1 Before the

2 UNITED STATES SENTENCING COMMISSION

3 Public Hearing

4 Thursday, February 16, 2012

5 Federal Judicial Center, Classrooms A-C

6 Thurgood Marshall Federal Judiciary Building

7 One Columbus Circle

8 Washington, DC 20002-8002

9 The hearing was convened, pursuant to

10 notice, at 8:39 a.m., before:

11 JUDGE PATTI B. SARIS, Chairwoman

12 MR. WILLIAM B. CARR, JR., Vice Chairman

13 MS. KETANJI BROWN JACKSON, Vice Chairwoman

14 CHIEF JUDGE RICARDO H. HINOJOSA,

15 Commissioner

16 JUDGE BERYL A. HOWELL, Commissioner

17 MS. DABNEY FRIEDRICH, Commissioner

18 MR. JONATHAN J. WROBLEWSKI, Ex-Officio

19 Member of the Commissioner

20

21

22 COURT REPORTER: Jane W. Beach, Ace-Federal Reporters

1 PANEL I: Current State of Federal Sentencing
2 HONORABLE PAUL BARBADORO
3 United States District Judge
4 District of New Hampshire
5 MATTHEW AXELROD
6 Associate Deputy Attorney General
7 United States Department of Justice
8 CHARLES SAMUELS, Director
9 Federal Bureau of Prisons
10 RAYMOND MOORE
11 Federal Public Defender
12 Districts of Colorado and Wyoming
13 ROUNDTABLE I: Improving the Advisory Guideline
14 System
15 HONORABLE GERARD LYNCH
16 United States Circuit Judge
17 United States Court of Appeals for
18 the Second Circuit
19 HONORABLE ANDRE M. DAVIS
20 United States Circuit Judge
21 United States Court of Appeals for
22 the Fourth Circuit

1 ROUNDTABLE I (Continued):

2 HENRY BEMPORAD

3 Federal Public Defender

4 Western District of Texas

5 PROFESSOR SUSAN R. KLEIN

6 Alice McKean Young Regents Chair in Law

7 University of Texas School of Law

8 MATTHEW MINER

9 Attorney

10 Washington, DC

11 ROUNDTABLE II: Restoring Mandatory Guidelines

12 HONORABLE THEODORE McKEE

13 Chief United States Circuit Judge

14 Third Circuit Court of Appeals

15 HONORABLE WILLIAM K. SESSIONS III

16 United States District Judge

17 District of Vermont

18 MICHAEL NACHMANOFF

19 Federal Public Defender

20 Eastern District of Virginia

21

22

1 ROUNDTABLE II (Continued):

2 PROFESSOR FRANK BOWMAN III

3 Floyd R. Gibson Missouri Endowed Professor of Law

4 University of Missouri School of Law

5 MICHAEL VOLKOV

6 Attorney

7 Washington, DC

8 PANEL II: Comparing the Options, An Academic

9 Perspective

10 PROFESSOR SARA SUN BEALE

11 Charles L.B. Lowndes Professor of Law

12 Duke University School of Law

13 PROFESSOR MICHAEL TONRY

14 Russell M. and Elizabeth M. Bennett Chair

15 in Excellence

16 University of Minnesota Law School

17 PROFESSOR DOUGLAS BERMAN

18 Robert J. Watkins/Procter & Gamble Professor of Law

19 The Ohio State University Moritz College of Law

20

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1 PANEL III: Comparing the Options, Community
2 Perspectives
3 MARY PRICE
4 General Counsel
5 Families Against Mandatory Minimums
6 MARC MAUER, Executive Director
7 The Sentencing Project
8 PANEL IV: Comparing the Options, Practitioners'
9 Perspectives
10 DAVID DEBOLD, Chair
11 Practitioners Advisory Group
12 LISA WAYNE, President
13 National Association of Criminal Defense Lawyers
14 JAMES E. FELMAN, Co-Chair
15 Criminal Justice Section
16 Committee on Sentencing
17 American Bar Association
18
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1 P R O C E E D I N G S

2 (8:39 a.m.)

3 CHAIR SARIS: Good morning. Everyone

4 should be seated. We've got a long and great day

5 ahead.

6 Good morning. On behalf of the United

7 States Sentencing Commission I would like to welcome

8 all of you to today's important hearing on federal

9 sentencing issues, seven years after the Supreme

10 Court's decision in *United States v. Booker*.

11 Since 2005, the Supreme Court has issued

12 seven opinions that have significantly affected

13 federal sentencing, and the Commission currently is

14 in the process of studying and preparing a report on

15 what those effects have been.

16 Yesterday we held a hearing on federal

17 child pornography offenses. That hearing was

18 extremely informative and helpful to our study of

19 those offenses and their penalties, and I am sure

20 that today's hearing will be equally informative and

21 helpful to our study of post-*Booker* federal

22 sentencing.

1 In both the Commission's recently issued
2 report to Congress on mandatory minimum penalties,
3 and my October 12th, 2011, testimony before the House
4 Judiciary Committee's Subcommittee on Crime,
5 Terrorism, and Homeland Security, the Commission
6 stated its continued position that a strong and
7 effective sentencing guideline system best serves the
8 purposes of the Sentencing Reform Act.
9 As I stated at the subcommittee hearing,
10 the Commission continues to believe that a strong and
11 effective guidelines system is an essential component
12 of the flexible, certain, and fair sentencing scheme
13 envisioned by the Congress when it passed the SRA.
14 In light of increased sentencing
15 inconsistencies in sentencing practices that the
16 Commission has observed since *Booker* and its progeny,
17 and with the benefit of having several years of
18 experience under the advisory guideline system, the
19 Commission has suggested a number of ways in which
20 the current federal sentencing system may be improved
21 to ensure that it meets the purposes of sentencing
22 set forth in the SRA.

1 Specifically, the Commission suggested
2 that Congress enact a more robust appellate review
3 standard that (1) requires appellate courts to apply
4 a presumption of reasonableness to sentences within
5 the properly calculated guideline range; (2) requires
6 a greater variance from the guidelines be accompanied
7 by a greater justification for variance by the
8 sentencing court; (3) creates a heightened standard
9 of review for sentences imposed as a result of a
10 policy disagreement with the guidelines. The
11 Commission also suggested that Congress clarify
12 statutory directives to the sentencing court and the
13 Commission regarding how certain offender
14 characteristics should be considered under the
15 statutes 28 U.S.C. 994, and 18 U.S.C. 3553(a), that
16 are currently intentioned.
17 Finally, the Commission suggested that
18 Congress should require that sentencing courts give
19 substantial weight to the guidelines in sentencing
20 and codify the three-part sentencing process.
21 That does not mean, however, that those
22 suggestions are the only way to improve the current

1 advisory system, or that other types of guideline
2 systems that are consistent with the constitutional
3 holdings of *Booker* and its progeny should not be
4 considered.
5 It is for this reason that the Commission
6 is holding this important hearing today to hear
7 feedback about the Commission's suggestions, to hear
8 other ideas for improving the current system, and to
9 explore other possible guideline systems.
10 We look forward to hearing your
11 viewpoints, and I am sure they will be helpful to the
12 Commission as it prepares its upcoming report on
13 *Booker*.
14 Now I would like to introduce the rest of
15 the commissioners. Mr. Will Carr — some of you sat
16 here yesterday. This may not be necessary, but I
17 see some new faces out here, so here we go — Mr. Will
18 Carr, to my right, has served as vice chair of the
19 Commission since December 2008. Previously he served
20 as an assistant United States attorney in the Eastern
21 District of Pennsylvania from 1981 until his
22 retirement in 2004.

1 Ms. Ketanji Jackson, to my left, has
2 served as vice chair of the Commission since February
3 2010. Previously she was a litigator at Morrison &
4 Foerster, LLP; and was an assistant federal public
5 defender in the Appeals Division of the Office of the
6 Federal Public Defender in the District of Columbia.
7 Judge Ricardo Hinojosa served as chair and
8 subsequently acting chair of the Commission from 2004
9 to 2009. He is the chief judge of the United States
10 District Court for the Southern District of Texas,
11 having served on that court since 1983.
12 Judge Beryl A. Howell has served on the
13 Commission since 2004. She has also been a judge of
14 the United States District Court of the District of
15 Columbia since last year.
16 Dabney Friedrich, Ms. Friedrich, has
17 served on the Commission since December 2006.
18 Previously she served as an associate counsel at the
19 White House, as counsel to Chairman Orrin Hatch of the
20 Senate Judiciary Committee, and assistant U.S.
21 attorney in the Southern District of California, and
22 the Eastern District of Virginia.

1 And to my far right is Jonathan
2 Wroblewski, who is an ex-officio member of the
3 Commission, representing the Attorney General of the
4 United States. Currently he serves as director of
5 the Office of Policy and Legislation in the Criminal
6 Division of the Department of Justice.
7 So before we get going with our first
8 panel, I wanted to know if any of the other
9 commissioners had any remarks to make.
10 VICE CHAIR JACKSON: Could I say
11 something?
12 CHAIR SARIS: Commissioner Jackson.
13 VICE CHAIR JACKSON: I would just like to
14 say that I am extremely delighted that we are having
15 this hearing today, not only because it permits
16 feedback on the Commission's proposals for
17 strengthening the existing guideline system, but also
18 because it begins a dialogue about alternatives to,
19 and improvements to the particular set of guidelines
20 that we now have.
21 I personally have long believed that the
22 original Commission devised the current guideline

1 scheme consistent with the provisions of the
2 Sentencing Reform Act, and the understanding that the
3 guidelines that they were creating would be
4 presumptive or binding in their application.
5 Now after *Booker*, there is a different set
6 of circumstances which in my view warrant
7 reconsideration of the basic structure and function
8 and form of the sentencing guidelines.
9 I see this hearing as a welcome step in
10 beginning this kind of big picture analysis, and I
11 look forward to hearing from all of the witnesses
12 today.
13 CHAIR SARIS: Thank you. Anybody?
14 (No response.)
15 CHAIR SARIS: All right. So now I have a
16 panel of terrific people, but four of you. So the
17 way we're trying to do this is, to keep this moving,
18 is — the First Circuit does this. It's pretty brutal,
19 actually. It's these little lights. And so as
20 you're nearing the end of the time allocated, the
21 yellow light pops up. And then the red light. And
22 then the hook.

1 Now yesterday I was a little bit — I let
2 people go over because we had shorter panels, but
3 today we are sort of an active bench, shall we say.
4 I mean, we ask a lot of questions. I just want to
5 make sure there's time at the end. So if people can
6 sort of stay within their limits, and I'll start
7 dancing around if the red light goes off and you
8 haven't really noticed it.
9 So I'm going to start off with the
10 Honorable Paul J. Barbadoro, who is a United States
11 district court judge for the District of New
12 Hampshire, and served as chief judge of that district
13 from 1997 to 2004. Currently he is a member of the
14 Criminal Law Committee of the Judicial Conference of
15 the United States.
16 Matthew S. Axelrod is an associate deputy
17 attorney general, where he advises the Deputy
18 Attorney General of the United States on criminal
19 enforcement issues. Previously Mr. Axelrod served as
20 senior counsel to the assistant attorney general for
21 the Criminal Division, and an assistant United States
22 attorney in the United States Attorney's Office for

1 the Southern District of Florida.

