

THE DISTRICT OF COLUMBIA

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SENTENCING COMMISSION

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PUBLIC HEARING

+ + + + +

TUESDAY, MAY 15, 2007

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The Public Hearing of the District of Columbia Zoning Commission convened in Old Council Chambers South Building, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 5:00 p.m., Frederick Weisberg, Chairperson, presiding.

SENTENCING COMMISSION VOTING MEMBERS PRESENT:

| | |
|--------------------|--------------|
| FREDERICK WEISBERG | Chairperson |
| PATRICIA RILEY | Commissioner |
| LAURA HANKINS | Commissioner |
| DAVID ROSENTHAL | Commissioner |
| PAUL QUANDER JR. | Commissioner |
| BRIAN FORST | Commissioner |
| ANNE SEYMOUR | Commissioner |
| RAMSEY JOHNSON | Commissioner |
| HAROLD CUSHENBERRY | Commissioner |
| EARL SILBERT | Commissioner |

SENTENCING COMMISSION NON-VOTING MEMBERS PRESENT:

THOMAS KANE Member

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

5:00 p.m.

CHAIRPERSON WEISBERG: Alright, we're going to get started. Good evening everyone. This is a public meeting of the District of Columbia Sentencing and Criminal Code Revision Commission. Today is May 15, 2007, we are at One Judiciary Square. I am the chair of the Commission, Judge Frederick Weisberg. This public meeting is required by Public Law 93-198, which is Title VII, Section 742 of the Open Meetings Acts, also found in Title I of District of Columbia Code Section 207.42, which requires the Commission to hold a public meeting when it takes "official action" of any kind. The commission has determined that ranking offenses and other guideline significant actions within the meaning of the Open Meetings Act. This is a public meeting, but not a public hearing. There will be no opportunity for public comment at this meeting.

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1 I note the presence of a quorum,
2 which under District of Columbia Code Title
3 III, Section 103, is eight of the Commission's
4 15 voting members. Notice of the public
5 hearing -- public meeting appeared in D.C.
6 Register on May 4, 2007. The members should
7 all have tonight's agenda with your materials,
8 and we have a number of things on the agenda
9 that will require votes tonight.

10 The Council passed last year the --
11 I'm not sure I have the term, or the official
12 name of this legislation -- the Omnibus --

13 MS. RILEY: Public Safety Act.

14 CHAIRPERSON WEISBERG: -- Public
15 Safety Act of 2006. Is it '06 or '05?

16 MS. RILEY: '06.

17 CHAIRPERSON WEISBERG: Of '06, which
18 changed the penalties for certain offenses and
19 increased -- and created a number of new
20 criminal offenses, all of which then needed to
21 be ranked for purposes of sentencing under the
22 Guidelines and also scoring in connection with

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1 criminal history scoring. At the last meeting
2 of the Commission, the Commission discussed,
3 but did not agree on, the ranking for the new
4 offense, two new offenses of criminal abuse of
5 a vulnerable adult, and we have some
6 discussion that we'll need to do for that
7 offense this evening.

8 There are a number of other offenses created
9 by the same legislation, some of which the
10 Subcommittee on Offense Ranking has agreed
11 upon, and we are proposing to the full
12 Committee tonight for a vote. Other offenses
13 the Subcommittee and Offense Ranking was not
14 able to agree upon, and we're going to have to
15 defer a final vote on the ranking of those
16 offenses to a later meeting, a later public
17 meeting, perhaps after some discussion at
18 other Commission meetings and within the --
19 and further discussion within the Criminal
20 History Subcommittee, but ultimately we will
21 either reach agreement within the Subcommittee
22 or not, and those other offenses are going to

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1 have to come for full Commission -- for
2 ranking decisions.

3 On the agenda, under item two, you
4 will find the offenses on which there was
5 consensus among the members of the Offense
6 Ranking Subcommittee, and that included the
7 representative of the United States Attorney's
8 Office, the representative of the Public
9 Defender's office, the representative of the
10 Attorney General's office, and myself. To be
11 fully candid, my own view was that if the
12 public defender and the U.S. Attorney member
13 agreed on a ranking decision, that, in my mind
14 at least, carried with it a presumption that
15 that was probably the correct ranking, but I
16 looked at all of them as a member of that
17 Subcommittee, and in fact, I also agreed with
18 the ranking that was being proposed. All of
19 those appear -- on which there was agreement,
20 appear under the second agenda item, except
21 for criminal abuse or neglect of a vulnerable
22 adult, on which there is still not agreement,

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1 and we have to discuss. I propose then, that
2 we discuss and then call for a vote, as you
3 wish, on the ones on which there is agreement,
4 beginning with armor-piercing ammunition. And
5 for those members who are seeing these perhaps
6 for the first time, the statute which defines
7 the offenses is attached to your agenda,
8 beginning on -- I think it is, isn't it Kim?
9 If we don't have the statute, I have it, and
10 members can refer to it or ask to have the
11 definition of the offenses read, so you'll know
12 what, what the conduct is that you're being
13 asked to vote on. There's a little discussion
14 of it on the agenda, but you may -- members
15 may feel they need a more complete
16 understanding of the offense before voting.

17 Beginning with armor-piercing
18 ammunition, the Subcommittee proposes that
19 this be ranked in group seven of the, of the
20 master grid, which some of you may also not
21 have with you. You are free to ask what the
22 penalty would be if you needed to make an

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1 informed decision. That particular provision
2 in the Omnibus Act amends the current offense
3 of possession of ammunition, unlawful
4 possession of ammunition, to increase the
5 penalty for knowing possession of a specific
6 kind of ammunition that's called armor-piercing
7 ammunition from one year, which the statute
8 otherwise provides as a maximum, to ten years,
9 and also creates a one-year mandatory minimum
10 for that offense. The Subcommittee proposes
11 that that be placed in group seven, which for
12 first offenders would permit a sentence
13 between 12 and 36 months, but also allows a
14 suspended sentence with probation for a first
15 offender. Is there any discussion of that
16 proposal?

17 MR. FORST: I have a question.
18 Would an offense like this be governed by
19 federal law?

20 CHAIRPERSON WEISBERG: Is your mic
21 on, because the reporter -- push the button
22 first --

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1 MR. FORST: Yes it is.

2 CHAIRPERSON WEISBERG: Okay.

3 MR. FORST: It is on. My question
4 is, is this offense covered under dual
5 jurisdiction under federal authority? Would
6 this be a --

7 CHAIRPERSON WEISBERG: I, I
8 understand the question, and I don't know the
9 answer. I don't know whether there is a
10 federal crime of possession of ammunition
11 generally or possession of armor-piercing
12 ammunition in particular.

13 MS. RILEY: Okay.

14 CHAIRPERSON WEISBERG: The question
15 is, is there a federal offense that's
16 equivalent to this DC Code offense for armor-
17 piercing -- possession of armor piercing
18 ammunition.

19 MS. HANKINS: I, I don't know.

20 CHAIRPERSON WEISBERG: You would
21 want to know where it was ranked?

22 MR. FORST: Well, I'm curious as a

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1 practical matter if an offense of this sort,
2 would it be brought before District court in
3 all likelihood rather than Superior court?

4 CHAIRPERSON WEISBERG: Oh, no. This
5 offense will be brought in Superior court.

6 MR. FORST: Okay.

7 CHAIRPERSON WEISBERG: And I think
8 this offense could not be brought in the
9 District court, I don't think.

10 MR. FORST: Okay, that's answers my
11 question.

12 CHAIRPERSON WEISBERG: It's a DC
13 Code offense, there may be a U.S. -- another
14 Title XVIII offense that relates to
15 ammunition, but it's not this one.

16 MR. FORST: Okay, thank you.

17 MR. ROSENTHAL: It could be joined
18 with other --

19 CHAIRPERSON WEISBERG: It could be,
20 that's true. You could have a federal firearms
21 charge --

22 MR. ROSENTHAL: Or a federal murder.

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1 CHAIRPERSON WEISBERG: Or any other
2 federal offense, and a local offense can be
3 joined with it. I, I -- you're right.

4 MS. RILEY: But the federal court is
5 following our guidelines for DC Code offenses
6 that the --

7 CHAIRPERSON WEISBERG: That's also
8 correct.

9 MS. RILEY: -- U.S. Parole -- Parole
10 and Probation people ask what our DC ranking
11 is, and that's where they, they put it, and
12 that's what the judges have been doing.

13 MR. FORST: So there is no
14 redundancy here at all?

15 MS. RILEY: No, no.

16 MR. FORST: Okay.

17 CHAIRPERSON WEISBERG: Anybody else
18 want to discuss the proposed ranking of group
19 seven? Alright, I call for a vote, and I'm
20 going to go through the voting members pretty
21 much in the order I have them listed. A "yes"
22 vote means you agree to rank it in group

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1 seven; a "no" vote means you think it should be
2 ranked otherwise. Judge Cushenberry?

3 JUDGE CUSHENBERRY: Yes.

4 CHAIRPERSON WEISBERG: Mr. Forst?

5 MR. FORST: Yes.

6 CHAIRPERSON WEISBERG: Ms. Hankins?

7 MS. HANKINS: Yes.

8 CHAIRPERSON WEISBERG: Judge
9 Johnson?

10 JUDGE JOHNSON: Yes.

11 CHAIRPERSON WEISBERG: Mr. Quander?

12 MR. QUANDER: Yes.

13 CHAIRPERSON WEISBERG: Ms. Riley?

14 MS. RILEY: Yes.

15 CHAIRPERSON WEISBERG: Mr.
16 Rosenthal?

17 MR. ROSENTHAL: Yes.

18 CHAIRPERSON WEISBERG: Mr. Silbert?

19 MR. SILBERT: Yes.

20 CHAIRPERSON WEISBERG: Ms. Seymour?

21 MS. SEYMOUR: Yes.

22 CHAIRPERSON WEISBERG: And Judge

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1 Weisberg votes yes, so that is unanimous. I
2 may need some help from other members of the
3 Subcommittee on some of these who may be more
4 familiar with what would be a heartland
5 version of these various offenses.
6 Contributing to the delinquency of a minor
7 created two new offenses, a three-year offense
8 for certain conduct, where it's a second
9 conviction, and a five-year -- is there a
10 misdemeanor also, that, that's a first
11 conviction?

12 MS. HANKINS: Yes, there is.

13 CHAIRPERSON WEISBERG: There's a
14 misdemeanor that we're not ranking, that would
15 be a first conviction. For a second
16 conviction, for certain kinds of conduct, it
17 would be a three-year maximum felony, and for
18 other types of conduct, even for a first
19 offense, it would be a five-year felony. Now,
20 that doesn't tell --

21 MS. HANKINS: So --

22 CHAIRPERSON WEISBERG: -- the other

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1 members much of anything, I think they need to
2 know what --

3 MS. HANKINS: Okay, so the three-
4 year is, is again, if somebody had been
5 subsequently convicted of the following: you
6 have to be an adult four years or more -- four
7 more years older than a minor, and you invite
8 that minor to -- you invite, solicit, recruit,
9 assist, support, cause, encourage, enable,
10 induce to do some of the following -- let me
11 just -- two through six: possess or consume
12 alcohol or without a valid prescription
13 possess a controlled substance; run away for
14 the, for the purpose of criminal activity from
15 the place of abode of his or her parent,
16 guardian or other custody -- rather custodian;
17 violate a court order; violate any criminal
18 law that would be a misdemeanor or join a
19 criminal street gang. So, if you do any of
20 those, and are convicted a second time of that
21 is a three-year offense.

22 CHAIRPERSON WEISBERG: And the five-

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1 year?

2 MS. HANKINS: And the five-year
3 offense, I'm sorry, the five-year offense is if
4 you -- to 7Q, an adult four or more years
5 older than a minor invites, solicit, recruit,
6 assist, et cetera, to violate any criminal law
7 that would constitute a felony, and that's a
8 five-year max.

