterize the current relationship between DEA and your counterparts in Mexico right now? And then secondarily for the DAG yesterday we saw the arrest of a warden in a federal prison in California the latest example of serious misconduct within the bureau of prisons how do you plan to address the misconduct within the BOP to ensure the safety of the about 150,000 inmates in the DOJ's custody? And given the number of incidents in the Bureau of Prisons in the last year and a half, do you have confidence in Director Carvajal?

LOM: I'll start and turn it over to the administrator. First, without getting into any specific case, Mike, as I'm sure you can appreciate, what I would say is whenever somebody abuses a position of trust and whenever that abuse of that position of trust particularly happens with somebody in their care... That is something that is unacceptable and we need to do everything we can we are committed to doing everything we can to hold those people accountable. So I'll say that broadly, again, without speaking about a particular case.

With regard to the Bureau of Prisons, more broadly, as I think you know, I'm taking a very serious look at these issues across the board. And Director Carvajal, I've had many discussions with him. I do have confidence in his leadership because he and I are completely aligned on the following which is: the Bureau of Prisons really has two missions it's a two-fold mission. One is the safe, secure, humane custody and detention of individuals. And the second is doing everything we can to properly prepare individuals for a return to society. In instances like with the MCC in New York, where I have personally toured and gone to see for myself where that two-fold mission is not being carried out, I've taken steps to address it. In that instance, directing the closure of the MCC. And its that same approach that I will take going forward with other issues.

4. Cornyn

(b) (5)

(b) (5)

- (b) (5)
 - The Sexual Assault Forensic Evidence Reporting (SAFER) Act of 2013 passed as part of the 2013 reauthorization of VAWA and was sponsored by **Cornyn**, with Klobuchar as one of the co-sponsors. SAFER focused on the accurate, timely, and effective collection and processing of DNA evidence in sexual assault cases and provided for audits of untested SAKs. It also required NIJ to develop and issue non-binding “best practices and protocols for the collection and processing” of DNA evidence in sexual assault cases. The resulting report and recommendations are contained in *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach* (2017).
 - Cornyn also recently led reauthorization of the *Debbie Smith Crime Victims Protection Act* with Sen. Klobuchar in 2019, which provides funding authorization to support testing of DNA evidence to reduce the rape kit backlogs in states. Every year, Cornyn also leads a bipartisan letter to Senate appropriators to urge sufficient funding for this program, and is seen as a leader with respect to reducing the rape kit backlog.

(b) (5)

(b) (5)

5. Feinstein

(b) (5)

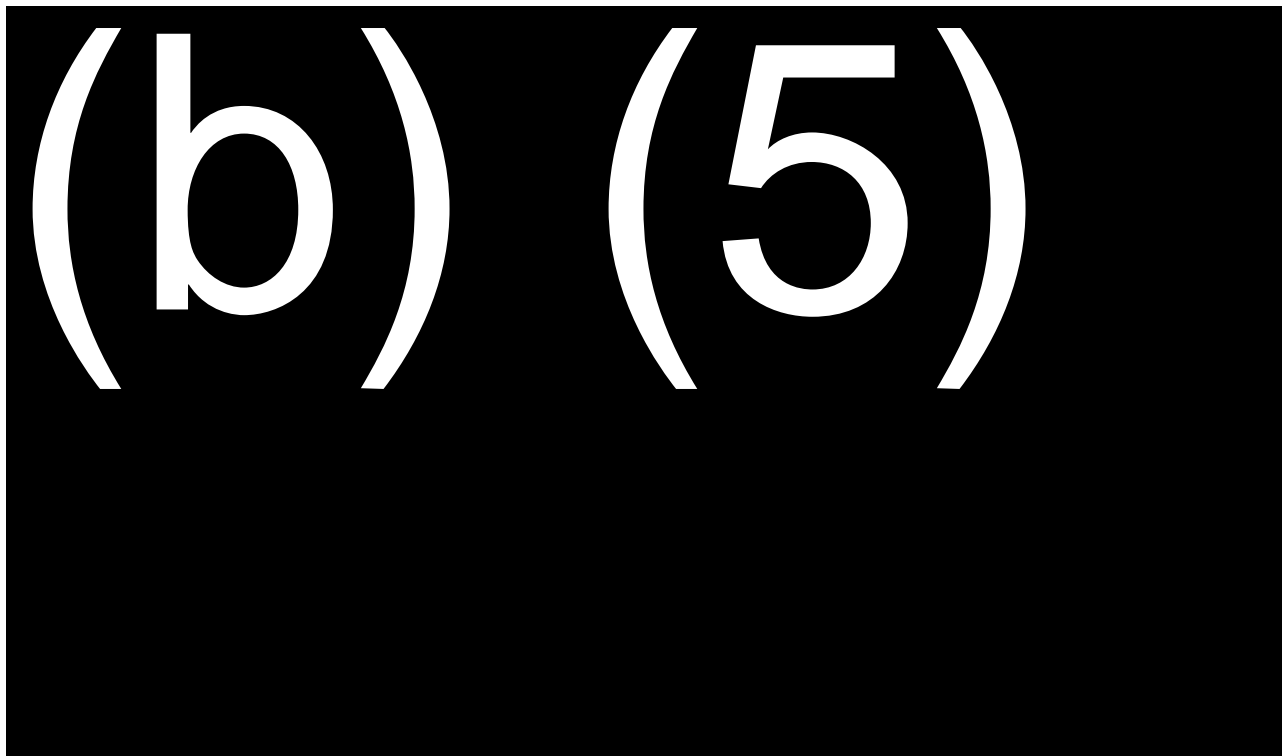
From Meg Lewis / Peter Hyun:

6. Senator Blumenthal Call

OLA + Meg called Blumenthal's staffer to provide a courtesy call on JM and AG Guidelines memos, noting that we understood the Senator's keen interest in these issues. The staffer was appreciative, but did not provide further insight into what Blumenthal may ask at the hearing. We recomme (b) (5)

(b) (5)

(b) (5)



If you have any questions regarding this response, please contact Tony Quinn of the United States Attorney's Office for the District of Columbia at 202-252-7558.

Sincerely,

A handwritten signature in blue ink that reads "Jonathan Breyan". The signature is written in a cursive, flowing style.

Jonathan Breyan
Senior Supervisory Attorney
for
Vanessa R. Brinkmann
Senior Counsel

Enclosures