2 Charles Samuels was appointed director of

3 the Federal Bureau of Prisons on December 21st, 2011.

4 From January 1st, 2011, until his appointment as

5 director, he served as associate director of the

6 Correctional Programs Division.

7 Raymond Moore is a federal public defender

8 for the districts of Colorado and Wyoming. He

9 previously served as an assistant public defender for

10 the District of Colorado. Previously he served as

11 both an associate and partner with Davis, Graham &

12 Stubbs, and an assistant U.S. attorney for the

13 District of Columbia.

14 So welcome to all of you, and let's start

15 with Judge Barbadoro.

16 JUDGE BARBADORO: Good morning,

17 Commissioners. You have my written testimony, and

18 you have a busy day, and I've just heard Judge

19 Saris's warning, so let me see if I can bring my

20 summary in in under five minutes. I'd hate to see

21 the red light come up.

22 (Laughter.)

1 JUDGE BARBADORO: I also prefer a hot
2 bench myself when I'm on your side, so it's only fair
3 to prefer it when I'm on this side, and I'm anxious
4 to answer any questions that you have.
5 So my assignment was to describe the
6 positions of the Judicial Conference and the Criminal
7 Law Committee with respect to the impact of *Booker*
8 and its progeny on sentencing.
9 I think I can summarize those positions
10 really in a sentence, which is that the Conference
11 and the Committee have consistently supported efforts
12 to preserve judicial flexibility in guideline
13 sentencing.
14 As far back as 1990, well before *Booker*,
15 the Conference authorized the Criminal Law Committee
16 to work with the Commission to develop proposals to
17 amend the guidelines where appropriate to increase
18 sentencing flexibility. This approach was reflected
19 in the 1995 long-term plan for the courts, which
20 recommended that the Commission afford sentencing
21 judges the ability to depart from the guidelines
22 where appropriate, and to consider a greater number

1 of offender characteristics in sentencing.
2 In 2003, Judge Hamilton on behalf of the
3 Committee testified to the Commission and urged the
4 Commission to preserve the ability of judges to
5 exercise individual sentencing judgment.
6 The only time that the Conference has
7 expressed a few post-*Booker* was in 2005, shortly
8 after the *Booker* opinion was issued. And at that
9 time, the Conference urged Congress to maintain an
10 advisory guideline system. It also specifically
11 agreed to oppose legislation that would respond to
12 *Booker* by either directly raising the upper limits of
13 each guideline range, or expanding the use of
14 mandatory minimums.
15 The Conference hasn't revisited that
16 position since 2005, but I think there's good reason
17 to believe that most judges continue to believe in an
18 advisory guideline system. As the Commission knows,
19 a recent survey of my colleagues demonstrates that of
20 those that responded, 75 percent continued to believe
21 that the current advisory guideline system best
22 achieves the purposes of sentencing.

1 Although the Commission's recent data
2 showing a decline in the rate of within-guideline
3 sentencing is something that obviously requires
4 careful consideration, I think we have to keep it in
5 perspective. And it is important to remember that 80
6 percent of all sentences, even now, are still either
7 within the guidelines or are agreed to by the
8 government.
9 It is also important to bear in mind, in
10 my view, that sentencing guidelines continue to
11 perform important norm-setting and anchoring
12 functions even when the guidelines are not strictly
13 followed. They continue to exert an influence on the
14 sentences that judges give, even when those sentences
15 are outside the guidelines.
16 Finally, I think, while we need to clearly
17 strive to reduce unwarranted sentencing disparity, it
18 is vitally important in my view that we not fall into
19 the trap of treating variance as a proxy for
20 unwarranted sentencing disparity.
21 Judges are required by law to consider the
22 nature and circumstances of the offense, and the

1 history and characteristics of the defendant when
2 they impose a sentence. No guideline system can
3 perfectly capture the effects of all relevant
4 sentencing factors. Departures and variances are
5 therefore both inevitable and necessary if we're to
6 have a sentencing system in which like cases are
7 truly treated alike.
8 The Committee has not yet taken a position
9 on the Commission's legislative proposals, so I am
10 not able to represent to you what the Committee's
11 position is on those proposals.
12 I do have some thoughts of my own about
13 those proposals. I also have some thoughts about the
14 Commission's I think important and interesting racial
15 disparity study. If those are things you'd like to
16 discuss during the question and answer period, I
17 would love to answer questions about it. But I won't
18 take up any more of your time and just say —
19 CHAIR SARIS: Oh, you have time.
20 JUDGE BARBADORO: — I'll wait and respond
21 to questions you may have on it. So just thank you
22 again for giving us the opportunity.

1 CHAIR SARIS: Thank you.
2 MR. AXELROD: Madam Chair and Members of
3 the Commission:
4 Thank you for giving me the opportunity to
5 appear before you today. As someone who until just a
6 few years ago was handling cases as an assistant
7 United States attorney in the Southern District of
8 Florida, sometimes with Michael Caruso, who is in the
9 audience here today on the other side, sentencing in
10 a post-*Booker* world is something I've both
11 experienced first-hand and care about deeply.
12 When I began my service as an AUSA, the
13 guidelines were mandatory and now they're advisory.
14 When I began my service as an AUSA, the Ashcroft Memo
15 required me and required my fellow line-prosecutors,
16 to recommend a guideline sentence in every case
17 unless a specific exception applied.
18 Now, under the new sentencing and charging
19 policy announced by Attorney General Holder, AUSA's
20 have more flexibility. This policy adjustment was
21 necessary in a post-*Booker* world. In a system where
22 judges are required to consider the 3553(a) factors,

1 and defense attorneys routinely make pitches under
2 those factors as to why their clients deserve less
3 time or no time at all in prison, line prosecutors
4 are now free to engage in the debate.
5 The Department of Justice has been clear
6 and consistent about its goals for federal sentencing
7 and corrections policy over the last three years. We
8 believe the system must protect the public first and
9 foremost.
10 At the same time, though, it must also be
11 fair to victims and defendants, minimize unwarranted
12 sentencing disparities, minimize the rate at which
13 those released from prison reoffend, and do it all
14 within the limits of available resources.
15 With these goals as our guide, we believe
16 federal sentencing and corrections policy today faces
17 serious challenges and has room for significant
18 improvement.
19 I want to highlight two specific issues in
20 my testimony.
21 First, the budget situation at the Bureau
22 of Prisons and its implications;

1 And second, the Department's concern about
2 unwarranted sentencing disparities.
3 Let me begin with an obvious but critical
4 truth: We are confronting unprecedented budget
5 challenges. Federal outlays directed towards law
6 enforcement and public safety are constrained, and
7 the federal prison system which is in size and scope
8 a product of federal sentencing makes up a
9 significant and increasing share of these outlays.
10 The Department of Justice's 2012 budget of
11 approximately $27 billion is virtually unchanged from
12 2011, despite increasing costs. This total budget
13 number masks important changes just below the
14 surface. In part because the federal prison
15 population grew by more than 7500 prisoners in
16 2011, the portion of the Department's 2012 budget
17 directed towards incarceration and detention grew by
18 several hundred million dollars.
19 Paying for this within the overall budget
20 limits meant that aid to state and local law
21 enforcement, grants for prevention and intervention
22 programs, and resources for prisoner reentry all had

1 to be cut by millions of dollars.

2 At the same time, funding has remained

3 relatively constant in most of the Department's

4 investigative and prosecutorial components. But

5 given the need to continue to pay certain

6 inflationary costs such as those associated with

7 employee benefits and office rent, the result of

8 level funding is fewer federal investigators and

9 prosecutors.

10 We are now in a funding trajectory that

11 over time will result in more federal money spent on

12 imprisonment and less spent on police, investigators,

13 prosecutors, and reentry and crime prevention. At

14 the same time, state and local enforcement and

15 corrections budgets are under severe strain. Taken

16 together, we do not think this trajectory is a good

17 one for continued improvements in public safety.

18 The Bureau of Prisons is currently

19 operating at 38 percent over rated capacity. This is

20 of special concern at the prisons housing the most

21 serious offenders, with 53 percent crowding at high-

22 security facilities, and 49 percent at medium-

1 security facilities.
2 This level of crowding puts correctional
3 officers and inmates alike at greater risk of harm
4 and makes far more difficult the delivery of
5 effective recidivism reducing programming, resulting
6 in a negative impact on public safety.
7 Even more troubling, as Director Samuels
8 can tell you, the Bureau of Prisons estimates that
9 its net inmate population will continue to grow by
10 more than 5,000 prisoners a year for the foreseeable
11 future.
12 To address these issues, the Department
13 has proposed limited new prison credits for those
14 offenders who behave well in prison and participate
15 in programs with proven records of reducing
16 recidivism.
17 We believe this is one example of a
18 responsible way to control prison spending while also
19 reducing the number of inmates who reoffend. Absent
20 changes such as these, we anticipate continued
21 increased cost to provide safe and secure
22 incarceration and to protect public safety.

1 At the same time, federal sentencing
2 practice has trended away from guideline sentencing
3 and towards more visible, widespread, and unwarranted
4 sentencing disparities. Let me be clear. Our
5 concern about these unwarranted disparities is not an
6 indictment of the Judiciary. Nor is it a denial of
7 the role that prosecutorial decisions play in
8 sentencing outcomes. It is simply a recognition of
9 the obvious: that *Booker* ushered in an era of
10 greater discretion in sentencing, and this era has
11 resulted in greater variation of sentencing outcomes
12 and an increase in unwarranted disparities.
13 The percentage of defendants sentenced
14 within the guidelines has decreased significantly
15 since the Supreme Court's decision in *Booker*. The
16 national rate of within-guidelines sentences has
17 fallen more than 16 percentage points from 71 percent
18 in 2004 to less than 55 percent in 2011.
19 Moreover, the data shows that federal
20 sentencing practice continues to fragment. The data
21 and the experience of practitioners like me shows
22 that some judges, some districts, and some circuits

1 are much more likely to hew closely to the sentencing
2 guidelines than others.
3 There are many districts that sentence
4 around three-quarters of the convicted offenders
5 within the guidelines, including the Middle District
6 of Georgia at 79.9 percent, the Eastern District of
7 Oklahoma at 76.7 percent, and the Southern District
8 of Mississippi at 80.1 percent.
9 At the same time, there are districts that
10 sentence fewer than one in three offenders within the
11 guidelines, including the District of Vermont at 31.4
12 percent, the District of Minnesota at 31 percent, and
13 the Eastern District of Wisconsin at 24.8 percent.
14 While differences in caseload and charging
15 practices explain some of the differences, the data
16 nonetheless reflects troubling disparities and
17 trends. We do not mean to suggest that pre-*Booker*
18 Sentencing Reform Act scheme was the perfect system,
19 or that the only performance measure of successful
20 sentencing policy is the within-guidelines sentencing
21 rate, or that we are advocating a return to the
22 pre-*Booker* regime. But the data and the Commission's

1 own research are concerning, for they suggest that
2 unwarranted sentencing disparities are in fact
3 increasing.
4 As you know, last year the Commission
5 published a report on demographic differences in
6 federal sentencing practice. In the report, the
7 Commission found that, after controlling for offense
8 type and other relevant legal factors, demographic
9 factors including race and ethnicity were associated
10 with sentence length to a statistically significant
11 extent in the post-*Booker* time period.
12 The Commission found that in the period
13 just prior to the *Booker* decision, controlling for
14 relevant factors, Black male offenders received
15 sentences that were 5.5 percent longer than those for
16 White males. But recently, following the Supreme
17 Court's decision in *Gall*, the Commission found that
18 Black male offenders received sentences that were
19 23.3 percent longer than those imposed on White
20 males. This is unacceptable.
21 There can be little doubt that the
22 sentencing reforms of the '70s and '80s, including