9 CHAIRPERSON WEISBERG: So that, that
10 would be contributing to the delinquency of a
11 minor by encouraging or otherwise soliciting
12 the minor to commit a felony. The
13 Subcommittee by agreement among its members
14 proposes that the three-year offense be ranked
15 in group nine, and the five-year offense be
16 ranked in group eight. If you have your grids
17 with you, the offenses in group nine are
18 escape and prison breach, failure to appear in
19 court, receiving stolen property, uttering
20 forgery, among others. And in group eight,
21 five year, carrying a pistol without a
22 license, unauthorized use of a motor vehicle,

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1 attempted robbery, attempted burglary, and
2 first degree theft. Any discussion of the
3 proposed rankings? Alright, we'll call for a
4 vote. Judge Cushenberry?

5 JUDGE CUSHENBERRY: Yes.

6 CHAIRPERSON WEISBERG: I'm sorry, I
7 should have said, a "yes" vote means that you
8 agree with the rankings in group nine and
9 group eight respectively, and a "no" vote means
10 that you don't, and if -- if that becomes
11 ambiguous then we'll have to figure out where
12 the disagreement may be. Judge Cushenberry?

13 JUDGE CUSHENBERRY: Yes.

14 CHAIRPERSON WEISBERG: Mr. Forst?

15 MR. FORST: Yes.

16 CHAIRPERSON WEISBERG: Ms. Hankins?

17 MS. HANKINS: Yes.

18 CHAIRPERSON WEISBERG: Judge
19 Johnson?

20 JUDGE JOHNSON: Yes.

21 CHAIRPERSON WEISBERG: Mr. Quander?

22 MR. QUANDER: Yes.

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1 CHAIRPERSON WEISBERG: Ms. Riley?

2 MS. RILEY: Yes.

3 CHAIRPERSON WEISBERG: Mr.
4 Rosenthal?

5 MR. ROSENTHAL: Yes.

6 CHAIRPERSON WEISBERG: Mr. Silbert?

7 MR. SILBERT: Yes.

8 CHAIRPERSON WEISBERG: Ms. Seymour?

9 MS. SEYMOUR: Yes.

10 CHAIRPERSON WEISBERG: And Judge
11 Weisberg votes yes. So that is unanimous.
12 The next one creates a new felony offense for
13 a second conviction of sale of drug
14 paraphernalia, with a maximum penalty of two
15 years, or a fine of not more than \$5,000. The
16 Subcommittee talked about whether that
17 belonged on the master grid or the drug grid,
18 and probably we could have handled it either
19 way, except that the least serious offenses on
20 the drug grid seemed to be more -- seemed to
21 us to be more serious than where we would
22 suggest the ranking, and therefore the

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1 corresponding sentences should be for this
2 two-year felony. All those other offenses
3 are, except for sale of marijuana, are 30-year
4 felonies, all the ones on the drug grid. So,
5 the proposal of the Subcommittee is to rank it
6 in group nine, which is the -- obviously the
7 least serious of the offenses on the master
8 grid. Any discussion? Alright, call for a
9 vote. Judge -- a "yes" vote means you agree
10 that it should be ranked on the master grid in
11 group nine. We talked about whether, if we,
12 if we create another level on the drug grid
13 for a number of drug offenses that haven't yet
14 been ranked, which are five-year maximum drug
15 offenses. They're rarely charged, but they
16 exist in the Code, and we probably should have
17 ranked them when we were ranking the rest of
18 them, but didn't, we created that next rung
19 down on the drug grid, it may be that the
20 Commission may want to consider moving this
21 offense over to that newly created offense
22 level on the drug grid. But for now, we

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1 decided it fits more appropriately in group
2 nine on the master grid. A "yes" vote means
3 you agree with that ranking. Judge
4 Cushenberry?

5 JUDGE CUSHENBERRY: Yes.

6 CHAIRPERSON WEISBERG: Mr. Forst?

7 MR. FORST: Yes.

8 CHAIRPERSON WEISBERG: Ms. Hankins?

9 MS. HANKINS: Yes.

10 CHAIRPERSON WEISBERG: Judge
11 Johnson?

12 JUDGE JOHNSON: Yes.

13 CHAIRPERSON WEISBERG: Mr. Quander?

14 MR. QUANDER: Yes.

15 CHAIRPERSON WEISBERG: Ms. Riley?

16 MS. RILEY: Yes.

17 CHAIRPERSON WEISBERG: Mr.

18 Rosenthal?

19 MR. ROSENTHAL: Yes.

20 CHAIRPERSON WEISBERG: Mr. Silbert?

21 MR. SILBERT: Yes.

22 CHAIRPERSON WEISBERG: Ms. Seymour?

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1 MS. SEYMOUR: Yes.

2 CHAIRPERSON WEISBERG: Judge

3 Weisberg votes yes. So that one is unanimous.

4 The next one, again, I may need some help
5 with this, because this statute creates a
6 couple of different events. It defines what a
7 criminal street gang is, which you see on your
8 agenda is the footnote at the bottom. A
9 criminal street gang is an association or
10 group of six or more persons that has one of
11 its purposes or frequent activities to
12 violations of criminal laws of the Districts
13 of the United States or any other state. It
14 creates a five-year felony for a member of a
15 street gang to knowingly and willfully
16 participate in any felony or violent
17 misdemeanor committed for the benefit of, at
18 the direction of, or in association with any
19 other member or participant of that criminal
20 street gang. Now obviously, the -- whatever
21 the felony is that they participate in would
22 be a separate offense, which either would or

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1 would not be charged, but the only thing being
2 ranked here is this new felony for being a
3 member of such a street gang as defined, and
4 participating in whatever that felony or
5 violent misdemeanor is, for the benefit of, at
6 the direction of, or in association with any
7 other member or participant in the gang. And
8 the proposal is to rank this in group eight.

9 Now, before we call for a vote on
10 that, was there one of -- another section of
11 the same thing that we did not agree on that
12 we --

13 MS. HANKINS: Yes.

14 CHAIRPERSON WEISBERG: -- need to
15 defer to a later meeting? Why don't we just
16 announce what that is.

17 MS. HANKINS: There is a 10-year
18 felony that makes it unlawful to use or
19 threaten to use force, coercion, or
20 intimidation against any person or property in
21 order to cause or attempt to cause a person to
22 join, participate in, or remain in a criminal

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1 street gang, or to submit to a demand by a
2 criminal street gang to commit a felony, or
3 retaliate against a person for refusing to do
4 so.

5 CHAIRPERSON WEISBERG: That's a --
6 that's a crime that we're going to have to
7 rank, the Subcommittee was unable to agree as
8 of yet on where it should be ranked, and it
9 requires further discussion. But it's a very
10 different type of offense, that's one where --
11 which makes criminal threats or intimidation
12 by a member of a gang against someone else,
13 either to join or to not quit the gang, either
14 threaten that person or someone close to that
15 person, and it's a very different kind of
16 conduct than what we're talking about here. In
17 any event, the one we're talking about here,
18 the proposal is to rank it at group eight. Is
19 there any discussion of that?

20 MR. SILBERT: Yes. I have a
21 question.

22 CHAIRPERSON WEISBERG: Yes.

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1 MR. SILBERT: And that is --

2 CHAIRPERSON WEISBERG: Do you have a
3 mic or if you don't --

4 MR. SILBERT: No mic, no.

5 MS. HANKINS: Come up closer.

6 CHAIRPERSON WEISBERG: Or you can
7 share Judge Cushenberry's if you want.

8 MR. SILBERT: The reference in the
9 statute toward -- in association with any
10 member or participant. My question is, how
11 does -- how is that term defined, and
12 particularly, how is it defined in comparison
13 to the concept of conspiracy and if so, how
14 does it differ from a conspiracy, for example,
15 to commit a -- you know, the crime of robbery?

16 CHAIRPERSON WEISBERG: Well,
17 conspiracy wouldn't require a gang, it would
18 just require two or more --

19 MR. SILBERT: I understand, I
20 understand that.

21 CHAIRPERSON WEISBERG: -- this
22 specifically requires it to be gang as defined

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1 --

2 MR. SILBERT: Well, this has to be
3 six or more.

4 CHAIRPERSON WEISBERG: I'm sorry?

5 MR. SILBERT: This has to be six or
6 more.

7 MS.HANKINS: Right, Six or more.

8 MR. SILBERT: Right.

9 CHAIRPERSON WEISBERG: Correct. Six
10 or more, but also --

11 MS. HANKINS: To comprise a gang,
12 but you wouldn't need six people to do, to do
13 the crime. Once you have the gang -- it seems
14 to me if you do -- if two members of the gang
15 do a crime in conjunction, that that would be
16 this offense. I don't know, conspiracy is
17 complicated.

18 CHAIRPERSON WEISBERG: Yes --

19 MS. HANKINS: But it would require
20 an agreement, right conspiracy? Well, I'll let
21 somebody else --

22 CHAIRPERSON WEISBERG: My -- I could

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1 be dead wrong, but my sense is that a
2 conspiracy can be an ad hoc association of
3 people who make an agreement to commit a
4 crime, that one crime. A gang seems to
5 require ongoing activity by six or more
6 persons, the nature or purpose of which is to
7 violate the criminal laws of the District, and
8 this offense could be any one of those crimes
9 committed as part of the gang activity.

10 MR. SILBERT: I'm not sure I'm
11 reading it that way.

12 CHAIRPERSON WEISBERG: Well, I could
13 be -- I could be wrong.

14 MR. ROSENTHAL: This also requires
15 the completion of the crime.

16 JUDGE JOHNSON: Well, for example
17 is, "in association with," how closely is that
18 analogous to aiding and abetting?

19 MR. SILBERT: Well I realize, I mean
20 I thought about that, aiding and abetting as a
21 concept, how does that compare to association?
22 How does that compare to conspiracy? What's

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1 the difference, and is there --

2 MS. RILEY: Well, doesn't conspiracy
3 require an agreement of some sort, whereas
4 aiding and abetting, two people can act in
5 concert, or associated with each other without
6 an explicit agreement to do whatever it is
7 that they're going to do?

8 MR. SILBERT: True, but then were
9 does "in association," what does that mean?
10 Because that's what the language of the statute
11 is, it's says "a felony or misdemeanor must be
12 committed for the benefit of, in the direction
13 of, or in association with."

14 MS. RILEY: I think it means that if
15 you are not a member of your gang, but you
16 associate with that gang member with, you
17 know, or it's not a specific member of that
18 gang, but you associate with them in
19 committing a felony, you would be in
20 associating with them. So, if somebody's
21 wearing their Blood or Crips jacket --

22 MS. HANKINS: No, no. You have to

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1 be a member. You have to be a member, or
2 actively participating. But the association
3 is if two people who are members or actively
4 participating in the gang, in association with
5 each other, two or more, then that is this --
6 that's this offense. And it's true, we don't
7 know what the association would be.

8 CHAIRPERSON WEISBERG: I'm sorry to
9 interrupt. I think a gang almost always will
10 require a definition of conspiracy, but a
11 conspiracy will not necessarily satisfy the
12 definition of a gang.

13 MR. SILBERT: I would -- what you
14 just said I agree with but, well, it strikes
15 me the statute's a little vague. I'm not sure
16 that's our purpose here this evening. Assuming
17 the statute is clear, my question was how --
18 how does our ranking here compare to the
19 ranking of the offense of, you know, the
20 conspiracy?

21 CHAIRPERSON WEISBERG: That's a good
22 question, which is also a five-year felony.

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1 Where did we rank conspiracy?

2 MS. HANKINS: We didn't rank it.

3 CHAIRPERSON WEISBERG: We didn't?
4 Let's find it. I think we ranked it by
5 reference to the crime it was a conspiracy to
6 do.