1 the Sentencing Reform Act, in combination with other
2 criminal justice reforms and investments, achieved
3 remarkable results over the last two decades.
4 Dramatically lower crime rates have led to
5 millions of fewer crime victims, a fact that is too
6 often overlooked in the discussion about sentencing
7 and corrections policy.
8 At the same time, though, this achievement
9 came at a high economic and human price, resulting,
10 and including the incarceration of over 2 million
11 Americans. Today we face real criminal justice
12 challenges, including constrained law enforcement
13 budgets.
14 We must work together to find systemic
15 solutions to these challenges, and forge policies
16 that will continue to increase public safety while
17 reducing the cost to our country and our citizens.
18 We are prepared to work with the
19 Commission and with Congress to address the questions
20 of how best to control prison spending, and how best
21 to reduce unwarranted sentencing disparities. We
22 have already put forward specific proposals to

1 provide a limited expansion of prison credits to
2 encourage both good behavior in prison and
3 participation in prison programs with a proven record
4 of reducing recidivism, which enhances public safety
5 and saves money.
6 I know that some of you may be
7 disappointed that the Department is not at present in
8 a position to say more, or to react to the specific
9 proposals put forth by the Commission or those put
10 forth by Judge Sessions or by certain witnesses who
11 will be testifying on panels later today. Please
12 know that our lack of a clear Department position on
13 the best way forward does not reflect a lack of
14 commitment to these issues, or a lack of interest in
15 the discussion.
16 If Congress considers potential
17 legislation, we will endeavor to develop a clear
18 Department position on it. We cannot, however,
19 attempt to clear a reaction by the Department to each
20 proposal that reformers put forth.
21 And unlike His Honor, I don't have life
22 tenure, so I'm not going to opine on my personal

1 beliefs.
2 (Laughter.)
3 MR. AXELROD: But please know this: We
4 share the view of those who believe that the current
5 system is flawed and trending in the wrong direction.
6 Where we haven't yet spoken is on the question of
7 whether there's something better out there to replace
8 it with.
9 Our view on that question will necessarily
10 depend on the specifics of a legislative proposal
11 developed by Congress. The devil, as they say, is in
12 the details.
13 In closing, I would like to thank the
14 Commission again for this opportunity to share the
15 views of the Department of Justice and for your
16 continued commitment to the development of fair
17 sentencing policy.
18 CHAIR SARIS: Thank you. Mr. Samuels.
19 MR. SAMUELS: Madam Chair and members of
20 the Sentencing Commission:
21 I appreciate the opportunity to appear
22 before you today to discuss the Bureau of Prisons. I

1 want to start by thanking the Commission for working
2 with us over the years on a variety of issues — most
3 recently on the retroactive application of the new
4 sentencing guidelines for crack cocaine offenses.
5 As a result of these guidelines, the
6 Bureau has processed more than 4,800 court orders for
7 sentencing reductions, including 1,660 orders to
8 immediately release the inmates based on the time
9 already served.
10 I also want to thank you for collaborating
11 with us on data sharing. These efforts have
12 benefitted both agencies, allowing for detailed and
13 careful analysis of the potential impact that
14 statutory and guideline changes would have on
15 sentencing in the Bureau's population. I look
16 forward to our continued strong working
17 relationship.
18 Today I would like to discuss the Bureau's
19 mission and operations. Specifically, I will address
20 the challenges we face and what we can do to address
21 these challenges to meet our goals of ensuring public
22 safety.

1 The mission of the Bureau is to protect
2 society by confining offenders in a controlled
3 environment of prisons and community-based facilities
4 that are safe, humane, cost-efficient, and
5 appropriately secure; and, to provide inmates with a
6 range of work and other self-improvement programs
7 that will help them adopt a crime-free lifestyle upon
8 their return to the community.
9 As our mission indicates, the successful
10 re-entry of offenders is as important to public
11 safety as their secure incarceration. As the
12 nation's largest corrections system, the Bureau is
13 responsible for an incarceration of almost 217,000
14 inmates.
15 Currently the Bureau confines more than
16 176,000 inmates in 117 facilities that collectively
17 were designed to house only 128,433 individuals.
18 More than 18 percent of federal inmates are housed in
19 privately operated prisons, residential reentry
20 centers, and local jails.
21 Continuing increases in the inmate
22 population pose ongoing challenges for our agency.

1 In fiscal year 2011, the inmate population increased
2 by 7,541 inmates, and by the end of fiscal year 2013
3 the Bureau expects a net increase of 11,500 inmates.
4 As Mr. Axelrod noted, systemwide the
5 Bureau is operating at 38 percent over rated
6 capacity, and crowding is of special concern at
7 higher security facilities, with 53 percent crowding
8 at high-security facilities, and 49 percent at
9 medium-security facilities.
10 We believe the inmate population will
11 continue to increase for the foreseeable future, but
12 we continue to take a variety of steps to mitigate
13 the effects of crowding in our facilities. The
14 safety of our staff is always a top priority, and we
15 use all available resources to ensure our
16 institutions are secure.
17 We are grateful for congressional funding
18 to activate three prisons that are already complete.
19 When fully activated, FCI Mendota, California, FCI
20 Berlin, New Hampshire, and FCI Aliceville, Alabama,
21 will provide us with an additional 2,304 male medium
22 security beds and 1,500 female secure beds. But with

1 the increase in the inmate population expected over
2 the next couple of years, we do not anticipate a
3 decrease in crowding. As noted by Mr. Axelrod, the
4 current trajectory is not a good one.
5 The Bureau does not control the number of
6 inmates who come into our custody, the length of
7 their sentences, or the skill deficits they bring
8 with them. We do control, however, the programs in
9 which inmates can participate while they are
10 incarcerated, and therefore the skills they acquire
11 before they leave our custody and return to the
12 community.
13 Each year, more than 45,000 federal
14 inmates return to our communities, and eventually
15 almost all federal inmates will return home. Most
16 need to acquire job skills, vocational training,
17 education, counseling, and other assistance in order
18 to become productive members of the community when
19 they return.
20 The acquisition of these skills is
21 critical to successful reentry, which we know is
22 linked to decreased recidivism and increased public

1 safety. And decreases in recidivism, in the long
2 term, will result in decreases in the Bureau's
3 population.
4 As such, investments in robust reentry
5 programs today will in later years directly result in
6 prison cost savings and yield safer communities.
7 Unfortunately, the levels of crowding and an
8 increasing number of inmates will limit resources far
9 more and make it difficult for the delivery of
10 effective recidivism-reducing programming.
11 We are working to maximize our investment
12 in these programs and the tools that we have to try
13 to increase opportunities and encourage inmates to
14 take full advantage of them.
15 To achieve this goal, the Bureau has a
16 comprehensive reentry strategy that unifies our many
17 inmate programs and services.
18 The three principles of the strategy are:
19 One, inmate participation in programs must
20 be linked to the development of relevant inmate
21 reentry skills;
22 Two, inmates must acquire or improve a

1 particular skill rather than simply completing a
2 program; and
3 Lastly, resources must be allocated to
4 target inmates with a high risk for reentry failure.
5 The Bureau's reentry strategy includes a
6 comprehensive assessment of inmates' strengths and
7 deficiencies in nine core areas, and allows us to
8 meet the important reentry goals required by the
9 Second Chance Act, known as the Inmate Skills
10 Development System.
11 This critical information is updated
12 throughout an inmate's incarceration and is provided
13 to Residential Reentry Centers and supervision
14 agencies as inmates approach their release from
15 prison.
16 The communication of this important
17 information to post-release supervision authorities
18 prior to an inmate's release assists with community
19 reentry planning and ensures the continuation of
20 skill enhancement for successful reentry.
21 Bureau staff use the information stored in
22 the Inmate Skills Development tool to track

1 individual inmate needs and their progress toward
2 remedying deficiencies, gaining skills, and preparing
3 for release.
4 The automation of the data also allows
5 institutions to determine optimal resource
6 utilization for specific, targeted programming. At
7 the national level, the system will assist the Bureau
8 in tracking the needs of the entire inmate population
9 to determine resource requirements, prioritize
10 requests for program funds, and provide assessments
11 of progress toward meeting inmate reentry needs.
12 We have a number of important reentry
13 programs that are evidence-based and proven to reduce
14 recidivism, such as the Residential Drug Abuse
15 Program known as RDAP, Education, Occupational and
16 Vocational Training, and Federal Prison Industries.
17 RDAP is an intensive 500-hour treatment
18 program for inmates who have a moderate to serious
19 substance abuse problem and who volunteer for
20 treatment. It also has a community treatment
21 component. RDAP has been proven effective in
22 reducing recidivism and relapse by 16 percent and 15

1 percent respectively.

2 Funded by revenue generated by the wholly

3 owned government corporation, Federal Prison

4 Industries is a program that provides inmates the

5 opportunity to gain marketable skills and a general

6 work ethic — both of which can lead to viable

7 sustained employment upon release.

8 Rigorous research has demonstrated that

9 inmates who participate in Federal Prison Industries

10 or vocational training are 24 percent less likely to

11 recidivate than similar non-participating inmates.

12 Also, inmates who participate in work programs and

13 vocational training are less likely to engage in

14 institutional misconduct, thereby enhancing the

15 safety of staff and other inmates.

16 While Federal Prison Industries has

17 experienced a significant increase[sic] in inmates

18 employed over the last five years, due in part to

19 legislative changes, we believe there is an

20 opportunity for growth due to two new statutory

21 authorities in the Bureau's Fiscal Year for 2012.

22 The first grants Federal Prison

1 Industries — provides the authority that states have
2 long had to engage in interstate commerce of prison-
3 produced goods provided that inmates participate
4 voluntarily, are paid prevailing wages, and are not
5 deprived of the right to state and federal benefits
6 solely due to their status as inmates.
7 The second allows Federal Prison
8 Industries to engage in interstate commerce if the
9 merchandise produced or manufactured is currently or
10 would otherwise be manufactured, produced, mined, or
11 assembled outside the United States.
12 We are optimistic that these two
13 authorities will allow us to expand this important
14 reentry program to benefit more inmates, making
15 institutions safer and better preparing inmates for
16 reentry into their communities — which makes
17 communities safer.
18 As inmates complete their sentence of
19 imprisonment, many transfer to residential reentry
20 centers — also known as halfway houses — to help them
21 adjust to life in the community and find suitable
22 post-release employment.

1 These centers provide a structured,
2 supervised environment and support in job placement,
3 counseling, and other services important to
4 successful reentry.
5 For inmates at minimal risk and with few
6 reentry needs, we are emphasizing transfer to home
7 detention directly from prison. Other inmates
8 transfer to home detention after a stay in the RRC.
9 While on home detention, the offenders are under
10 strict schedules with telephonic and/or electronic
11 monitoring.
12 The mission of the Bureau of Prisons is
13 challenging. While there are many facets to our
14 operations, the foundation for it all is safe,
15 secure, orderly institutions, and each and every
16 staff member in the Bureau is critical to its
17 mission. Through the continuous diligent efforts of
18 our staff who collectively work 24 hours each day,
19 365 days per year, weekends and holidays, we protect
20 the public. By maintaining high levels of security
21 and ensuring inmates are actively participating in
22 evidence-based reentry programs, we serve and protect

1 society.

2 The Bureau's core values — respect,

3 integrity, and correctional excellence — are critical

4 to our agency's continued effectiveness. Inmates and

5 staff are expected to treat everyone — other inmates

6 and staff, visits, and the public — with dignity and

7 respect.

8 As such, behavior that disrespects rules

9 and undermines the safety and security of our prisons

10 will not be tolerated. I have communicated these

11 expectations to the inmate population, and have

12 emphasized with them the critical importance of

13 preparing for reentry.

14 It is my hope that each and every inmate

15 uses his or her term of incarceration to acquire the

16 skills needed to live successfully in the community.

17 To that end, I have encouraged the inmate population

18 to take advantage of the many programs that are

19 available, get help in overcoming problems they have

20 faced, improve skills they need to succeed in the

21 community, and strengthen their spiritual or

22 religious connections.

1 We are prepared to work with the
2 Commission and Congress to address the challenge of
3 decreasing prison crowding. We are similarly
4 prepared to address initiatives that might provide
5 additional reentry programming opportunities to
6 inmates to reduce recidivism and the number of
7 inmates returning to our population.
8 I would welcome the opportunity for
9 further discussion with you on these important
10 matters in the coming months.
11 Judge Saris, Vice Chairs Carr and Jackson,
12 and Commissioners, I want to thank you for your
13 continued strong collaboration with our agency, as
14 well as this opportunity to discuss the Bureau's
15 priorities and challenges. I am pleased to answer
16 any questions you may have.
17 CHAIR SARIS: Thank you. Mr. Moore.
18 MR. MOORE: Thank you for this opportunity
19 to speak and address the Commission on these
20 important matters.
21 I also have no life tenure, but I also
22 have no difficulty with expressing my personal

1 opinions to the Commission with regard to the matters
2 that are being discussed today.
3 I suppose I'll start by saying that I am
4 appreciative of the fact, and want to highlight the
5 fact, that at least as I have heard the statements of
6 the panel, no one here advocates the return to the
7 mandatory guidelines system.
8 Now to say that we're all in agreement may
9 be saying too much, but at least it should be noted
10 that there is not, from any of these divergent groups
11 of interest here, some pressure or belief that we
12 were better off before than we are now.
13 Obviously the system has changed. It's
14 gone from mandatory to advisory. The position of the
15 defendant community is that we are pleased with the
16 changes in the framework of the new system, not
17 necessarily suggesting that that change alone
18 constitutes an adequate change in the guidelines.
19 There still remain guidelines that are
20 problematic, in our opinion; that are overly severe;
21 that need to be addressed. And this is where we
22 think the emphasis should be.

1 Under the current system, or the current
2 framework of the advisory guidelines system, we are
3 in a better place than we were. District judges have
4 flexibility. They can impose sentences that comport
5 with the purposes of sentencing. Sentences are
6 individualized. And while I appreciate the
7 difficulty of the work that the Commission does in
8 trying to come up with guidelines that cover all of
9 the human variation, it simply is not possible.
10 Each of us is different. Each of you is
11 different. Our families, our communities. And to be
12 able to have those differences considered by
13 sentencing judges is something that is valuable and
14 is something that is increased under the new system.
15 The new system is transparent in that
16 judges have to communicate the basis for their
17 decision. They have to discuss the purposes of
18 sentencing and how the sentence conforms to that.
19 It is a different conversation when you're
20 standing at the podium than the old days in which the
21 conversation often was: Well, sir, I may not agree
22 with this sentence but my hands are tied; I have no

1 choice. And an individual goes away for decades with
2 that degree of individualization, or individualized
3 attention to him or her as a person.
4 I believe it is better communication. I
5 believe that it is a better system in that it allows
6 for correction of severe guidelines. Obviously the
7 prime example of that in recent times is the crack
8 cocaine. And the hue and cry, the drumbeat, if you
9 would, of the need for change in my opinion
10 undeniably contributed to the outcome that we have
11 today.
12 We do not feel that the Commission does
13 not have a place. In fact, we think it is and should
14 exercise its role as an expert body. We don't think
15 that the Commission should feel marginalized or
16 threatened by an advisory system. We think that it
17 ought to embrace that system and revisit its
18 guidelines, explain them with more detail, build
19 better guidelines. And, that the better the
20 guidelines the better the compliance will be.
21 I have spoken up to now about the role of
22 the advisory system in individual cases, but I think

1 it has had broader policy implications as well.
2 As I hinted, some may disagree, but I
3 believe that it is the advisory guideline system and
4 the ability of judges to criticize and critique the
5 crack cocaine guideline that gave it some momentum to
6 result in where we are today with more reduced
7 guidelines, the Fair Sentencing Act. I don't mean to
8 minimize the contribution of the Commission, the
9 Congress, the Department of Justice, or anyone else,
10 but I do think that when the environment is different
11 the outcome is different.
12 I note as well that now, after the
13 environment changed and there has been discussion
14 about the fairness of having Fast Track in some
15 districts, and other districts not; the fairness of
16 having for example in my district, Colorado,
17 essentially being a donut hole where the surrounding
18 states seem to have Fast Track but we did not, that
19 the Department of Justice has responded to that, and
20 responded to that by a memorandum that would
21 institute effective March 1, I believe, a nationwide
22 system of Fast Track to eliminate these difficulties.

1 All of these are positive developments.
2 Despite all of this, and despite the fact that judges
3 now have discretion, the notion that the matter is
4 out of hand is I think deeply exaggerated.
5 There has been no major displacement of
6 the guidelines. Eighty percent of sentences still
7 remain within the guidelines, or are government
8 sponsored. The rate of below-guideline sentences
9 that are not government sponsored is 17.8 percent.
10 It was, one year after *Booker*, 12.5 percent, a modest
11 increase post-*Gall* of slightly under 5 percent.
12 And my understanding, based on the
13 Commission data, is that it has leveled off, or is
14 beginning to level off. So the notion that things
15 are spiraling out of control is I think more fear
16 than reality, and not supported by the numbers.
17 There is no wholesale disregard of the
18 guidelines. To be clear, we wish that there were
19 more expression or exercise of the discretion that
20 the district court has because there are a number of
21 guidelines that need to be responded to in this way.
22 Clearly, our position is that the child pornography

1 guideline is excessive. It is overly severe.

2 We appreciate the fact that the Commission

3 is looking at that guideline. But there are others.

4 There are the career offender guideline which

5 adversely impacts African Americans. The fraud

6 guideline seems out of control. The drug guideline

7 is tethered to mandatory minimums when it need not

8 be, and moreover is two levels higher than is

9 required even if you accept the fact that some degree

10 of tethering is suggested or required by what

11 Congress has imposed.

12 There are two things that are hot topics

13 of conversation that I want to comment on briefly.

14 Whether they are cast as justifications for change or

15 consequences of the current system is really of

16 little import. They seem to be matters that have

17 drawn attention, and so I wish to address them.

18 The first is race, and the second is

19 geographic disparity.

20 In terms of race, clearly the Commission

21 has produced a study, a multivariant study, that

22 shows some increase in the gap between Blacks and

1 Whites in terms of sentencing. What must be
2 recognized is that, like all studies, choices were
3 made in the methodology; and that, like most things
4 those choices affect the outcome.
5 For example, the Commission chose to group
6 the in-and-out choice as a sentencing decision, or
7 sentencing length, by calling it a zero month
8 sentence. The Commission chose not to have a
9 separate control for criminal history on the basis
10 that the presumptive sentence to some degree captured
11 that aspect.
12 Well there are other studies of the same
13 data that produces contrary results, opposite
14 results. I am referring to the Penn State study
15 which took the Commission's data and in fact made
16 different methodological choices, separating the
17 decision to imprison from the length of imprisonment,
18 deciding that criminal history deserved a separate
19 control factor in addition to or apart from what had
20 been built into the presumptive sentence.
21 To look at the immigration as affecting
22 things in a slightly different way — and I'm not going

1 to sit here and try and spout the numbers and the
2 equations; I simply can't do that. My head hurts
3 when I read these studies, as I'm sure everyone's
4 does. But the point is, you make slightly different
5 methodological choices and the gap disappears.
6 The Black/White gap is less now, according
7 to Penn State, than it was before the *Koon* decision.
8 It is identical to the pre-PROTECT Act period.
9 What conclusions do we draw from this?
10 That any discussion with Congress or anyone else
11 about racial impact ought to, at a bare minimum,
12 identify the fact that there are alternative and
13 differing studies, outcomes, results — at a bare
14 minimum, ought to highlight that slight changes in
15 methodology produces big changes in outcome.
16 And I think ultimately at some point
17 someone needs to say what the Commission says this
18 means. As I hear things, no one is suggesting that
19 it is a function of race, racial animus on the part
20 of the judges, and obviously it's not, but what does
21 it mean? Is it simply a product of numbers that has
22 no explanation?

1 If there is no explanation, then how do we
2 go and decide what the right cure is?
3 I will step across — this is all covered in
4 more detail in my message, and I notice that my light
5 is telling me to be quiet — so I will step across and
6 be a little quick here, but in essence I believe that
7 if this is something that was in the real world it
8 should be evident to the real world.
9 I think the defenders who stand next to
10 these individuals on a daily basis should be able to
11 tell whether they are being sentenced in ways that is
12 racially disparate. I believe that those affected,
13 whether it be the NAACP or some other group, should
14 know, or at least be spoken with about whether or not
15 they feel that advisory systems hurt them. And I
16 don't think they do.
17 I think there are other things at issue:
18 The University of Michigan study which shows that
19 racial impact of prosecutorial choices is something
20 that needs to be looked at, because it is real. To
21 be fair, life is complicated. We're not suggesting
22 that anyone here has evil motives, but we do believe

1 that judges should maintain their flexibility because
2 they are the ones who have the best chance of
3 staying — of responding in a fair way. They are
4 pressured by us, at least we sometimes believe. They
5 are dealing with a situation where their explanations
6 have to occur in open court. They are dealing with
7 prosecutors, probation officers, attorneys, appellate
8 level judges. The ability that they have to do
9 things, to make sure that the system is fair for all
10 races, is the best of all the players in the criminal
11 justice system.
12 With regard to geographic disparity, I
13 will be quick. There needs to an explanation. Fun
14 with numbers if not enough. It is simply not enough
15 of a basis to say, well, there are different numbers
16 and therefore there's something significant going
17 on.
18 With regard — I agree that the numbers are
19 as have been reported. There is a spread. That
20 spread runs from 49 percent of the nongovernment
21 sponsored in New York to 4 percent in Georgia for
22 nongovernment sponsored. But with respect to

1 government sponsored, there's an even greater spread.
2 It goes from 60.4 percent in the Southern District of
3 California to 3.7 percent in South Dakota.
4 The mere fun with numbers does not
5 suggest, certainly no one here suggests, that the
6 Department of Justice's number is caused by some
7 leniency, or caused by some discretion, or caused by
8 some impact of the advisory guideline system, but
9 those numbers are as real as the other numbers. It
10 is not simply sufficient to quote numbers and suggest
11 that things, on the basis of numbers, are heading for
12 a disaster.
13 The sky simply is not falling. I will
14 leave the appellate issues to my written submission,
15 noting only that appellate review is robust. We
16 think that substantive review is half of the
17 equation; that procedural review is meaningful, that
18 it is real; that it results in sentences that are
19 different on remand; and, bottom line, we think that
20 the current system is one that should be embraced and
21 advanced and improved upon and that we should not go
22 back to a mandatory system, nor should we go in that

1 direction to some kind of a hybrid man-visory system.