7 MS. HANKINS: If the underlying
8 offense is, it must be five, five years or
9 less than five --

10 CHAIRPERSON WEISBERG: First of all,
11 you have to --

12 MS. HANKINS: -- five years.

13 MALE VOICE: Less than five years.

14 CHAIRPERSON WEISBERG: To help this
15 fellow, if we're going to speak for the record,
16 we should speak --

17 MS. HANKINS: I'm sorry.

18 CHAIRPERSON WEISBERG: -- so he can
19 do it. But where are you -- where are you
20 looking?

21 MS. HANKINS: I'm looking at
22 Appendix C of our manual. The penalty for

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1 conspiracy is five year or the same amount of
2 the underlying offense, if the offense is less
3 than five years, and we have ranked that in
4 master group nine

5 CHAIRPERSON WEISBERG: Does that
6 answer your question? The proposal for this
7 one is that we rank it also in nine, I think.
8 I'm sorry, it would be in group eight.

9 MS. HANKINS: Eight.

10 CHAIRPERSON WEISBERG: You raise a
11 good question whether it is significantly
12 different that it would justify a different
13 ranking. The maximum penalty is the same, but
14 --

15 MR. SILBERT: I guess --

16 CHAIRPERSON WEISBERG: -- it's, it's
17 to commit any felony, or even a violent
18 misdemeanor. But if it's a gang, almost by
19 definition, it's -- it'd still have to be more
20 serious than an ad hoc agreement of one or
21 more -- two or more persons. Maybe you don't
22 agree with me.

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1 MR. SILBERT: Well I'm not sure
2 there's a difference between the ad hoc nature
3 of a conspiracy versus the ad hoc nature of a
4 gang, based on the language I've seen here
5 tonight, but that being said, there is a
6 difference between six or more people in a
7 gang concept than a conspiracy, it's somewhat a
8 little vague, but I can see -- I can see the
9 Commission saying nine for one and eight for
10 the other. There's enough of a distinction
11 that you could make that separation or
12 differentiation.

13 MS. HANKINS: Although the six or
14 more people doesn't refer to this offense,
15 that's what makes a gang in the first place.
16 We're potentially a gang, but if two of us get
17 together to do something, we've committed this
18 offense, but nobody else, although it's the
19 fact that we've got more than six here that
20 established that we're in the gang.

21 CHAIRPERSON WEISBERG: So if it were
22 charged in a charging document, it would be an

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1 element of the offense that the two of you
2 committed this crime, and that you had to do
3 it -- you were members of a group of at least
4 six people.

5 MS. HANKINS: Exactly.

6 CHAIRPERSON WEISBERG: That would be
7 an element, yes. Alright, further discussion
8 on the ranking in group eight? Alright, let
9 me call for the vote. The proposal is, a "yes"
10 vote means that you agree that it should be
11 ranked in group eight, a "no" vote means you
12 don't. Judge Cushenberry?

13 JUDGE CUSHENBERRY: Yes.

14 CHAIRPERSON WEISBERG: Mr. Forst?

15 MR. FORST: Yes.

16 CHAIRPERSON WEISBERG: Ms. Hankins?

17 MS. HANKINS: No.

18 CHAIRPERSON WEISBERG: Judge
19 Johnson?

20 JUDGE JOHNSON: Yes.

21 CHAIRPERSON WEISBERG: Mr. Quander?

22 MR. QUANDER: Yes.

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1 CHAIRPERSON WEISBERG: Ms. Riley?

2 MS. RILEY: Yes.

3 CHAIRPERSON WEISBERG: Mr.
4 Rosenthal?

5 MR. ROSENTHAL: Yes.

6 CHAIRPERSON WEISBERG: Mr. Silbert?

7 MR. SILBERT: Is one allowed to
8 abstain?

9 CHAIRPERSON WEISBERG: Sure.

10 MR. SILBERT: Abstain.

11 CHAIRPERSON WEISBERG: Ms. Seymour?

12 MS. SEYMOUR: Yes.

13 CHAIRPERSON WEISBERG: Judge
14 Weisberg votes yes. We better have a count.

15 MS. HANKINS: Ten voting members,
16 eight yeses.

17 CHAIRPERSON WEISBERG: Ten voting
18 members, there's an abstention and a no vote,
19 though, so it passes by a vote of eight. The
20 next one, going back to the agenda -- yes,
21 we've got one on here on which there's no
22 agreement, I'm looking -- oh, that's not the

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1 agenda, sorry. The next one on tonight -- I'm
2 sorry, I need to find the document that tells
3 me -- here it is, okay.

4 MS. HANKINS: Kim, I'm sorry,
5 skipped which one?

6 DR. HUNT: Under tampering, the
7 first is a misdemeanor.

8 CHAIRPERSON WEISBERG: Right, I'm
9 sorry, I was just on the wrong document. The
10 next one on which there is agreement in the
11 Subcommittee is the felony offense of
12 tampering with a VIN number, that's the
13 identification number of a vehicle, which
14 obviously is intended to make it more
15 difficult to steal cars, or drive stolen cars.

16 It it's a -- if you commit a crime simply for
17 tampering with the VIN number, it's a five year
18 felony offense if the part of the vehicle that
19 is removed or tampered with has a value of
20 \$250 or more. I must confess --

21 MR. ROSENTHAL I don't know what
22 that means.

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1 CHAIRPERSON WEISBERG: -- I don't
2 know what it means, I thought the VIN number
3 was stamped on the --

4 MR. ROSENTHAL: That's right, it's --

5 CHAIRPERSON WEISBERG: -- on the
6 engine bar, but which is -- which in most
7 cars, but not all, is worth more than \$250.
8 But maybe somebody knows better than I would.

9 MR. ROSENTHAL: You could scratch
10 it, destroy the engine.

11 MS. RILEY: It's the VIN, but there
12 are other --

13 CHAIRPERSON WEISBERG: It's in more
14 than one place.

15 MS. RILEY: And it's any
16 identification number, and there are
17 identification numbers on other parts.

18 CHAIRPERSON WEISBERG: Right, but if
19 the number that's stamped on a plate inside the
20 door, for example, if there is one, if you
21 remove that, that plate is worth about ten
22 cents.

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1 MR. ROSENTHAL: That's right.

2 CHAIRPERSON WEISBERG: Does that
3 mean you haven't committed this offense?

4 MR. ROSENTHAL: I thought it was the
5 motor vehicle or any part was valued at \$250
6 or more.

7 MS. RILEY: Well in any case --

8 CHAIRPERSON WEISBERG: Oh, that
9 would explain it.

10 MR. ROSENTHAL: Yes.

11 CHAIRPERSON WEISBERG: Okay, so if
12 it's anything other than a junk vehicle, it's
13 going to be, it's going to be the offense. The
14 proposal, the agreement is it's a five year
15 felony to rank in group nine. Any further
16 discussion of that?

17 MR. SILBERT: May I ask where is it
18 ranked?

19 CHAIRPERSON WEISBERG: I think it's
20 eight.

21 MR. SILBERT: It's -- it's eight?

22 MS. RILEY: Yes.

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1 CHAIRPERSON WEISBERG: Also a five
2 year penalty, receiving stolen property is a
3 nine. Alright, calling for a vote, a "yes"
4 vote means you agree that it should be placed
5 in group, a "no" vote means you disagree.
6 Judge Cushenberry?

7 JUDGE CUSHENBERRY: Yes.

8 CHAIRPERSON WEISBERG: Mr. Forst:?

9 MR. FORST: Yes.

10 CHAIRPERSON WEISBERG: Ms. Hankins?

11 MS. HANKINS: Yes.

12 CHAIRPERSON WEISBERG: Judge
13 Johnson?

14 JUDGE JOHNSON: Yes.

15 CHAIRPERSON WEISBERG: Mr. Quander?

16 MR. QUANDER: Yes.

17 CHAIRPERSON WEISBERG: Ms. Riley?

18 MS. RILEY: Yes.

19 CHAIRPERSON WEISBERG: Mr.
20 Rosenthal?

21 MR. ROSENTHAL: Yes.

22 CHAIRPERSON WEISBERG: Mr. Silbert?

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1 MR. SILBERT: Yes.

2 CHAIRPERSON WEISBERG: Ms. Seymour?

3 MS. SEYMOUR: Yes.

4 CHAIRPERSON WEISBERG: And Judge
5 Weisberg votes yes. So that one is unanimous.

6 The next one, again I may need some help from
7 some other members of the Subcommittee
8 describing this, it creates two -- threatening
9 government officials -- create two different
10 offenses, one more serious than the other.
11 One is a five-year felony, the other's a three
12 year felony. I think I need to go to the
13 statute to -- okay. Okay, let me read you
14 what the statute makes criminal. The five-
15 year felony is -- well, first of all, it
16 defines the official or the employee who's the
17 victim of the conduct as a person who
18 currently holds or formerly held a paid or
19 unpaid position in the legislative, executive
20 or judicial branch of the government of the
21 District of Columbia, including boards and
22 commissions, so it was specifically intended

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1 to include ANC commissioners and others,
2 including sentencing commissioners, probably.

3 The five-year felony makes it a crime for any
4 person who corruptly, by threats of force, or
5 by threatening letter or communication
6 intimidates, impedes, interferes with or
7 retaliates against, or attempts to do any of
8 those things, any official or employee while
9 the official or employee is engaged in the
10 performance of his or her duties, or on
11 account of the performance of those duties,
12 shall be fined not more than \$5,000 or
13 imprisoned not more than five years, or both.

14 And the proposal that the Subcommittee agreed
15 on is that that one would be ranked in group
16 eight, and the three-year felony makes it a
17 crime for any person who stalks, threatens,
18 assaults, kidnaps, or injures any official or
19 employee, or vandalizes, damages, destroys or
20 takes the property of any official or
21 employee, while the official or employee is
22 engaged in the performance of his or her

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1 duties, or on account of the performance of
2 those duties. Fined not more than \$3,000 or
3 imprisoned not more than three years, or both.

4 So even though it could include assault and
5 kidnaping, which sound more serious perhaps
6 than mere words, which are criminalized in the
7 five-year felony, that one is a three-year
8 felony. The proposal that the Subcommittee
9 agreed to was to rank that in group nine,
10 largely because it was deemed by the council
11 to be less serious than the five-year felony.

12 The other one's a misdemeanor isn't it?
13 Oh I'm sorry, there's another three-year
14 felony, there's a third one that also, we
15 propose ranking in group nine, I'm sorry, which
16 makes criminal any person who stalks,
17 threatens, assaults, kidnaps or injures a
18 family member, or vandalizes, damages,
19 destroys or takes the property of a family
20 member of an official or employee on account
21 of the official or employee's official duties,
22 or while in the performance of them. That's

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1 also a three-year felony. So largely because
2 -- I think it's fair to say largely because the
3 council made one a five-year felony and one a
4 three-year felony, we've ranked the three-year
5 felony below the five-year felony, although I
6 could certainly conceive of conduct in the
7 commission of the three-year felony that could
8 be more serious than some of the conduct that
9 would be a violation of the five-year felony.

10 Any discussion?

11 MR. FORST: I think on that latter
12 case, that it would be -- there would be other
13 charges that would be forthcoming. For
14 example if, you know, an official got
15 kidnaped, there would be a kidnaping charge, I
16 would hope.

17 MS. SEYMOUR: For any of those --
18 that was my question. Like stalking, we do
19 have a separate nine for stalking, so there
20 could be a separate charge --

21 CHAIRPERSON WEISBERG: Almost
22 certainly.

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1 MS. SEYMOUR: -- because as it's
2 written, it doesn't make sense, but if it would
3 be a separate assault charge, separate
4 kidnaping, separate stalking.

5 CHAIRPERSON WEISBERG: But we have a
6 separate threats charge, too.

7 MS. SEYMOUR: Right, alright.

8 CHAIRPERSON WEISBERG: You commit a
9 threat, that's the five-year felony, you could
10 have with it a 20-year threats charge. But
11 it's true that the more serious conduct that
12 would constitute the three-year felony would
13 almost always have with it associated other
14 charge.