2 Thank you.

3 CHAIR SARIS: Thank you. All right, Judge

4 Howell?

5 COMMISSIONER HOWELL: I'll just start with

6 Judge Barbadoro. Why don't you share with us your

7 thoughts on the proposal?

8 JUDGE BARBADORO: Well, yes, if I could

9 first start on the racial disparity study, because

10 when I read your testimony that was the thing that

11 leaped out at me as something — your congressional

12 testimony — as something that really concerned me.

13 And so I went and read the study. And

14 although I certainly don't claim any expertise in

15 this area, my sense about that study is that it's an

16 important study. It's well done. But it is a real

17 mistake to cite that study as evidence of an

18 unexplained racial disparity because more work needs

19 to be done on it.

20 I read the Penn State study, which I think

21 is another very well done response, and I echo some

22 of the things that were said earlier. To make it a

1 little more specific, in my mind there are two things
2 that leaped out at me. And one is the possibility of
3 selection bias, which — multiple regression analysis
4 is a very powerful and useful statistical tool, but
5 it is one that is prone to the potential for
6 selection bias.
7 And the Penn State study did demonstrate
8 that when you explored criminal history and
9 controlled for that, much of the across-the-board
10 disparity was substantially reduced. There may be
11 other unexplained variables in there that need to be
12 further teased out of the data.
13 The other thing that was really important
14 to me is the dependent variable characterization.
15 And the Penn State study did split out, as had been
16 mentioned, the in/out decision from the sentence-
17 length decision. And when you do that, you see that
18 the alleged increasing racial disparity largely
19 disappears from the sentence length calculation, and
20 is small with respect to the in/out decision.
21 I don't know if the other judges on the
22 panel agree with me on this or not, but I think the

1 in/out decision is a qualitatively complex and
2 different kind of calculation than a sentence-length
3 determination, and there may be many things about it
4 that if you study you could explain any apparent
5 disparity.
6 I don't know about you, but an in/out
7 decision that I'm making is usually when you have
8 someone who doesn't have violence, haven't done
9 prison time before, has other things going on that
10 may make you think that an alternative of home
11 detention will be more productive to that person's
12 ultimate success in the community, and it may well be
13 that those factors, if controlled for in a proper
14 regression analysis, would largely explain any
15 disparity on the in/out decision.
16 So I think you've got a lot more to do
17 before people can whip that study out and start
18 citing it as evidence that racial disparity increases
19 when you do to an advisory guideline system. I
20 really think we need to be very careful about that.
21 I think it is an important and useful
22 study, and we need as judges to always be reminding

1 ourselves about that.

2 COMMISSIONER HOWELL: Can I just say that

3 one of the interesting things about both these

4 studies, and when you do multivariant regression

5 analysis particularly dealing with sort of the racial

6 or demographic effect that it might have in

7 sentencing, everybody's ears prick up and they may

8 put more emphasis on it than not, and gloss over a

9 lot of the caveats that are in both the Commission's

10 study as well as the Penn State study because neither

11 study has some very significant information in it

12 that affects sentencing judges' decisions with

13 respect to a particular defendant who is standing in

14 front of them.

15 The one thing that, you know, I am struck

16 by, despite the missing — you know, some of the

17 missing factors in both studies, the differences in

18 methodology in both, and I think that, you know,

19 there have been some assertions made about the

20 Commission's study that, for example, that it's not

21 peer-reviewed which are just flatly wrong, and so on.

22 But without going into those details, the one thing

1 that strikes me is that in the end both studies — I
2 have to disagree with you, Mr. Moore — don't come out
3 with opposite or contrary results.
4 They both, frankly, come out with the
5 result that pre-*Booker* versus post-*Gall*, there are
6 statistically differences in the sentence lengths for
7 Black male offenders than for White male offenders
8 when what we can control for is controlled for.
9 To me, putting aside some of the
10 differences in the methodology, that is something
11 that we can't explain and we don't ever assert that
12 it's because of racial animus on the part of judges,
13 but it is — it's a statistically significant result,
14 whichever study you're looking at, and that is of
15 concern.
16 JUDGE BARBADORO: I agree with you in most
17 respects. The one point where I would part company
18 is that my reading of the Penn State study suggests
19 that the sentence length determination does not show
20 increased racial disparity in the post-*Gall* period.
21 That, to the extent there is anything left, it is in
22 the in/out decision not in the sentence length

1 decision, to any substantial degree. That's what the
2 Penn State authors suggest, and I think —
3 COMMISSIONER HOWELL: I think they found
4 them 7.7 percent higher in the post-*Gall* period
5 versus —
6 JUDGE BARBADORO: Compared to the pre-*Koon*
7 period —
8 COMMISSIONER HOWELL: pre-*Booker* 4.5
9 percent.
10 JUDGE BARBADORO: Compared to the pre-*Koon*
11 period, I agree with you on that, the pre-*Koon* period
12 it shows there isn't a increased disparity post-*Gall*.
13 For the PROTECT period, there's a modest one, but
14 most of it is explained by the in/out decision.
15 COMMISSIONER FRIEDRICH: But, Judge, with
16 respect to the in/out decision, I think the Ulmer
17 study found that Black males were 20 percent more
18 likely —
19 JUDGE BARBADORO: I agree with you on
20 that.
21 COMMISSIONER FRIEDRICH: — on the in/out
22 decision.

1 JUDGE BARBADORO: I agree with you on
2 that, and what I'm trying to suggest to you is that,
3 as someone who has sentenced for 20 years, the in/out
4 decision has a lot of other considerations, like have
5 you served time in prison before? Generally
6 speaking, judges want to use incremental punishments.
7 And so if somebody hasn't been incarcerated before,
8 they are more likely, all other things being equal,
9 among many judges, I can't speak for all, to end up
10 with a nonincarcerative sentence.
11 So if there is a correlation between race
12 and having served prison time before, that could
13 affect very greatly the in/out decision in a way that
14 would explain the racial disparity. We simply don't
15 control for it.
16 But I agree with you, absolutely. It does
17 show increased racial disparity with the in/out
18 decision, but not substantially increased racial
19 disparity with the sentence length decision. I'm not
20 an expert. I may well have misinterpreted the study,
21 but that's sort of my take on it.
22 It's important — I think it's important. I

1 just don't think people ought to wield these studies
2 as tools to try to support a position that they
3 really aren't yet able to support. That's my only
4 position on that.
5 On their proposals, if people want me to
6 go further — but I've monopolized your time, so I'll
7 wait to see if there's a question.
8 CHAIR SARIS: If you want to, go ahead,
9 but there are —
10 JUDGE BARBADORO: I'll be quick about it.
11 I am speaking only for myself. The last time the
12 Committee took this up with respect to the three-part
13 sentencing proposal and the enhanced appellate review
14 standard, the Committee decided not to take a
15 position. We're going to look at that in light of
16 your testimony and probably will be formulating some
17 views on that in June.
18 But my only — my strongest view is with
19 respect to the reasonableness, enhanced
20 reasonableness standard. And again, I'm speaking
21 personally. Other judges would disagree. My own
22 view is I think the Commission is on the right track

1 in trying to focus on policy-based variances, and
2 suggesting as I believe Justice Breyer did in his
3 *Pepper* concurring opinion, that it is a reasonable
4 thing to do to look more carefully when a judge
5 disagrees based on policy. Because I think the
6 Commission — it's my own view — has greater
7 institutional competence and a greater responsibility
8 for setting policy than individual judges do.
9 My business is primarily about trying to
10 get into the facts of my case. And as long as you
11 don't interfere with my ability to do that, I am
12 comfortable. So I think the Commission is largely on
13 the right track about that.
14 The other area that I think the Commission
15 is on the right track on is the outlier variances are
16 what are problems. In my view, most variances are
17 modest in scope, are based on the specific facts of
18 the case, and are for a legitimate reason.
19 Outlier sentences are more troubling to
20 me. And it may well be that an enhanced
21 reasonableness standard, as suggested in the Supreme
22 Court precedents, would help rein in some of those

1 outlier sentences.

2 The fear I have is that we unnecessarily

3 reinject the court of appeals into essentially

4 resentencing. To the extent we get closer to a *de*

5 *novo* standard of review on appeal, it becomes

6 unconstitutional, but it also I think — again as a

7 matter of institutional competence — raises

8 substantial questions.

9 You've probably sat as an appellate judge

10 reviewing district judge sentences, I have. I can

11 tell you, I don't have nearly as good a handle on

12 what's really going on when I sit as an appellate

13 judge reviewing another judge. And I'm very

14 concerned that we not take that reasonableness review

15 in the majority of variances, which are modest in

16 scope, tied to the facts of the case, and for a

17 legitimate reason, and we not expand that review

18 unnecessarily.

19 How you get it right, I haven't figured

20 that answer out, but I wanted to register that

21 concern. I'm sorry to monopolize so much of the

22 time.

1 CHAIR SARIS: No, thank you. Thank you.
2 COMMISSIONER HOWELL: May I ask Mr.
3 Axelrod a question?
4 CHAIR SARIS: Yes, go ahead, and then I
5 think Commissioner Carr has some.
6 COMMISSIONER HOWELL: Mr. Axelrod, I
7 appreciate your testimony and that of the Bureau of
8 Prisons. I think it is one of the very important
9 considerations that this Commission has to give.
10 It's one of our missions, to help regulate
11 overcapacity in prison capacity, in terms of the
12 numbers of incarcerated individuals.
13 And so, Mr. Axelrod, I was very pleased to
14 hear that the Department of Justice wants to work
15 with us on systematic solutions, and is very
16 cognizant clearly of the 38 percent overcapacity and
17 what that means for the rest of the mission of the
18 Department of Justice, which is so important.
19 So in that regard, I have to say I have
20 been waiting for the Department of Justice to come
21 forward on the different occasions that the
22 Commission has offered, on fraud guidelines, on child

1 pornography guidelines, to come forward and to not
2 just leave it to the very capable hands of the
3 federal public defenders to come up with mitigating
4 circumstances for us to deal with to address some of
5 the overseverity or piling on of guidelines, in those
6 two particular guidelines, and others as well, but to
7 come forward with things other than aggravating
8 enhancers, sentence enhancers.
9 And I have been waiting without any
10 positive response from the Department of Justice.
11 When we had our fraud guidelines' hearing, the
12 Department of Justice representative came forward not
13 with any way to mitigate some of the severity of the
14 fraud loss table, but just more aggravators to add.
15 On child pornography, so far we've just heard about
16 perhaps more aggravators.
17 Is there going to be a time when the
18 Department of Justice will come forward with 38
19 percent overcapacity, with constructive proposals
20 when we're revisiting guidelines, to address the
21 severity of them with some responsible constructive
22 ideas for reducing the severity of some of the

1 guidelines?

2 MR. AXELROD: It's a fair question. I

3 think that, first of all, the Department I think has

4 taken steps, and as Mr. Moore mentioned, recently in

5 the Fast Track Program, for example, to make sure that

6 we have policies in place that make sense across the

7 Department of Justice. And those will have impacts

8 on the overall prison population.

9 We also have the credits proposals that we

10 are supporting and in favor of. I think it is

11 tricky — the Bureau of Prisons funding issue is real.

12 It is why Director Samuels talked about it today. It

13 is why I talked about it today.

14 But it is also — it can't — there's a

15 tension in allowing it to drive our substantive

16 recommendations on what are, as the Department of

17 Justice we think are the appropriate penalties for

18 particular crimes.

19 And that is even at the macro level.

20 Certainly at the micro level, I never want us to be

21 in a position where our line prosecutors are in court

22 saying to you, or thinking to themselves, you know, I

1 think what the appropriate sentence in this case is
2 is, you know, 36 months, but I know the Bureau of
3 Prisons has a funding crisis so I'm going to
4 recommend 12. That's not what we should have our
5 people be doing.
6 The funding constraints are real, and
7 that's why we have to engage them at the systemic
8 level. And that's why we've put forward certain
9 proposals that we think will help address that issue,
10 like the good time proposal and expanding the
11 reductions for people who participate in the
12 recidivism reducing programs.
13 But I am hesitant to link them to the
14 fraud guidelines, or the child pornography guidelines
15 in that way. I think, I would hope that the
16 Department is engaging with the Commission, and if
17 there's disappointment in that I will try harder to
18 engage with the Commission on for what we believe the
19 substance of those guidelines should be. But we have
20 to make our call on what we think the substance of
21 those guidelines should be on the merits and not tie
22 them to the funding, because I think that leads us to

1 a dangerous place.

2 CHAIR SARIS: Thank you. Commissioner

3 Carr.

4 VICE CHAIRMAN CARR: Mr. Axelrod,

5 representatives of both the defense and the Judiciary

6 have suggested that in terms of increasing disparity

7 one of the things we should look at is departmental

8 charging and plea bargaining decisions. And to your

9 credit, I think you did recognize that some

10 departmental decisions can be leading to disparity.

11 And, anecdotally, we sometimes hear that

12 there are districts in which the U.S. Attorneys'

13 offices will agree to below-guideline sentences

14 because they know their bench, and perhaps they're

15 protecting against how far down it will go.

16 Is the Department doing — and of course the

17 Holder Memo has given more latitude to individual

18 U.S. Attorneys' offices to look at individual cases.

19 Is the Department doing anything

20 internally to study the extent to which office-to-

21 office disparities could be leading to sentencing

22 disparity?

1 And as you know, the plea bargaining
2 decisions sometimes result in things that are
3 invisible to those of us who are trying to figure out
4 what's going on.
5 MR. AXELROD: So the Department, as I said
6 before, is concerned about the unwarranted
7 disparities. And that is a joint enterprise, as I
8 recognized and as you just recognized in your
9 question. I think we would all agree — well maybe not
10 all, but we in the Department agree that justice
11 shouldn't depend on whether you're charged in New
12 York or New Mexico, and it should also not depend on
13 when you're in a district you draw judge A or judge
14 B. And as I think you also acknowledged, we've
15 recently taken some steps internally to reduce
16 disparity that was prosecutor-related in the
17 Fast Track program.
18 And so we are expanding, as Mr. Moore
19 acknowledged, we're expanding the Fast Track Program.
20 That should all happen in March. So that it's
21 nationwide and it's not just certain districts that
22 have it, and that it's consistent across the country,

1 which should help reduce disparity in that regard.
2 And the Holder — Attorney General Holder's
3 memo I think was designed to give — to meet the
4 reality of the current system. In other words, to
5 meet the reality that guidelines are currently
6 advisory. Our prosecutors were being put in a
7 position of where they were showing up in court
8 before the Holder Memo, for sentencing saying we
9 recommend a guideline sentence. We recommend a
10 guideline sentence. In virtually every case, then,
11 the judges were looking at them like the potted plant
12 that they were.
13 And so we needed to catch up. You know,
14 the Ashcroft Memo made sense in the world when it was
15 formed, and now the Holder Memo makes sense in the
16 world we're currently living in.
17 But I would point out that the Holder Memo
18 has some things in there to help make sure that there
19 is at least consistency within an office. The
20 differences between offices is harder to get a handle
21 on, and something that we should think about and look
22 at.

1 But at least within an office, at
2 sentencing when prosecutors want to seek a variance,
3 they need to get supervisory approval. Now critics
4 may say that's to reduce the number of variances that
5 prosecutors — but that's not the reason for it. The
6 reason for it is we want to have some centralized
7 point within an office so that if all requests sort
8 of are looked at by supervisors, that there should be
9 some consistency within the district.
10 It's harder to get a handle on differences
11 in plea bargaining practices from district to
12 district. And it is a tension. And I think it is
13 the same tension that the Commission is grappling
14 with, and that we are all grappling with on the
15 sentencing side as to how do you balance the need for
16 flexibility to meet individualized circumstances with
17 the need for justice not depending on which judge you
18 draw, or which prosecutor you draw.
19 VICE CHAIRMAN CARR: And, Mr. Moore,
20 correct me if I'm quoting you incorrectly. I believe
21 you said the racial impact of prosecutorial choices
22 is real?

1 MR. MOORE: Yes.
2 VICE CHAIRMAN CARR: You're not suggesting
3 that those are racially motivated, are you?
4 MR. MOORE: No, no, no.
5 VICE CHAIRMAN CARR: You don't even have
6 to answer that further. But by the same token, when
7 we come out with a study and Penn State comes out
8 with a study, and again although there are
9 differences in the numbers and the percentages, each
10 study says that there are significantly statistically
11 significant and increasing rates of disparities
12 between sentences of Black men and White men. Again,
13 you can accept that we are not suggesting, and the
14 Penn State people are not suggesting that those
15 judicial decisions are racially motivated?
16 MR. MOORE: Let me respond in a number of
17 ways. First, my interpretation of the studies tends
18 to be more in line with the judges than with the
19 Commission's in terms of I believe Penn State
20 basically, the Penn State study basically puts any
21 issue on the in/out decision and not on sentence
22 length.

1 VICE CHAIRMAN CARR: Okay, we disagree
2 there, but we don't need to spend a lot of time on
3 that.
4 MR. MOORE: Yes. Beyond that, you know, I
5 think the issue is most significant for — it's a fair
6 point to say, well, what am I saying is the root
7 cause of this? But I think it's also important to
8 note that the Commission has at least started it with
9 its study, which is important, should have been done,
10 I'm not suggesting it shouldn't have been, but when
11 everyone is seizing upon that study and saying, oh,
12 my God, there's racism in federal court, there should
13 be something more said than silence.
14 There should be some explanation.
15 VICE CHAIRMAN CARR: Who is the "everyone"
16 who is seizing upon that?
17 MR. MOORE: Well, okay, certainly there is
18 discussion. I've seen and heard in the Commission's
19 testimony in front of Congress, congressmen being
20 concerned about this. It is something that people
21 should be concerned about. But I think it sits as
22 the elephant in the room without some form of

1 explanation.

2 In terms of what happens on the

3 prosecutor's side, do I say it's animus? No. But I

4 think what happens is that it is a systematically

5 different universe.

6 Prosecutors office with prosecutors.

7 Their decisions are informed by prosecutors. Their

8 decisions are perhaps discussed with law enforcement.

9 It is a closed system. And to the extent that

10 someone might say hey, is this right? Is this

11 perhaps some place we shouldn't go? It is less when

12 you have less variety of input in those decisions.

13 In terms of the courts, you have that

14 variety. It is done in the sunlight. It is done

15 with explanation. It is reviewed by the court of

16 appeals. It is in the face of defense counsel who

17 are trying to actively protect their client and make

18 sure that their decisions are based on relevant and

19 rational facts. It is informed by the probation

20 department. It is informed by the U.S. Attorney’s

21 office.

22 There are differences in these universes,

1 and those differences may cause certain things to
2 occur. That's what we're saying. Am I saying that
3 the U.S. Attorney's office wears robes of a different
4 color? Absolutely not.
5 CHAIR SARIS: Can I just — Judge Hinojosa
6 and then Commissioner Jackson, and then we've got to
7 move on.
8 COMMISSIONER HINOJOSA: Okay, I have two
9 questions for everybody except for my fellow judge.
10 (Laughter.)
11 JUDGE BARBADORO: Thank you, Judge.
12 (Laughter.)
13 COMMISSIONER HINOJOSA: Mr. Samuels, of
14 the 217,000 inmates, how many of those are in
15 pretrial detention?
16 MR. SAMUELS: In pretrial?
17 COMMISSIONER HINOJOSA: Yes. Because I
18 know these numbers are thrown around as far as the
19 number of people that are in prison, but it's my
20 understanding that that includes people that are
21 being held pretrial, which would include a lot of
22 noncitizens that can't be held — usually are not

1 bondable, and so these numbers get inflated based on
2 that number of people that are not really subject to
3 being out on bond.
4 Do you have any idea exactly how many of
5 those there are?
6 MR. SAMUELS: That would be 3.3 percent of
7 our population; 95.9 percent for sentence.
8 COMMISSIONER HINOJOSA: And so the rest
9 are all pretrial?
10 MR. SAMUELS: Yes.
11 COMMISSIONER HINOJOSA: You're talking
12 about reentry programs, but one of my questions has
13 always been to the head of the Bureau of Prisons,
14 what kind of reentry programs are we doing for people
15 that are going to be deported and have lived in the
16 United States most of their life, but they get
17 deported? And then they come back and we have them
18 back in the courtroom and they said, I'm not prepared
19 to live in a country that I haven't lived in before.
20 And so are we doing anything in the Bureau of Prisons
21 with regards to that so that they'll have some way of
22 making a living and staying in the country of their

1 citizenship?
2 MR. SAMUELS: Non-U.S. citizens are
3 eligible to participate in our psychology treatment
4 programs. And I know there's been a concern with the
5 ability to participate in residential release, you
6 know, centers. And if the individual has an order to
7 be deported, they cannot participate in that.
8 Our belief is that every inmate that
9 enters the Bureau of Prisons, you know, should
10 receive some form of reentry programming. So there
11 are a lot of various program that they can
12 participate in, which our staff encourages them to
13 participate in, and we definitely want to ensure that
14 individuals who are going to be deported, that they
15 do also have some skills as well. And that is
16 beneficial to us.
17 As I stated earlier, with the number of
18 inmates that we have incarcerated within the Bureau,
19 reentry is definitely tied to our security. And we
20 believe that if we're giving the inmates the tools
21 that they need, and if they're going to eventually be
22 released from the prison, that it also benefits them

1 to have some skill set inside the institution because
2 it's easier and safer for us to manage those
3 individuals within our facility.
4 COMMISSIONER HINOJOSA: I guess, Mr.
5 Moore, you talked about transparency under the
6 present system. You've been a public defender for
7 how long?
8 MR. MOORE: Since January 4th of 1993.
9 COMMISSIONER HINOJOSA: So you did not
10 participate in the system prior to the guidelines
11 System?
12 MR. MOORE: That is incorrect. I was an
13 assistant United States attorney for the District of
14 Colorado, not the District of Columbia —
15 CHAIR SARIS: I'm sorry, I misspoke.
16 MR. MOORE: That's okay. From 1982 to
17 1986.
18 COMMISSIONER HINOJOSA: And you don't
19 agree with the statement that really it was the
20 guidelines system that brought transparency to the
21 whole process? For those of us who — I sentenced five
22 years without the guidelines, and there really was

1 not the transparency system in that I did not have to
2 explain to somebody that I was considering their role
3 in their offense, or the amount of drugs, or the fact
4 they had a gun, or relevant conduct matters that were
5 in their presentence report. And that it's really
6 the guidelines system that brought all this
7 transparency to a full discussion with both sides
8 being able to respond to mitigating, as well as
9 enhancements that are with regards to factors that
10 raise your potential penalty. And, that there was a
11 full discussion with regards to argument — the need
12 that I had to explain why I was considering these
13 factors.
14 MR. MOORE: I believe that it's apples and
15 oranges. And what I mean by that is, to ask the
16 question of whether or not there is more transparency
17 in a mandatory guidelines system than there was in
18 the prior system, it may generate one answer. That
19 does not mean that that answer holds for the
20 comparison between the advisory system and the
21 mandatory system.
22 You are comparing two different systems.