15 MS. RILEY: And the statute make it
16 clear in the two three-years that this is in
17 addition to any other penalties authorized by
18 law.

19 CHAIRPERSON WEISBERG: Yes, sir?

20 MR. SILBERT: What is the -- what is
21 the ranking for bribery?

22 CHAIRPERSON WEISBERG: I would have

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1 to look it up.

2 MS. HANKINS: I see on page C-3 of
3 the manual, that bribery of a public servant
4 is a 10-year offense, ranked in eight.
5 Bribery of a witness is a five-year offense,
6 also ranked in eight. The statutes are 22712
7 for bribery of a public servant, and 22713 for
8 bribery of a witness.

9 CHAIRPERSON WEISBERG: I would add
10 only that when we ranked these, which is now
11 almost ancient history, in our process, I
12 think that offenses like bribery and certainly
13 obstruction of justice were among the most
14 difficult because of the variety of forms that
15 they can be committed in. And so there are --
16 one could conjure up a bribery of a public
17 official, particularly where there's a
18 significant amount of money involved, that
19 sounds more serious than group eight or group
20 nine. But they're rarely charged, and when we
21 looked at the heartland offenses, they can be,
22 you know, also fairly small penny-anny bribery

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1 things.

2 MR. SILBERT: Well my, my initial
3 question -- I asked the question because of
4 this five-year statute actually can encompass
5 conduct, corruptly threatening an official in
6 the performance of his or her duties, can be
7 more serious than offering to bribe them, as
8 serious as an offer to bribe may be. And so
9 therefore, I think that the ranking that has
10 been proposed is, is acceptable.

11 CHAIRPERSON WEISBERG: Okay. Any
12 other? Alright. Alright, I'm going to call
13 for the vote, and a "yes" vote -- does anybody
14 want to do these separately or I guess they
15 almost should be done together, unless anybody
16 wants to do them separately, because they're a
17 five-year and a three -- and two three-year
18 felonies. A "yes" vote would mean you agree
19 that the five-year felony should be ranked in
20 group eight, and the two three-year felonies
21 should be ranked in group nine. Does anybody
22 disagree with doing it --

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1 MR. SILBERT: That's fine.

2 CHAIRPERSON WEISBERG: -- alright.

3 MS. HANKINS: No, we don't.

4 CHAIRPERSON WEISBERG: You sure?

5 Okay. Judge Cushenberry?

6 JUDGE CUSHENBERRY: Yes.

7 CHAIRPERSON WEISBERG: Mr. Forst?

8 MR. FORST: Yes.

9 CHAIRPERSON WEISBERG: Ms. Hankins?

10 MS. HANKINS: Yes.

11 CHAIRPERSON WEISBERG: Judge

12 Johnson?

13 JUDGE JOHNSON: Yes.

14 CHAIRPERSON WEISBERG: Mr. Quander?

15 MR. QUANDER: Yes.

16 CHAIRPERSON WEISBERG: Ms. Riley?

17 MS. RILEY: Yes.

18 CHAIRPERSON WEISBERG: Mr.

19 Rosenthal?

20 MR. ROSENTHAL: Yes.

21 CHAIRPERSON WEISBERG: Mr. Silbert?

22 MR. SILBERT: Yes.

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1 CHAIRPERSON WEISBERG: Ms. Seymour?

2 MS. SEYMOUR: Yes.

3 CHAIRPERSON WEISBERG: And Judge
4 Weisberg votes yes, so that's unanimous.

5 MS. HANKINS: Judge?

6 CHAIRPERSON WEISBERG: Yes.

7 MS. HANKINS: Before we take on the
8 next thing, I think Ms. Riley, for the record,
9 may have to go --

10 CHAIRPERSON WEISBERG: Oh, you have
11 to go at six --

12 MS. HANKINS: -- are, are --

13 CHAIRPERSON WEISBERG: -- but we're
14 finished.

15 MS. HANKINS: -- finished, because
16 we were maybe coming up with some agreements,
17 could we take a short break for me to talk
18 with my colleague, and we may have more that
19 we agree on that could go on the agenda if
20 people were going to vote on it?

21 CHAIRPERSON WEISBERG: I'm happy to
22 do that, although I'm cognizant of the fact

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1 that we, we really would like to do the abuse
2 of a vulnerable adult, which is going to
3 require --

4 MS. HANKINS: That's one on which
5 we may have reached -- I think we've reached an
6 agreement.

7 CHAIRPERSON WEISBERG: Okay,
8 alright, we'll take a two-minute break.

9 (Whereupon, a short break was
10 taken).

11 CHAIRPERSON WEISBERG: We're back on
12 the record now at the public meeting of the DC
13 Sentencing Commission.

14 MS. RILEY: I guess that there are
15 three items that are not on the agenda that
16 we've been negotiating over, as we've been
17 sitting here, and Laura will announce what our
18 positions are, and then you all can vote after
19 I leave.

20 MS. HANKINS: Okay, so starting with
21 criminal abuse of a vulnerable adult. To
22 start with what our positions have been, and

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1 then to say what the proposal is. I'll just do
2 first degree and second degree. It's been the
3 position of the U.S. Attorney's Office that
4 first degree criminal abuse of a vulnerable
5 adult should be ranked in group five, so
6 that's, that's abuse of a vulnerable adult that
7 results in either death or permanent harm. It
8 had been PDS' position that if the abuse
9 resulted in death, that it should be ranked in
10 group five, which was in agreement with what
11 the U.S. Attorney's Office had said, but if it
12 resulted in permanent bodily harm I think is
13 the phrase, it should be in group six.

14 With respect to second degree
15 criminal abuse of a vulnerable adult, the U.S.
16 Attorney's Office had said group seven, and we
17 had said group eight, similar to second degree
18 cruelty to children. The U.S. Attorney's
19 Office said it should be higher than that.
20 Our agreed-upon proposal, PDS and U.S.
21 Attorney's Office agreeing that first degree
22 abuse, if it results in death should be five;

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1 if it results in permanent bodily harm, it
2 should be six, and we're proposing splitting
3 the first degree. And second degree should be
4 group seven, which is what the U.S. Attorney's
5 Office had said. So they're accepting our
6 proposal to split death and permanent harm for
7 first degree, and we're accepting their
8 position on group seven for second degree.

9 MS. SEYMOUR: Could you repeat that
10 --

11 MS. HANKINS: Was that complicated?

12 MS. SEYMOUR: -- a little more
13 slowly?

14 MS. HANKINS: Okay.

15 MS. SEYMOUR: Thank you.

16 MS. HANKINS: First degree, there's
17 two ways you get there, if the abuse results
18 in death or in permanent bodily harm. The
19 U.S. Attorney's Office had said group five, no
20 matter what the result was. We proposed --
21 PDS when I say "we" -- had proposed if it
22 results in death, it's group five, but if it

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1 resulted in only -- I'll say it for this
2 purposes -- if it only resulted in permanent
3 bodily harm, it should be six. The proposal
4 agrees to what PDS said, which is to split it,
5 five and six. Five if it's death, six if the
6 result is permanent bodily harm.

7 For second degree, the U.S.
8 Attorney's Office had said it should be ranked
9 to group seven, one above cruelty to -- second
10 degree cruelty to children. PDS had made an
11 argument it should be ranked the same as
12 second degree cruelty to children, in group
13 eight. We are now accepting what the U.S.
14 Attorney's Office had ranked it, it's abuse
15 that results in serious bodily injury, and
16 we've agreed to rank that at a seven.

17 So, so the ultimate proposal is,
18 first degree if it results in death is ranked,
19 it would be ranked in group five; if it
20 results in permanent bodily harm, it would be
21 in group six, and if it was second degree, it
22 would be ranked in group seven. So that's one

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1 proposal.

2 The second proposal, these weren't
3 on the agenda, there's other unranked offenses.

4 Assault on a police officer previously was a
5 five-year offense with -- if you did it with a
6 dangerous weapon, it was a 10-year offense.
7 That scheme has been changed so that assault
8 on a police officer with no injury, or not
9 significant bodily injury is now 180 days. If
10 it -- if the assault on a police officer
11 results in significant bodily injury or a
12 grave risk of significant bodily injury, it's a
13 10-year offense now, and PDS and the U.S.
14 Attorney's Office agree to rank that in seven.

15 It's been -- APO has been made a crime of
16 violence, meaning if you commit APO while
17 armed with a deadly or dangerous weapon, it's
18 now a 30-year offense, and PDS and the U.S.
19 Attorney's Office have agreed to rank that in
20 group five.

21 As part of that same agreement,
22 there are new kinds of solicitation for murder

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1 and solicitation of -- soliciting a crime of
2 violence. So there's a new penalty, it's a 20-
3 year felony if you solicit someone to murder
4 someone, and PDS and the U.S. Attorney's Office
5 agree to rank that in four. And it's a new
6 offense, 10-year offense, to solicit someone
7 to commit a crime of violence, and PDS and the
8 U.S. Attorney's Office agree to rank that in
9 six. And that was -- well I guess I should
10 say, our initial positions -- this is, PDS
11 agreeing to what the U.S. Attorney's Office
12 wanted for solicitation, for those
13 solicitations, and the U.S. Attorney's Office
14 in exchange agreeing with what PDS wanted on
15 the APOs. So that's why they're -- it's a joint
16 agreement.

17 CHAIRPERSON WEISBERG: I would
18 really would like to try to get votes on this
19 tonight if we can, because the public meetings
20 at which we are allowed to take votes are
21 rather infrequent, and some of these are going
22 to be charged and really need to be decided if

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1 we can, but I don't want to put any member at a
2 disadvantage because they didn't appear on the
3 agenda, and you may feel unprepared to make an
4 intelligent vote. But I certainly am prepared
5 to take as much time as necessary to try to
6 explicate what you just learned. My own vote
7 as, if I were a member of the Subcommittee,
8 would be to agree, as a member of the
9 Subcommittee, to every one of the proposals
10 Ms. Hankins just announced, which to some
11 degree represent compromises on both sides but
12 still, to me at least, reflect very rational
13 rankings of all those offenses, and it would
14 be four or five more than we would have
15 otherwise been able to take on tonight, if we
16 hadn't reached agreement. I don't know, David
17 --

18 MR. ROSENTHAL: Yes, I was just
19 thinking, I was about to say that if this
20 compromise had been mentioned at a previous
21 Subcommittee meeting, it -- I am confident it
22 would have been adopted and recommended to the

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1 group, so I feel comfortable going forward if
2 others do.

3 CHAIRPERSON WEISBERG: We can go
4 through them slowly and more deliberately so
5 that everybody can feel comfortable of what's
6 being ranked, what type of conduct is being
7 ranked, but that's -- I would like to try to do
8 that tonight if we can, and you can have your
9 --

10 MS. RILEY: I guess one of the
11 questions is could we --

12 JUDGE CUSHENBERRY: I'd vote for the
13 compromise agreement.

14 MS. RILEY: -- could we move them
15 in block, as we say in the council, and if
16 nobody has any questions about them, vote on
17 them as a group?

18 CHAIRPERSON WEISBERG: I'm perfectly
19 willing to do that, but I don't want to have
20 anyone feel that they're at a disadvantage
21 because you haven't had a chance to think about
22 it, or reflect on it. Judge Cushenberry has

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1 to leave, and Ms. Riley has to leave, although
2 Ms. Riley has a substitute from her office.
3 Judge Cushenberry's just whispered to me that
4 he agrees with the compromises that were just
5 announced.

6 MS. SEYMOUR: Are we -- I'm sorry,
7 are we going to bunch those together with the
8 vulnerable adult, or vote separately on
9 vulnerable adult?

10 JUDGE CUSHENBERRY: Well, my vote is
11 to vote -- I agree with the vulnerable adult
12 compromise, it makes imminent sense to me, so
13 I would vote yes on that compromise.