1 Do I believe that the advisory system that we are
2 currently in is more transparent than the mandatory
3 system that was in place before it? Yes.
4 Do I believe that the mandatory system was
5 more transparent than the fully discretionary system
6 that preceded it without a guideline influence? To
7 be honest, sir, it's at this point almost ancient
8 history. I would concede your point that there was
9 some more transparency, but it's not — that doesn't
10 mean that there's not more transparency now, and
11 transparency in a different place.
12 Now the sentencing judge has to fully
13 articulate his reason and can't simply hide behind,
14 to be honest, I have to do this because the
15 guidelines say so.
16 COMMISSIONER HINOJOSA: Well, we'll
17 disagree on that for a long time probably, and in
18 fact some would say the PROTECT Act really brought
19 more transparency because it required more statement
20 of reasons.
21 I'll move on to Mr. Axelrod. And I have
22 three questions for you. The first one is this

1 limited credit plan of the Justice Department. Some
2 would say it's a return to parole, in that these
3 decisions are going to be made by somebody in the
4 Bureau of Prisons as opposed to the sentencing court
5 or the defense attorney being able to argue, and the
6 prosecutor being able to argue.
7 And then it also raises the issue in a
8 system that now has so many, over 40 percent of the
9 people are noncitizens, as to what if any of these
10 programs are going to be available for them, and
11 whether they will get that kind of credit. And are
12 we creating that kind of disparity?
13 The next one is with regards to the whole
14 issue of the Fast Track now being a national program
15 that applies in every district. Fast Track was
16 actually congressionally brought into the system with
17 regards to the knowledge and the view that there
18 would be disparity here, but it was required because
19 of the necessity in certain districts to be able to
20 handle their docket.
21 And when it comes to the illegal reentry
22 guideline, whenever the Commission has looked at some

1 ameliorating and mitigating factors with regards to
2 trying to change that, the Department of Justice has
3 not been in the forefront of supporting that.
4 But now the Department of Justice has gone
5 in and decided on a large scale factor, a nationwide
6 factor, to go in and basically rewrite a whole
7 guideline with regard to a Fast Track Program. And
8 does that not totally go away from what the whole
9 idea of congressional Fast Track meant?
10 And finally, with regards to we expressed
11 no opinion with regards to any proposal here other
12 than to say we think there's a problem, is a little
13 odd to me considering that the Attorney General when
14 he came into office said that within four to six
15 months there would be some kind of proposal, and that
16 he had the committees that would be set up with
17 regards to sentencing proposals that we would hear.
18 And we have yet to hear any, other than
19 today that we think there's a serious problem with
20 the system. There is disparity. But we have no
21 opinion.
22 And so that makes it hard for us to hear

1 from the defenders who really, I mean there are
2 several of them in the audience, each one of the has
3 an opinion that they're willing to express on a
4 pretty regular basis —
5 (Laughter.)
6 COMMISSIONER HINOJOSA: — and sometimes
7 pretty strongly, I might add.
8 (Laughter.)
9 COMMISSIONER HINOJOSA: As last night.
10 But then the other, when you're in the courtroom and
11 you're the sentencing judge, the other side is saying
12 we have no opinion? That makes it hard. One side is
13 not being represented.
14 And so at what point will the Justice
15 Department have an opinion as to what needs to be
16 done here? Those are my questions, and I'm leaving
17 the judge alone.
18 (Laughter.)
19 MR. AXELROD: I took notes, so let me try
20 to address your three questions, Your Honor.
21 First, your first question was about the
22 credits proposals and whether we're advocating a

1 return to a parole system. And I would say we are
2 not advocating a return to a parole system.
3 The two credits proposals I think are both
4 limited in scope and simply extensions of what's
5 currently in place. One of the proposals is on good
6 time. As Your Honor may be aware, the way good time
7 credits are currently calculated it results in 47
8 days — up to, if an inmate does everything right in
9 the Bureau of Prisons, they can earn up to 47 days of
10 good time credit each year.
11 Our proposal, if adopted, would extend
12 that by seven days per year to 54 days. As an assistant
13 U.S. attorney, I always — my understanding was always
14 that good time credits could total 15 percent of an
15 offender's sentence.
16 For the way the good time gets calculated,
17 it turns out that it's actually slightly less than
18 that. All this proposal would do would be to extend
19 the current system to basically where I think a lot
20 of defenders and prosecutors thought it was to begin
21 with.
22 COMMISSIONER HINOJOSA: If that's what you

1 were talking about, not the other proposal that you
2 have?
3 MR. AXELROD: I'm talking about both of
4 them. The second one, the idea behind the second one
5 is, again it's a limited extension of what's already
6 in place with the RDAP program.
7 Inmates who qualify for the RDAP program
8 get a reduction off their sentence. That's the sort
9 of, I think the policy reasons are twofold I think
10 for that. One, it's incentive for people to get the
11 treatment they need. And two, the idea is that
12 people who go through that treatment are less likely,
13 and statistics I believe support this, are less
14 likely to reoffend, and that's worth some reduction
15 in the sentence.
16 There are other programs within the Bureau
17 of Prisons that perform a similar function, and I
18 believe as Director Samuels said, some of those
19 programs are available to noncitizens, as well. And
20 so if the program is proven to reduce recidivism and
21 an inmate participates in it, our proposal would
22 allow for the — consistent with the policy behind the

1 RDAP program, to allow the inmate to earn time off
2 his sentence above and beyond the good time credit,
3 although still capped at a certain percentage.
4 So I think that — our view is that these
5 are limited extensions of what's already in place,
6 and could be beneficial to offenders as well as
7 beneficial to — without endangering public safety.
8 Your second question was about the
9 Fast Track proposal, or the Fast Track — new Fast Track
10 policy and whether the Department of Justice is
11 essentially attempting to rewrite the guideline. And
12 I respectfully disagree.
13 I think the Fast Track policy — I would
14 agree with you the Fast Track policy was put in place
15 in a certain limited number of districts that were
16 facing crushing illegal reentry caseloads, and I
17 believe your district is one of them.
18 COMMISSIONER HINOJOSA: And you would
19 agree that was the congressional intent with regards
20 to the Fast Track program? Which is in the PROTECT
21 Act. I mean that's where it came from.
22 MR. AXELROD: I agree that — I agree that

1 was the motivating factor for Fast Track. But I think
2 we've seen a couple of things in development since
3 then.
4 There are illegal reentry cases growing
5 not just on the border, right? So the border still
6 gets the worst of it, but there are, as Mr. Moore
7 said, you know, in his district there was a donut
8 hole. So districts around had the Fast Track policy
9 for a felony illegal reentry case, and his district
10 didn't.
11 And at a time where we're concerned about
12 the difference and the disparity that can result from
13 district to district when certain districts have that
14 policy and others don't, and at a time where post-
15 *Booker* in those other districts there were lots of
16 challenges and litigation and requests for variances
17 based on the disparity, we made a policy
18 determination that it made sense to extend the
19 Fast Track program. But we believe that is consistent
20 with both the statute and the guidelines.
21 On your last question about the fact that
22 we don't yet have a cleared position on the proposal

1 by the Commission —

2 COMMISSIONER HINOJOSA: Leave out the

3 proposal of the Commission, just any opinion.

4 MR. AXELROD: Well, so —

5 COMMISSIONER HINOJOSA: I mean, you say

6 the system is broken, "but we're not expressing an

7 opinion as to how to fix it." And you are one big

8 side in the whole issue. The defenders have very

9 clear opinions.

10 MR. AXELROD: They do.

11 (Laughter.)

12 COMMISSIONER HOWELL: And in that regard,

13 if I could just — do you agree with Mr. Moore that the

14 Department of Justice prefers the advisory system

15 over a mandatory guideline system? At least does the

16 Department have an opinion about that?

17 MR. AXELROD: I do not agree that the

18 Department — I think Mr. Moore took our sort of

19 silence as to any of the proposals as sort of an

20 endorsement of the current system over the system we

21 had before.

22 COMMISSIONER HOWELL: The peril of

1 silence.

2 MR. AXELROD: No, I understand. I mean,

3 as I explained in my — in my statement, Your Honor, we

4 care deeply about these issues. And we will engage

5 on specific proposals. But we can't yet.

6 And so the reason for that is there are

7 thousands of prosecutors in the Department, which as

8 a lawyer you know means tens of thousands of

9 opinions. And we can't clear — we can't clear

10 testimony — we can't clear a position sort of on each

11 proposal, or on sort of a philosophy in the abstract.

12 It's very difficult to do.

13 When there are specific legislative

14 language, or legislative language being contemplated,

15 I imagine we will try to have a cleared proposal.

16 One place where I think we and the

17 defenders agree is that any change is going to result

18 in lots of litigation and be disruptive. So there

19 are going to be costs to any change from the current

20 system.

21 The question is going to necessarily have

22 to be: What are the benefits? And the anticipated

1 benefits from the Department of Justice's point of
2 view to such a proposal. And do the benefits
3 outweigh the costs that we know are coming?
4 You know, uncertainty is not great for
5 prosecutors or, I think, for the justice system. And
6 that's not to say that the status quo must remain.
7 We're not -- the current trend lines are not good. I
8 think we agree with the Commission on that, and we're
9 concerned about them.
10 The question is what would be better? And
11 until there is sort of specific concrete legislative
12 proposals that we can talk internally about to see
13 whether those benefits would outweight the costs that
14 we know are going to come from the litigation that
15 will follow, we're having difficulty sort of
16 presenting a clear position -- which I understand is
17 frustrating.
18 CHAIR SARIS: Commissioner Jackson, then
19 Commissioner Friedrich, and then we have another good
20 panel on the way.
21 VICE CHAIR JACKSON: Mr. Moore, you said
22 in your testimony that the advisory system allows for

1 the correction of severe guidelines. And I guess I
2 am struggling with that a little bit.
3 I am not so sure about it. The sort of
4 changes with crack cocaine were underway before the
5 system became advisory in a lot of ways, and
6 Fast Track we're still sort of sorting out. I think
7 it might be a bit early to count that as a success of
8 the advisory system, necessarily, and there are lots
9 of complicated factors that went into it.
10 And I guess my concern is that the
11 Commission, as you noted, has an obligation to
12 produce guidelines that work. And by "work," I mean
13 that produce consistent and fair sentencing outcomes
14 so that the criminal justice community largely buys
15 into them and then unwarranted disparity is reduced
16 because people believe in the guidelines.
17 But the underlying argument in favor of
18 the advisory system, at least theoretically in my
19 perspective, is that the current guidelines are so
20 bad, so harsh, so complicated that the solution is
21 essentially to allow judges to set them aside, rather
22 than focus on fixing the manual.