14 CHAIRPERSON WEISBERG: But we could
15 vote on that separately if you prefer.

16 MS. SEYMOUR: Yes, because I don't.
17 Yes.

18 CHAIRPERSON WEISBERG: Is that your
19 preference?

20 MS. SEYMOUR: That would be great,
21 thank you.

22 CHAIRPERSON WEISBERG: Alright.

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1 Then, I think we should vote them all, all of
2 them separately. I don't want anybody --

3 MS. SEYMOUR: I don't mind bunching
4 the other ones together, I did have a concern
5 about the vulnerable adult.

6 CHAIRPERSON WEISBERG: Alright, well
7 then let's -- let's -- separate that one out.

8 MS. SEYMOUR: If you don't mind.

9 CHAIRPERSON WEISBERG: Is there a
10 Roberts Rules of Order way of preserving Judge
11 Cushenberry's vote "yes," even though we haven't
12 called for the vote yet? Does anybody know?

13 MS. HANKINS: Can I -- can I also
14 ask before we answer that -- that question,
15 whether we still have a quorum when the Judge
16 leaves, or whether, if he's giving a proxy if
17 that's what's about to happen, do we need a
18 proxy on voyeurism, contempt, and accessory
19 after the fact?

20 MS. RILEY: No, because there's not
21 -- there will be nine left because he can vote
22 for me.

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1 MS. HANKINS: Okay.

2 CHAIRPERSON WEISBERG: We'll still
3 have a quorum. I guess the record is what it
4 is, I mean he's indicated that that would be
5 his vote were he present, and if you need it,
6 we have a record of it. Alright, okay.

7 JUDGE CUSHENBERRY: Thank you.

8 CHAIRPERSON WEISBERG: Putting aside
9 then, what was just done, why don't we go in
10 order that they're listed on the agenda, and
11 then we'll get to the ones we've just done in a
12 second. The next one on the list to take up
13 would have been a new offense created, which
14 is called on your agenda voyeurism. It
15 creates -- is the one-year offense that it
16 creates a felony that needs to be ranked?

17 MS. HANKINS: No, that's --

18 MALE VOICE: No, it's a misdemeanor
19 offense.

20 CHAIRPERSON WEISBERG: Alright, so
21 it creates two offenses, one of which is a
22 misdemeanor, so on your agenda the first one

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1 doesn't have to be ranked. The second one is a
2 five-year felony for knowingly distributing a
3 recording that has been created by the conduct
4 prohibited by the misdemeanor, which is a
5 recording of persons using the bathroom,
6 engaging in sexual activity, changing clothes,
7 "upskirting," which is a term of art in the
8 statute, or otherwise capturing the private
9 area of an individual. In other words, if you
10 do that, if you record it, you're guilty of the
11 misdemeanor; if you knowingly distribute it,
12 you're guilty of a five-year felony. And the
13 proposal of the Subcommittee is to rank that
14 five-year felony in group eight. Is there any
15 discussion of that one? Alright, we'll call
16 for the vote. Mr. Forst? A "yes" vote means
17 you agree to rank it in group eight.

18 MR. FORST: Yes.

19 CHAIRPERSON WEISBERG: Ms. Hankins?

20 MS. HANKINS: Yes.

21 CHAIRPERSON WEISBERG: Judge

22 Johnson?

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1 JUDGE JOHNSON: Yes.

2 CHAIRPERSON WEISBERG: Mr. Quander?

3 MR. QUANDER: Yes.

4 CHAIRPERSON WEISBERG: Mr. Asuncion?

5 MR. ASUNCION: Yes.

6 CHAIRPERSON WEISBERG: Voting for
7 Ms. Riley. Mr. Rosenthal?

8 MR. ROSENTHAL: Yes.

9 CHAIRPERSON WEISBERG: Mr. Silbert?

10 MR. SILBERT: I'll abstain.

11 CHAIRPERSON WEISBERG: Alright, Ms.
12 Seymour?

13 MS. SEYMOUR: Yes.

14 CHAIRPERSON WEISBERG: Judge
15 Weisberg votes yes. We better have a count.

16 DR. HUNT: Eight "yes", one
17 abstention. Are we counting Judge
18 Cushenberry?

19 CHAIRPERSON WEISBERG: No, we can't
20 count Judge Cushenberry in that.

21 DR. HUNT: So it's eight "yes."

22 CHAIRPERSON WEISBERG: Okay, that

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1 passes with one abstention. Alright, those
2 are all the ones listed under item two on the
3 agenda, we'll get to contempt in a minute, and
4 we're going to add to that also a proposal of
5 -- relating to accessory after the fact, which
6 is an unusual crime in the District of
7 Columbia. But that brings us to the ones that
8 are not on the agenda that we just announced a
9 compromise agreement on. And I think we
10 should go carefully and deliberately. We'll
11 leave criminal abuse and neglect of vulnerable
12 adult I think for last, because that's probably
13 the most complicated in terms of splitting out
14 the offense and describing it. So the other
15 areas of compromise that have now reached
16 agreement are the offense of assault on a
17 police officer, and to re -- and Laura, you
18 may have to help me if I get this wrong.

19 In the past, until this change in
20 the law, assault on a police officer did not
21 exist as a misdemeanor, and was a five-year
22 felony whether there was a serious injury

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1 associated with it or not, and it was a 10-
2 year felony if it was committed with a deadly
3 or dangerous weapon. Both those two offenses
4 have effectively been repealed and replaced by
5 the following: there is now a misdemeanor
6 assault on a police officer, where there is no
7 injury to the officer. There's a 10-year
8 felony -- by 10-year I mean maximum sentence
9 -- if there is a significant bodily injury or
10 a violent act that creates a grave risk of
11 significant bodily injury, and I'm informed
12 that significant bodily injury was
13 deliberately chosen to define the injury,
14 because it was deemed to be serious, but less
15 serious than serious bodily injury, which is
16 defined elsewhere in the statute in connection
17 with other offenses. So it's less serious than
18 serious bodily injury, but obviously not
19 insignificant.

20 In addition, there is a new crime,
21 a new category, that makes assault on a police
22 officer a crime of violence, which means that

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1 when it is committed with a deadly or
2 dangerous weapon, instead of a 10-year felony,
3 it would be a crime of violence with a deadly
4 or dangerous weapon, which would make it a 30-
5 year felony, like all the other crimes of
6 violence committed while armed. So those are
7 the two significant changes. Before the
8 compromise that was just reached, the U.S.
9 Attorney's Office had proposed that the 10-year
10 felony be ranked in group six, and the Public
11 Defender member -- Office had proposed that
12 it be ranked in group seven, and with respect
13 to the 30-year felony, the U.S. Attorney's
14 Office had proposed that it be ranked in group
15 four, and the Public Defender's Office proposed
16 that it be ranked in group five.

17 On both of those former areas of
18 disagreement, the U.S. Attorney's Office has
19 now agreed that the 10-year felony can be
20 ranked in group seven, and the 30-year felony
21 can be ranked in group five. And group five,
22 just so you know, are other 30-year felonies

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1 including armed robbery, there may be others,
2 and in group seven, where the 10-year felony
3 would be ranked, there are some 10-year
4 felonies, there's a 15-year felony, burglary in
5 the second degree, and some others. So the
6 proposal now that the Subcommittee -- and I
7 indicate that I would agree with this new
8 proposal, and I think Mr. Rosenthal also
9 indicated he would have had it been proposed
10 in the Subcommittee, the proposal is that we
11 rank the 10-year felony in group seven, and
12 the 30-year felony in group five. Any
13 discussion? Is it -- do you want to add
14 anything to that?

15 MS. HANKINS: I don't -- I'm not sure
16 how you're doing this. I mean to be fair, the
17 agreement is they agree to that with the
18 other.

19 CHAIRPERSON WEISBERG: Well I, I
20 understand that. Yes --

21 MS. HANKINS: Okay, okay. No, I
22 have nothing to add to the --

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1 CHAIRPERSON WEISBERG: -- that's a
2 fair statement though, I mean, the willingness
3 to compromise was a package deal with other
4 offenses, but I thought that we should, just
5 so everybody knows --

6 MS. HANKINS: Sure.

7 CHAIRPERSON WEISBERG: -- what
8 they're voting on, we should do them one at a
9 time. If it falls apart because we can't get
10 agreement from the Commission on any one, I
11 guess the package falls apart and we're back to
12 areas of disagreement, we would defer it to
13 another meeting. Any other discussion?
14 Alright, let's deal with the assault on a
15 police officer offenses together. When I call
16 for a vote, a "yes" vote means that you agree
17 that the 10-year felony should be ranked in
18 group seven, and the crime of violence should
19 be ranked in group five.

20 MR. QUANDER: Could you explain it
21 again ?

22 CHAIRPERSON WEISBERG: Sure.

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1 MR. QUANDER: The difference between
2 the 10-year felony and I think the assault
3 with a dangerous -- can you explain just once
4 more the difference between the 10-year felony
5 and the assault with a --

6 CHAIRPERSON WEISBERG: Yes.

7 MR. QUANDER: -- a crime of
8 violence?

9 CHAIRPERSON WEISBERG: Before this
10 enactment, a 10-year APO was only one that was
11 committed with a deadly or dangerous weapon.
12 As a result of the enactment, it creates a 10-
13 year felony even if there is no weapon, in
14 fact, when there is no weapon, but it results
15 in -- but the assault results in significant
16 bodily injury, or constitutes a violent act
17 that creates a grave risk of significant
18 bodily injury, but without a weapon.

19 MR. QUANDER: I got it.

20 CHAIRPERSON WEISBERG: And the crime
21 of violence is that assault, that I've just
22 described, if it's also committed with a deadly

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1 or dangerous weapon.

2 MR. QUANDER: Thank you.

3 CHAIRPERSON WEISBERG: Alright, are
4 we ready for a vote? A "yes" vote means you
5 agree to rank the 10-year felony in group
6 seven, and the crime of violence in group
7 five. Mr. Forst?

8 MR. FORST: Yes.

9 CHAIRPERSON WEISBERG: Ms. Hankins?

10 MS. HANKINS: Yes.

11 CHAIRPERSON WEISBERG: Judge
12 Johnson?

13 JUDGE JOHNSON: Yes.

14 CHAIRPERSON WEISBERG: Mr. Quander?

15 MR. QUANDER: Yes.

16 CHAIRPERSON WEISBERG: Mr. Asuncion?

17 MR. ASUNCION: Yes.

18 CHAIRPERSON WEISBERG: Mr.
19 Rosenthal?

20 MR. ROSENTHAL: Yes.

21 CHAIRPERSON WEISBERG: Mr. Silbert?

22 MR. SILBERT: Yes.

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1 CHAIRPERSON WEISBERG: Ms. Seymour?

2 MS. SEYMOUR: Yes.

3 CHAIRPERSON WEISBERG: And Judge
4 Weisberg votes yes. So far, so good. The
5 next change, if I'm right Ms. Hankins, deals
6 with solicitation offenses?

7 MS. HANKINS: Yes.

8 CHAIRPERSON WEISBERG: And that's
9 the only other part that was packaged together
10 with --

11 MS. HANKINS: Yes.

12 CHAIRPERSON WEISBERG: Okay. These
13 two new offenses are new in the law, there are
14 two of them. The Omnibus Act makes it a
15 crime, a 20-year felony, to solicit murder.
16 Solicit is defined as encouraged, procure -- I
17 can look it up actually and give you the exact
18 language, but it means solicit, another to do
19 it. And it creates a 10-year felony to
20 solicit any other crime of violence, other
21 than murder. I assume murder is first or
22 second degree, but it almost by definition, it

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1 would be first degree if you're soliciting it.

2 It would, almost by definition, it would be
3 pre-meditated obviously.

4 Before tonight, the United States
5 Attorney's Office had proposed ranking the 20-
6 year felony for soliciting murder in group
7 four, and the Public Defender's Office had
8 proposed ranking it in group five. The United
9 States Attorney's Office had proposed ranking
10 the 10-year felony in group six, and the
11 Public Defender Service had proposed ranking
12 it in group eight. As a result of the
13 compromise that's pair to the compromise on the
14 assault on a police officer, the current
15 proposal with which I agree as a Subcommittee
16 member, and I think Mr. Rosenthal also
17 indicated he would have agreed, is to rank the
18 20-year felony in group four, where it would
19 be with aggravated assault while armed and
20 voluntary manslaughter, among others, and rank
21 the 10-year felony in group six, where it's not
22 like any of these, but it would be ranked with

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1 assault with a dangerous weapon, robbery,
2 aggravated assault, second degree sexual
3 abuse, assault with intent to commit robbery,
4 and others. Any discussion?

5 Maybe I should also add that for
6 first offenders -- for first offenders who
7 commit a group four offense, neither probation
8 or a split sentence is available, and the
9 range of imprisonment is 48 months to 120
10 months. So four years to 10 years for a first
11 offender. And in group six, where the other
12 proposed 10-year felony would be ranked,
13 probation is unavailable for a first offender,
14 a split sentence would be available, and the
15 prison range is 18 to 60 months, so a year and
16 a half to five years. Any discussion? There
17 being no discussion, I'll call for the vote. A
18 "yes" vote means that you agree that the 20-
19 year soliciting offense should be ranked in
20 group four, and the 10-year soliciting offense
21 should be ranked in group six. Mr. Forst?

22 MR. FORST: Yes.

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1 CHAIRPERSON WEISBERG: Ms. Hankins?

2 MS. HANKINS: Yes.

3 CHAIRPERSON WEISBERG: Judge

4 Johnson?

5 JUDGE JOHNSON: Yes.

6 CHAIRPERSON WEISBERG: Mr. Quander?

7 MR. QUANDER: Yes.

8 CHAIRPERSON WEISBERG: Mr. Asuncion?

9 MR. ASUNCION: Yes.

10 CHAIRPERSON WEISBERG: Mr.

11 Rosenthal?

12 MR. ROSENTHAL: Yes.

13 CHAIRPERSON WEISBERG: Mr. Silbert?

14 MR. SILBERT: Yes.

15 CHAIRPERSON WEISBERG: Ms. Seymour?

16 MS. SEYMOUR: Yes.

17 CHAIRPERSON WEISBERG: And Judge

18 Weisberg votes yes. So that's good, we've

19 accomplished quite a bit. Now, getting back

20 to -- well, do you have a preference whether

21 we take up the contempt and accessory after

22 before we take up the -- they're pretty easy.

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1 MS. HANKINS: I think those are
2 easy.

3 CHAIRPERSON WEISBERG: Alright. On
4 your agenda, before we get to the compromise
5 relating to criminal abuse of a vulnerable
6 adult --

7 MR. QUANDER: Judge, can I ask a
8 question?

9 CHAIRPERSON WEISBERG: Yes.

10 MR. QUANDER: I have some time
11 constraints. Is it antipating -- anticipated
12 that the discussion on the vulnerable adult is
13 going to be involved?

14 CHAIRPERSON WEISBERG: Not, not so
15 much now because we reached an agreement. So
16 you want to do that first?

17 MR. QUANDER: I would prefer to --
18 to do that one --

19 CHAIRPERSON WEISBERG: That's fine
20 with me.

21 MR. QUANDER: -- since I'm prepared
22 --

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1 CHAIRPERSON WEISBERG: That's fine
2 with me.

3 MS. HANKINS: Okay.

4 CHAIRPERSON WEISBERG: So, we'll go
5 back to that one then. Let me get the statute
6 from you. You -- you've all received position
7 papers from the U.S. Attorney's Office and the
8 Public Defender's Office as to their original
9 positions up until tonight relating to this
10 offense, and their rationale for, for
11 initially at least not being able to agree on
12 ranking. I would like -- is the statutory
13 language attached to the agenda?

14 MR. QUANDER: Yes, it is.

15 MS. HANKINS: Oh, is it?

16 MR. QUANDER: Yes, it's on page five
17 of the agenda, there's a handwritten page five
18 at the bottom.

19 CHAIRPERSON WEISBERG: Alright, it
20 may be less important that we go through the
21 line by line comparison with cruelty to
22 children now than it was before, because that

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1 was a large part of the disagreement, but if
2 you look on page -- it's actually page five of
3 my -- it that what -- yes, on page five of, at
4 the bottom of the page is the statutory
5 definitions of criminal abuse of a vulnerable
6 adult. It's -- you have to read 933, 934, 935,
7 and the penalties are in 936. But -- and it's
8 the -- it's the penalties versions that we're
9 ranking. The criminal abuse is in 933, any
10 person who intentionally or knowingly does
11 certain things to somebody who is defined as a
12 vulnerable adult, meaning 18 years of age or
13 older who has a physical or mental condition
14 which substantially impairs the person from
15 adequately providing for his or her own care
16 or protection. If, if someone knowingly or
17 intentionally does any of the things listed in
18 one, two and three of Section 933, they're
19 guilty of criminal abuse of a vulnerable
20 adult. There's also in 934 a negligence
21 standard for a person who willfully, or
22 through wanton and reckless or willful

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1 indifference, fails to discharge a duty or to
2 provide care, et cetera, to a vulnerable
3 adult, including adequate food, clothing,
4 medicine, shelter and so on, that would be
5 deemed necessary for the well-being of the
6 adult.

7 And then the penalties are in 936,
8 and criminal abuse or criminal neglect of a
9 vulnerable adult is a misdemeanor, if it's not
10 accompanied by any injury at all in Section B,
11 a person who commits the offense of criminal
12 abuse or criminal neglect of a vulnerable
13 adult, which causes serious bodily injury or
14 severe mental distress can be fined up to
15 \$100,000 or imprisoned up to 10 years. And C,
16 a person who commits criminal abuse or
17 criminal neglect of a vulnerable adult which
18 causes permanent bodily harm or death shall be
19 subject to a fine of up to \$250,000, or
20 imprisoned up to 20 years, or both.

21 Up until tonight, the United States
22 Attorney's Office had proposed that the one

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1 that results in permanent injury or death,
2 which we'll call first degree, be ranked in
3 group five, and the one that results in
4 serious bodily injury be ranked in group
5 seven. The Public Defender's Office position
6 is the one we'll call first degree be split,
7 and that the one that results in permanent
8 injury be ranked in group six, but the one
9 that results in death be ranked in group five.

10 As to second degree, the United States
11 Attorney's Office had proposed that the one
12 that results in serious bodily injury, which
13 we'll call second degree, be ranked in group
14 seven, and the one that results in serious --
15 would be ranked in group seven, and the Public
16 Defender's Office proposed that that offense be
17 ranked in group eight, and they had each
18 articulated their rationale for those ranking
19 decisions in the position papers that you
20 previously received.

21 Part of the agreement reached
22 tonight, in combination with other ranking

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1 decisions, is that the United States Attorney's
2 Office agrees to split the first degree
3 offense into two, and that the one that
4 results in permanent injury be ranked in group
5 five -- in group six, but the one that results
6 in death be ranked in group five. That was
7 the initial position of the Public Defender's
8 Office, and that the one -- the second degree
9 offense that result in serious bodily injury
10 be ranked in group seven, which was the
11 original proposal of the U.S. Attorney's
12 Office, but not the proposal of the Public
13 Defender's Office, which proposed group eight.

14 So as a result, we would be ranking
15 the offense at three levels, first degree
16 would be ranked at group five if it results in
17 death, group six if it results in permanent
18 injury, and second degree would be ranked in
19 group seven. Have I said that correctly?

20 MS. HANKINS: Yes.

21 CHAIRPERSON WEISBERG: Alright. Any
22 discussion? And is it -- did I make it clear?

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1 MS. SEYMOUR: No, it's clear, I just
2 -- I don't like it, so it's clear, very clear.

3 CHAIRPERSON WEISBERG: You want to
4 say why?

5 MS. SEYMOUR: Yes, I -- I think,
6 reading both the position papers, but also my
7 experience as a victim advocate, I would
8 absolutely increase the penalties, especially
9 for death, that's the one that to me is very,
10 very low.

11 CHAIRPERSON WEISBERG: Part of the
12 thinking -- I don't want to speak for anybody
13 else, but my own thinking I guess I could say,
14 is that if it -- where it does result in
15 death, there's almost always going to be a
16 homicide associated with it, which is going to
17 be a 30-year felony, or if it's not first
18 degree, a 20-year felony. But I, you know, I
19 had the same reaction to the statute that you
20 did, it is crypting very serious conduct.

21 MS. SEYMOUR: I mean, it is preying.
22 I mean you're preying on a population that,

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1 you know, with the graying America, we should
2 all be concerned about this. And I know we
3 are, I'm not saying we're not, so I, I just
4 would like to see increased penalties for --

5 CHAIRPERSON WEISBERG: Alright. Any
6 other discussion?

7 MR. SILBERT: Yes. I'm looking at
8 the definition of criminal abuse under 933,
9 and I understand the decisions that have been
10 made with respect to subcategory one.
11 Subcategory two as I see it, involves speech.

12 It's speech that can be criminalized, but it
13 involves speech, and I wondered if the
14 Committee in reaching its agreement had
15 considered the applicability of the proposed
16 penalties to that, to that kind of conduct.
17 I'm not saying it should not be penalized or
18 criminalized, but the potential penalties here
19 are rather severe.

20 MS. HANKINS: When you say speech,
21 do you mean -- are you -- because it results
22 -- the result of severe mental distress? Is

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1 that --

2 MR. SILBERT: Yes.

3 MS. HANKINS: That's --

4 MR. SILBERT: Well that's what I'm,
5 I'm wondering, that's the way I see it would
6 apply, and I'm just wondering whether or not
7 under those circumstances, that conduct should
8 be treated differently than when somebody
9 threatens or actually inflicts, you know,
10 physical injury of the kind that's described in
11 the statute.

12 MR. ROSENTHAL: I -- I thought that
13 was the misdemeanor, that was the misdemeanor,
14 because in order to get to the felony --

15 MS. HANKINS: But you need severe
16 mental distress, so you could use speech to
17 cause severe mental distress.

18 CHAIRPERSON WEISBERG: It's
19 possible.

20 MS. HANKINS: It depends on what the
21 severe mental distress is. I mean, who knows.

22 I will say this is an offense that's been on

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1 the books since 2000, and that I know of -- we
2 were asked to write this because there was a
3 current case, and that's the first I know of
4 this statute being used.

5 MR. ROSENTHAL: Yes, this was --
6 this was not part of the Omnibus Act, I should
7 -- I meant to say that.

8 MS. HANKINS: Right, this is -- this
9 is an older offense than that, and it's not --
10 so it's not charged much, so the problem is
11 there are terms in here, like "severe mental
12 distress," or "permanent bodily harm," which I
13 discussed the problems with that, that we don't
14 know how the Court is going to interpret
15 those, we don't know what it's going to -- what
16 the conduct is going to be. So I don't know
17 where that moves anyone, I don't know whether
18 it should move anybody, but I will say I don't
19 think this is charged very much, although with
20 the graying of America, maybe it would
21 unfortunately have to be charged more. I don't
22 know.

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1 MR. SILBERT: Well, let me ask this.
2 Is -- with that point in mind, is PDS still
3 satisfied with the proposal?

4 MR. QUANDER: Before you answer
5 that, can I, can I ask a question?

6 MR. SILBERT: Sure.

7 MR. QUANDER: With it being in box
8 seven, with this offense being in box seven,
9 for that offense, for speech, a probation
10 sentence is appropriate, and fits within the
11 range of sentencing. So the Court can weigh
12 whether or not it's a speech, an issue of
13 speech that has caused the harm, and has the
14 flexibility of sentencing an individual to
15 probation, as opposed to some physical harm,
16 where the Court could impose a period of
17 imprisonment. So the box is broad enough to
18 cover those areas that address or -- where the
19 harm is caused by speech as opposed to
20 physical harm.

21 CHAIRPERSON WEISBERG: Assuming no
22 criminal is -- or minimal criminal.

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1 MR. QUANDER: Right, exactly.
2 Right.

3 MS. HANKINS: I think you raise a
4 good point, I wish I'd thought of it. I -- I
5 -- I don't know what to do now. I think that's
6 -- I mean, yes, I guess I, if I had thought
7 about it, I think it would probably, just as
8 first degree got split up, I can see making a
9 proposal to split up second degrees, that if
10 it caused serious bodily injury it's seven, and
11 severe mental distress is eight. I -- I'm not
12 sure where Mr. Asuncion feels about that, Ms.
13 Riley's left, I don't -- I feel in a bit of a
14 bind because I made -- because I made a
15 proposal on this, and so I think that's a
16 really good point. I'd love to have come to the
17 Subcommittee meetings, but.

18 CHAIRPERSON WEISBERG: Alright, you
19 know, nothing is carved in stone, and we've
20 always reserved the right to go back and look
21 at these rankings as we get more data from
22 charged offenses. The problem with this one

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1 is that we may not get much data for a very
2 long time if it's as rarely charged as, as it
3 has been the last five or six years. But you
4 know, if we begin to see a lot of these verbal
5 assaults, not resulting in physical injury,
6 obviously we have to rethink whether seven was
7 ranking it too high.

8 JUDGE JOHNSON: I'm -- I'm
9 comfortable with the seven, in part because of
10 what Mr. Quander has said about the range of
11 possibilities in those sentences. I would
12 also add that causing severe mental distress
13 to a vulnerable adult could run a pretty wide
14 range, from horrific to a less serious
15 approach. So, because our guidelines are
16 structured the way they are with those very
17 considerable ranges, I'd be fine with that.

18 CHAIRPERSON WEISBERG: Does
19 everybody feel ready to vote? You know, I'm
20 assuming, Mr. Kane, even though you have no
21 vote, that if you've had things you wanted to
22 contribute, you would do so. I didn't mean to

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1 overlook you. Your counsel is always wise,
2 and I always appreciate it, so if you want to
3 weigh in on any of this, even though you can't
4 vote, I took the same position with Nola Joyce
5 at the last public meeting, and she had some
6 things to say on a number of things.

7 MR. KANE: I would, Judge Weisberg.

8 CHAIRPERSON WEISBERG: Okay.
9 Calling for the vote, a "yes" vote means that
10 you agree to divide what we'll call the first
11 degree criminal and negligent abuse of a
12 vulnerable adult into two categories, category
13 five if the abuse results in death, and
14 category six if it does not, but results in
15 permanent injury. And you agree that the --
16 what we'll call the second degree abuse and
17 neglect resulting in serious bodily injury
18 will be ranked in group seven. Mr. Forst?

19 MR. FORST: Yes.

20 CHAIRPERSON WEISBERG: Ms. Hankins?

21 MS. HANKINS: Yes.

22 CHAIRPERSON WEISBERG: Judge

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1 Johnson?

2 JUDGE JOHNSON: Yes.

3 CHAIRPERSON WEISBERG: Mr. Quander?

4 MR. QUANDER: Yes.

5 CHAIRPERSON WEISBERG: Mr. Asuncion?

6 MR. ASUNCION: Yes.

7 CHAIRPERSON WEISBERG: Mr.

8 Rosenthal?

9 MR. ROSENTHAL: Yes.

10 CHAIRPERSON WEISBERG: Mr. Silbert?

11 MR. SILBERT: Abstain.

12 CHAIRPERSON WEISBERG: Ms. Seymour?

13 MS. SEYMOUR: No.

14 CHAIRPERSON WEISBERG: Judge

15 Weisberg votes yes. We better -- and Judge

16 Cushenberry, we may need it, but we didn't

17 count, but --

18 MR. ROSENTHAL: Point of order?

19 CHAIRPERSON WEISBERG: Yes.

20 MR. ROSENTHAL: I'm not sure what

21 the Chair is using as its basis for Roberts

22 Rules of Order, but my understanding is if we

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1 -- as long as we have a quorum, it is a
2 majority of the quorum which carries the vote.

3 CHAIRPERSON WEISBERG: I think
4 that's probably right.

5 MR. ROSENTHAL: So, if there are
6 eight voting members, five or more agreeing
7 one way would carry the vote.

8 CHAIRPERSON WEISBERG: I accept it,
9 I think that's exactly right. I've just been
10 thinking in my mind we should have eight for
11 that, but -- but I don't think we need to.

12 MR. ROSENTHAL: I believe five is
13 the --

14 CHAIRPERSON WEISBERG: Alright, so
15 we should still count anyway. We had -- for
16 the moment, not counting Judge Cushenberry,
17 although he did give a proxy, we have one,
18 two, three, four, five, six "yes," seven with
19 me, yes, an abstention, and a "no" vote. Is
20 that what you've got? Alright. The "yes" vote
21 has it, that will carry. Now, we've got a few
22 that I think will not be -- I hope will not be

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1 controversial that we'd like to add, since we
2 want to take advantage of being here at a
3 public meeting. One is the offense of
4 contempt. And again, I may need help with
5 this one, Ms. Hankins, to explain what we're
6 doing. We've never ranked it --

7 MS. HANKINS: No.

8 CHAIRPERSON WEISBERG: -- it's a
9 peculiar -- it's a peculiar offense in the DC
10 Code, there are some contempt offenses that
11 relate to bail violations that are
12 misdemeanors. They include going back to an
13 area that you've been prohibited from going to
14 as a condition of release, and such things.
15 Mr. Quander is probably more conversant with
16 those than I am. And then there's a contempt
17 in Title 22, Section 944, which has no penalty
18 associated with it at all, and it's always been
19 assumed that, theoretically at least, one
20 could get up to life imprisonment, and now 30
21 years, for, amid even life without release for
22 one of those contempts, although I can't think

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1 of a case in my 30 years where that's occurred.

2 There have been some fairly long sentences,
3 though, one of which actually got reversed by
4 the Court of Appeals, because it was thought
5 to be disproportionate to the other contempt
6 sanctions, sentences that were imposed.

7 In any case, we have to score it
8 for criminal history purposes, whether we rank
9 it or not, and the proposal -- again, correct
10 me if I'm wrong -- is the contempt would always
11 be scored as if it were a misdemeanor.
12 Certainly the bail contempts would be scored
13 at a quarter of a point, all other contempts
14 would be scored at a quarter of a point,
15 except that if the United States Attorney's
16 Office -- I assume that's who would be doing it
17 -- could show that the contempt in question in
18 one's criminal history was in fact a felony,
19 because the sentence imposed was longer than
20 one year, then it would be correspondingly
21 ranked as a felony, or scored as a felony I
22 should say, not ranked, scored as a felony,

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1 but with only one point as a rule of lenity,
2 even though it could conceivably have been a
3 sentence that might otherwise justify a higher
4 criminal history score. Is that accurate?

5 MS. HANKINS: Yes.

6 CHAIRPERSON WEISBERG: Is it -- can
7 you make it more accurate?

8 MS. HANKINS: No, that's the -- yes,
9 you're absolutely right on the, on the scoring.

10 It was -- it was -- we had actually, I
11 thought, had already decided that contempt,
12 11944, general contempt, couldn't be ranked
13 because there wasn't a penalty associated with
14 it. But then the question came up I think in
15 connection with somebody's case perhaps, what's
16 the criminal history, and then we realized
17 okay, well maybe we can't rank it, because it
18 just has to be proportional sentencing, but if
19 someone is convicted of it, how do we score
20 it? So that was the only -- so, so I actually
21 thought we'd already decided it, that it
22 couldn't be ranked, but we did have to score

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1 it, and you're absolutely right, a quarter of
2 -- we, we -- the U.S. Attorney's Office and
3 PDS, and I guess the Subcommittee a quarter of
4 a point, unless it was, the sentence indicate
5 it was a felony, in which was it could be one
6 point. Yes, that's right.

7 MR. QUANDER: Is that clear to
8 everybody?in

9 CHAIRPERSON WEISBERG: We're not
10 ranking, we're just doing this for criminal
11 history purposes. Does anybody want to be
12 heard further on how it will be scored? The
13 "yes" vote means you agree --

14 MR. QUANDER: Yes, I do have some
15 uneasiness. I don't remember the case, but
16 there was a Court of Appeals opinion, and I
17 think it was one of Judge Cushenberry's cases
18 in which there was a stay away order or
19 something of that nature, and there was a
20 violation. The individual was found in
21 contempt of that stay away order, and I think
22 there was a three-year sentence imposed, and

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1 which was upheld. How would we score that
2 three-year sentence?

3 CHAIRPERSON WEISBERG: If it was a
4 contempt imposed under the general contempt
5 power?

6 MR. QUANDER: Yes.

7 CHAIRPERSON WEISBERG: Then it would
8 be a one point felony.

9 MS. HANKINS: If the prosecution
10 went and found out it was three years.

11 CHAIRPERSON WEISBERG: Right.

12 MS. HANKINS: If they didn't do -- if
13 they didn't do that work, it would just be a
14 quarter of a point, because it would come
15 across as an 11944 contempt, and if you don't
16 know the sentence, you have no idea what, what
17 the sentence -- so it's -- so it would
18 originally be a quarter of a point. But if
19 the prosecution went and looked and said hey,
20 this is three years, then it would get one
21 point.

22 MR. QUANDER: But I'm concerned

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1 about my staff, the CSO who's doing the
2 criminal history investigation. So, if they
3 go behind and pull the J & C and so forth, and
4 they see that it's a three-year offense, or if
5 Courtview or some of the other enhancements
6 come online for electronic sharing of
7 information, if that information becomes more
8 readily available, then are we looking to the
9 diagnostic workers, our CSOs to make that
10 judgment, that is, say a full point as opposed
11 to a quarter point?

12 MS. HANKINS: Yes, I don't think it's
13 -- I think it was a matter of we weren't
14 requiring your office to do that, to do that
15 work, so that they could just say it's a
16 quarter of a point. Certainly if they happen
17 to know that sentence for some reason, it's not
18 -- it's not just that the prosecutor can be
19 the only one that can find it out. So if --
20 so yes, if somehow they have the J & C, then,
21 then it's a point. It's not -- it's not just
22 that the prosecutor brings it up, it's that

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1 there --

2 CHAIRPERSON WEISBERG: Right.

3 MS. HANKINS: -- in fact is
4 evidence that it was a felony sentence, and
5 then it's a point.

6 MR. QUANDER: And then --

7 MS. HANKINS: If it happens to be
8 your staff that raises it, then it's a point.

9 CHAIRPERSON WEISBERG: And then I
10 would assume that -- this is not what we need
11 to decide tonight, but as a procedural matter,
12 I assume that the diagnostic worker would
13 score it a point, but would also make sure
14 that the documents showing that it's a --

15 MR. QUANDER: Right.

16 CHAIRPERSON WEISBERG: -- that it's a
17 more than one year sentence is available as
18 backup, just in case.

19 MR. QUANDER: Right, and as I say,
20 my concern is that the more sophisticated we
21 get with CEGIS and Courtview and others,
22 pretty soon these things are going to be

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1 available electronically, so we'll be able to
2 go in, we'll make reference to it so that
3 anyone can pull it up and see.

4 CHAIRPERSON WEISBERG: Right, okay.

5 Alright, calling for the vote, a "yes" vote
6 mean you agree with the scoring of contempt as
7 indicated, a quarter of a point, unless the
8 contempt was sentenced as a felony, in which
9 case it would be a one-point in criminal
10 history. Mr. Forst?

11 MR. FORST: Yes.

12 CHAIRPERSON WEISBERG: Ms. Hankins?

13 MS. HANKINS: Yes.

14 CHAIRPERSON WEISBERG: Judge
15 Johnson?

16 JUDGE JOHNSON: Yes.

17 CHAIRPERSON WEISBERG: Mr. Quander?

18 MR. QUANDER: Yes.

19 CHAIRPERSON WEISBERG: Mr. Asuncion?

20 MR. ASUNCION: Yes.

21 CHAIRPERSON WEISBERG: Mr.
22 Rosenthal?

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1 MR. ROSENTHAL: Yes.

2 CHAIRPERSON WEISBERG: Mr. Silbert?

3 MR. SILBERT: Yes.

4 CHAIRPERSON WEISBERG: Ms. Seymour?

5 MS. SEYMOUR: Yes.

6 CHAIRPERSON WEISBERG: And Judge
7 Weisberg votes yes. Alright one more, and I
8 appreciate your patience, this took a little
9 longer than I thought it might, but this is
10 the last thing that's going to take much time,
11 if any. The offense of accessory after the
12 fact, which is charged as an independent
13 crime, carries a penalty that is by statute
14 one-half of whatever the maximum -- the
15 maximum sentence for the accessory after is
16 one-half of whatever the maximum sentence is
17 for the offense for which you are acting as an
18 accessory after the fact. So, if you're an
19 accessory after the fact to a 10-year maximum
20 felony, the maximum sentence for the accessory
21 after is five years, and if it's a 30-year
22 felony, the maximum sentence for the accessory

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1 after is 15 years.

2 In a ranking decision, which we've
3 already made, we decided that the guideline
4 for accessory after would be one-half of
5 whatever the guideline would be for the
6 offense to which the person is acting as an
7 accessory after. So for example, the sentence
8 for someone who -- a first offender who
9 commits a robbery, is a prison range of 18 to
10 60 months, an unarmed robbery. If a person is
11 convicted of accessory after to an unarmed
12 robbery, the guideline range would be exactly
13 half that, or nine to 30 months, for a first
14 offender. That's a decision we're not making
15 tonight, we've already made it. A question
16 arose however, where halving the, that is,
17 cutting in half the guideline would make a
18 person committed -- who was convicted of an
19 offense of comparable seriousness, eligible
20 for probation or a split sentence, in a box
21 that doesn't otherwise allow for it. So, to
22 use my example, again, Ms. Hankins, you're

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1 going to have to correct me if I don't explain
2 this clearly enough.

3 To use my same example, a person
4 committed of robbery who's a first offender is
5 in box 6A. The prison range available for the
6 robbery is 18 to 60 months, probation is not
7 available, but a split sentence would be
8 available, short split sentence would be
9 available. For the accessory after, the
10 prison range would be nine to 30 months, but
11 if they stayed in that same box, probation
12 would not be available, and a split sentence
13 would. And the proposal is -- and there's
14 agreement on this between the public defender
15 and the United States Attorney's Office --

16 MS. HANKINS: And me.

17 CHAIRPERSON WEISBERG: -- and the
18 other members of the Subcommittee. There's no
19 perfect way to do this, but the way we've
20 suggested doing it is to drop down one box
21 below whatever the box was for the completed
22 offense to which the person is acting as an

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1 accessory after, to find whether it's going t
2 to be a probation or a split-sentence eligible
3 sentence. So to use my example again, if
4 somebody commits a robbery, they'd be eligible
5 for a split sentence, but not probation. If
6 somebody's an accessory after a robbery, the
7 prison range would be half that for the person
8 who commits the robbery, but they would drop
9 down one box in terms of their eligibility for
10 probation or a split sentence, and they would
11 find themselves in box 7A, where probation
12 would be an available option. And it works
13 the same way through the rest of the grid.
14 Most of the time, it won't make any difference
15 if you're in -- if you're in an unshaded box and
16 you drop down one, and you're still in an
17 unshaded box. It doesn't make any difference.
18 So, the sentence is simply half the sentence
19 that it would have been in the original box.
20 But where it does make a difference along the
21 margin to get you into a split sentence box or
22 to get you into a probation-eligible box, we

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1 thought that the fair thing to do, since you're
2 only -- you've only committed an offense that's
3 half as serious as the one that we're using to
4 determine the sentence, that you ought to be
5 given consideration for probation or a split
6 sentence, if dropping down a box would make
7 you eligible for sentencing alternatives. Is
8 that a fair explanation?

9 MS. HANKINS: It is if everybody
10 understood it.

11 CHAIRPERSON WEISBERG: I -- I can't
12 do any better at this hour --

13 MS. HANKINS: Yes.

14 CHAIRPERSON WEISBERG: -- but I'll be
15 glad to try if anybody has any questions. Any
16 discussion?

17 MR. SILBERT: Yes.

18 CHAIRPERSON WEISBERG: Alright.

19 MR. SILBERT: Is PDS satisfied with
20 that proposal?

21 MS. HANKINS: It was my idea. I
22 think it's great.

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1 CHAIRPERSON WEISBERG: It's kind of
2 a -- it's kind of a rule of lenity basically,
3 you wouldn't have to move the person down, but,
4 but it makes sense to since the offense is
5 half as serious as the one you're starting
6 with.

7 MS. HANKINS: We didn't talk about
8 it. When we -- when we came up -- when, for
9 whatever reason, we had to, we had to do
10 something with accessory after the fact, we
11 talked about the prison sentence, and that
12 exposure, and we just sort of said we'll go to
13 that box, if they make a plea then we cut it
14 in half, and we even went through a whole
15 convoluted thing and had a whole thing in the
16 manual about ranking it, and then -- but for
17 whatever reason, never talked about the
18 shading, and then it came up. And I sort of
19 thought, well why, why does the shading have
20 to be the same as the completed offense? Can
21 there be something that, that is -- that
22 recognizes that the accessory is less, and so

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1 I thought for just sort of ease of -- for --
2 to simplify it, to just drop down a box and
3 take advantage of the shading below, although
4 you'd use the numbers of the box in the
5 completed offense.

6 CHAIRPERSON WEISBERG: Any other
7 discussion? Alright, we'll call for a vote. A
8 "yes" vote means that you agree, agree with
9 the proposal as stated. Mr. Forst?

10 MR. FORST: Yes.

11 CHAIRPERSON WEISBERG: Ms. Hankins?

12 MS. HANKINS: Yes.

13 CHAIRPERSON WEISBERG: Judge
14 Johnson?

15 JUDGE JOHNSON: Yes.

16 CHAIRPERSON WEISBERG: Mr. Quander?

17 MR. QUANDER: Yes.

18 CHAIRPERSON WEISBERG: Mr. Asuncion?

19 MR. ASUNCION: Yes.

20 CHAIRPERSON WEISBERG: Mr.
21 Rosenthal?

22 MR. ROSENTHAL: Yes.

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1 CHAIRPERSON WEISBERG: Mr. Silbert?

2 MR. SILBERT: Yes.

3 CHAIRPERSON WEISBERG: Ms. Seymour?

4 MS. SEYMOUR: Yes.

5 CHAIRPERSON WEISBERG: Judge
6 Weisberg votes yes. Good. Now if I can ask
7 your indulgence for two more minutes, I can
8 explain what the last part of the agenda is,
9 if I can find it. Here it is. On May 29th,
10 next Tuesday, or it's a week from next Tuesday,
11 the council is having a hearing, maybe it's a
12 markup, I don't know the terminology, on the
13 bill that was part of our annual report, where
14 we're asking for enabling legislation to put
15 the guidelines in place as voluntary
16 guidelines. The bill that we proposed was --
17 is attached to the agenda. Where is it? I
18 have so many documents in front of me, I can't
19 -- can't find it anywhere. Here it is.

20 MS. HANKINS: Judge Weisberg?

21 CHAIRPERSON WEISBERG: Yes?

22 MS. HANKINS: I really have to go.

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1 CHAIRPERSON WEISBERG: I -- you don't
2 have to be here.

3 MS. HANKINS: Okay. Do we --

4 CHAIRPERSON WEISBERG: Veda can come
5 up --

6 MS. HANKINS: Okay.

7 CHAIRPERSON WEISBERG: -- if --
8 there won't be any votes taken, I just wanted
9 to explain so everybody knows what we're --
10 what we're doing, and if anybody has a contrary
11 view, they can let us know. The bill is
12 attached beginning on page 20 of the agenda
13 package that was delivered tonight. Mr. Hunt
14 and I are proposing to attend, give testimony,
15 and answer questions, if any, and Mr. Hunt has
16 proposed a simple PowerPoint presentation to
17 explain what's in the -- what's in the annual
18 report, and our rationale basically for the
19 bill that we proposed. The PowerPoint is also
20 attached, beginning on page 24. It's quite
21 simple, and it -- and they probably don't want
22 a whole lot of time and a very elaborate

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1 recapitulation of the annual report. But I
2 think, if you all get a chance to look at it,
3 if there are things that are not in that we --
4 he can make PowerPoint slides for anything you
5 think we should bring to the council's
6 attention. So, I haven't reviewed it carefully
7 myself, I'm just seeing it for the first time,
8 but if any of you look at it, and say no, we
9 really ought to -- it's important that we let
10 the council know why we did this, or why we
11 did that, and that's not covered by the
12 PowerPoint, and want to suggest to Mr. Hunt
13 additional points that can be put in as part
14 of the PowerPoint, we'll be glad to include
15 anything that anybody wants, you know, within
16 reason. And I'm hopeful that it'll be a non-
17 controversial hearing, and that they will
18 agree without dissent to adopt the bill as
19 proposed, and enact it.

20 MR. ROSENTHAL: Can I just ask if we
21 can get emails of the draft PowerPoint?
22 That'll be great.

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1 CHAIRPERSON WEISBERG: Sure.

2 MR. ROSENTHAL: Some of us would
3 like to see that.

4 CHAIRPERSON WEISBERG: Sure.

5 MS. SEYMOUR: And Judge Weisberg,
6 when would you need our comments on that by,
7 like not tonight, right?

8 CHAIRPERSON WEISBERG: No, not --
9 definitely not tonight, but the sooner the
10 better. Maybe -- what's tonight, Tuesday?

11 MS. SEYMOUR: By Friday?

12 CHAIRPERSON WEISBERG: Friday this
13 week? Sure. Tuesday next week would be not
14 too late.

15 MS. SEYMOUR: Okay.

16 CHAIRPERSON WEISBERG: He can do --
17 he can put this together, as long as your --
18 as long as your additions are not, you know,
19 very elaborate, we can put it together pretty
20 quickly.

21 MS. SEYMOUR: Okay. And when is the
22 hearing, the council hearing again?

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1 CHAIRPERSON WEISBERG: 10:30 I
2 think, isn't it?

3 DR. HUNT: Probably start at 11:00,
4 but we can get you that.

5 MS. SEYMOUR: Okay.

6 CHAIRPERSON WEISBERG: Maybe put in
7 the same e-mail.

8 MS. SEYMOUR: Okay. Thank you.

9 CHAIRPERSON WEISBERG: Yes. You're
10 all welcome to attend, and anybody that wants
11 to should, and I'd appreciate the moral
12 support, but I'm not requiring attendance, and
13 it wasn't even clear that they wanted us to
14 make an elaborate presentation, but I
15 certainly want to be there to answer any
16 questions, and as you all know, parts of the,
17 of the proposed legislation are really
18 important to us to be able to carry on the
19 guidelines without concern about
20 constitutional issues and other issues that
21 we've assiduously and successfully avoided.

22 Is that -- is that it? Anything

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1 else that anybody wants to raise? Thank you
2 all for your patience and attendance and
3 participation. This meeting is adjourned.

4 MS. SEYMOUR: Thank you.

5 (Off the record.)
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