1 Now you say — you say — we should engage in
2 the process of fixing the guidelines, et cetera. But
3 I'm trying to figure out in an advisory environment
4 why? Right? I mean, here it is. The *Manual* is
5 there. Judges can, you know, calculate them. And
6 then they can do, in the 3553(a) exercise, what they
7 want to do.
8 So why are we engaging, or why should we
9 engage in the process of tooling and revising the
10 guidelines in that environment?
11 MR. MOORE: I think the answer is that if
12 the Commission wants to achieve the result of having
13 the criminal justice side of the equation,
14 defender/court/and government, respect and give
15 deference and, you know, support, or at least not
16 oppose as vigorously, particular guidelines, then
17 that is the reason.
18 I mean, ultimately if you believe that
19 there is undue disparity — and I don't; I think there
20 is disparity, or difference, not necessarily
21 disparity — but whether it's unwarranted or unjust,
22 that's a whole other discussion.

1 But if you want to reduce that and you
2 choose to let, or encourage the guidelines to be a
3 beacon, if you would, in the fog to say this is a
4 reasoned principled place to be, then if you want to
5 make that claim, when people get there they have to
6 find it to be a reasoned and principled place.
7 And so I appreciate the fact that in an
8 advisory system —
9 VICE CHAIR JACKSON: It takes the impetus
10 out of doing it —
11 MR. MOORE: — judges could self-correct.
12 VICE CHAIR JACKSON: Exactly. To me, it
13 takes the impetus out of fixing the real problem,
14 which you say is the way these guidelines are
15 developing.
16 MR. MOORE: I have no robe — well, I
17 probably still have my law school graduation robe in
18 a closet but that doesn't count for much. I think
19 judges want to see — get as much information as
20 possible. The Commission is a source of information.
21 We've never denied that.
22 We think that the information coming from

1 the Commission may be beneficial to the court. It
2 may be beneficial to our clients. If the Commission
3 starts looking seriously at not always ratcheting up
4 guidelines but trying to explain reasons to make them
5 less severe, that would be of benefit to us.
6 We're not advocating, and I've never
7 advocated the elimination of the Commission, or that
8 its work is simply a waste of time. We may disagree
9 with where we've come out, but there is, where we are
10 now, a norm-setting of value to it. We just want it
11 to be — to hit the mark more.
12 Admittedly, from our perspective it misses
13 the mark more. I would ask what the government's
14 perspective is, but — and now I supposed I'm poking
15 fun at Mr. Axelrod — now it may be silence. But
16 that's it.
17 I mean, we're not advocating in essence a
18 return to pre-SRA days and saying, eh, we don't need
19 you anymore. And those that think that that is what
20 we're trying to get at misunderstand. We want
21 reasoned, intelligent, fair, and explained guidelines
22 so that we can understand everything; so that the

1 government can understand everything; the court can
2 understand everything; and we can have a discussion
3 about individualized sentences.
4 VICE CHAIR JACKSON: Thank you.
5 CHAIR SARIS: Commissioner Friedrich.
6 COMMISSIONER FRIEDRICH: Mr. Axelrod, I
7 would like to follow up on your answer to Judge
8 Hinojosa's last question. But first I would like to
9 join Judge Hinojosa and Judge Howell in urging the
10 Department to join this debate. It is just too
11 important for the Department to remain on the
12 sidelines.
13 You said in response to his question that
14 the Department will need to weigh the benefits of the
15 Commission's proposals with the costs. And you
16 mentioned some of the costs of extensive litigation
17 that you expect that these proposals might lead to.
18 In fact, a number of witnesses we'll hear from today
19 have made compelling points about the constitutional
20 problems these proposals present.
21 Recognizing that you're not going to opine
22 for the Department on that issue, can you at least

1 share with us, if not the Department's perspective
2 your perspective on the benefits, how significant you
3 think the benefits would be from the Commission's
4 proposals should they be enacted?
5 MR. AXELROD: Unfortunately I really
6 can't. I can't sort of speak personally because I'm
7 here on behalf of the Department, and the Department,
8 as you know, is a large place with differing views on
9 issues. And we do sort of work through those issues
10 together to come up with a clear position, but we
11 haven't done that — we haven't done that yet. We've
12 had discussions. People are talking. But we don't
13 have a cleared position. So I can't tell you that
14 the view from the Department is the benefit of this
15 part of the Commission's proposal is X, or is Y. I
16 just am unfortunately not in a — not in a position to
17 do that today.
18 CHAIR SARIS: Anything else?
19 (No response.)
20 CHAIR SARIS: I had one fact question. I
21 said I was going to ask you this. When you assess
22 the amount of money it costs per prisoner, what

1 number do you use?

2 MR. SAMUELS: Our average annual cost for

3 all facilities combined is approximate $29,000 per

4 inmate.

5 VICE CHAIRMAN CARR: So your answer is,

6 you take the total cost and divide by the number of

7 inmates wherever they are?

8 MR. SAMUELS: I think it's just average.

9 CHAIR SARIS: Anybody else at this point?

10 (No response.)

11 CHAIR SARIS: All right. I promised we'd

12 be hot.

13 (Laughter.)

14 CHAIR SARIS: Thank you very much to

15 everyone here. We will probably do a five-minute

16 turnaround right now.

17 (Whereupon, a recess was taken.)

18 CHAIR SARIS: I would say "order in the

19 court," but that's sort of not quite right. Please,

20 everyone be seated.

21 So the next panel, equally daunting,

22 "Improving the Advisory Guideline System." We have a

1 fabulous panel, starting with Honorable Gerard E.
2 Lynch, who is a judge on the United States Court of
3 Appeals for the Second Circuit. Prior to his
4 appointment to the Second Circuit, Judge Lynch was a
5 district court judge for the Southern District of New
6 York.
7 Judge Andre Davis is a judge on the United
8 States Court of Appeals for the Fourth Circuit.
9 Prior to his appointment to the Fourth Circuit, Judge
10 Davis was a district court judge for the District of
11 Maryland.
12 Henry Bemporad — did I butcher that?
13 MR. BEMPORAD: That's correct, Your Honor.
14 CHAIR SARIS: — is a federal public
15 defender for the Western District of Texas, having
16 previously served in that position as deputy defender
17 and appellate section chief.
18 Professor Susan Klein is the Alice McKean
19 Young Regents Chair in Law at the University of Texas
20 School of Law. Her areas of expertise include
21 federal criminal law, criminal procedure, and
22 criminal law. Previously Professor Klein was an

1 attorney in the Department of Justice's Honors
2 Program, and a special U.S. attorney in the District
3 of Columbia.
4 COMMISSIONER HINOJOSA: And she's ignored
5 my Hook’em Horn —
6 (Laughter.)
7 CHAIR SARIS: And Matt Miner, Matthew
8 Miner, is a partner in the firm of White & Case, LLP,
9 Washington, DC. Previously he served in a number of
10 capacities on the staff of the United States Senate
11 Judiciary Committee, most recently as minority staff
12 director. He also served as an AUSA in the Middle
13 District of Alabama.
14 Now we're going to start with Judge Lynch,
15 and then — not Judge Klein — we're going to sort of
16 jump to Professor Klein who — I hope I'm not
17 embarrassing you — isn't feeling so well. So I want
18 to sort of make sure she gets in and out — do you want
19 to go first?
20 MS. KLEIN: No, I would not. After you.
21 CHAIR SARIS: Thank you.
22 JUDGE LYNCH: Well thank you for inviting

1 me. I want to start by saying I'm much more
2 optimistic about advisory guidelines than I think the
3 tone of the Commission's testimony and questions have
4 been.
5 I am a great believer in guidelines. Like
6 Judge Hinojosa, I participated, though in my case I
7 was an assistant U.S. attorney in the prior system.
8 I think guidelines are a great improvement. But I
9 think guidelines function best as "guidelines."
10 What I want to do is try to disaggregate
11 the issue of disparity or difference in sentences
12 into different categories.
13 First, I think there's the category of
14 justified difference. After many years on the
15 district court bench, I am confident that the quest
16 for uniformity in sentencing is a hopeless cause.
17 Cases and individuals vary too much for a guideline
18 system to capture all relevant factors, even with a
19 rule book that has already reached a rather high
20 level of detail and complexity.
21 In fact, complex guidelines themselves can
22 undermine uniformity because the more complicated the

1 guidelines the more likely they will be interpreted
2 and applied differently, or even be manipulated by
3 the parties and by judges.
4 At the other extreme, oversimplified
5 guidelines that rely on too few factors will not
6 capture all of the factors that are relevant to
7 sentencing. As the accountants say, you manage what
8 you measure. And in my view, the principal defect of
9 the fraud and narcotics guidelines are that they pay
10 most attention to what can be most easily measured,
11 not necessarily what is most important. And so they
12 have this quantitative overlay that I think leads to
13 judges finding occasions for flexibility.
14 Next, I disagree with some of the
15 philosophy of some of the folks who have spoken on
16 this in believing that some forms of uniformity are
17 not desirable.
18 Many of our cases, perhaps most, are not
19 cases of exclusively federal concern. And it is
20 ironic that the Fast Track Program, which I'm glad to
21 see is being extended uniformly around the country,
22 was one of the principal examples of a sentencing

1 system that was of exclusively federal concern where
2 uniformity might be most desirable and was among the
3 least uniform.
4 To take prominent examples of cases we
5 frequently see, the vast majority of drug dealers,
6 child molesters, firearms violators, armed robbers,
7 and con artists will be prosecuted in state courts.
8 And in our federal system, that means they will be
9 treated differently in New York, Texas, and
10 Minnesota.
11 Resentment of sentencing disparity, and
12 actual arbitrary differences in treatment, are more
13 likely to occur, and in my view are more problematic
14 when offenders from the same streets are treated
15 differently in state and federal court than when
16 offenders in federal court in one state are treated
17 differently from federal offenders in another.
18 We frequently see in the federal courts in
19 New York offenders in the narcotics area especially
20 who are used to an entirely different sentencing
21 system in the state. And by the way, as a New York
22 patriot, I would have to say someone should look at

1 the fact that New York has achieved greater success
2 in reducing crime than most other states while
3 maintaining a lower level of incarceration.
4 If offenders are taken into the federal
5 system arbitrarily and given entirely different
6 sentences, that's a form of disparity that in my view
7 is very important.
8 One type of disparity that is of great
9 concern is racial disparity, but mandatory sentences
10 and guidelines cannot be defended on the grounds that
11 they are good for racial minorities. In fact, these
12 practices, especially in the area of narcotics, have
13 led to disastrous increases in the rate of
14 incarceration of minority men.
15 More equal sentencing does not make up for
16 disparities in arrest and prosecution. And limiting
17 opportunities for leniency works significantly to the
18 disadvantage of the poor and minority groups who are
19 most often arrested and prosecuted.
20 It is obviously of concern if there is a
21 statistically significant difference in sentencing
22 between Black men and White men for similar crimes in

1 the federal courts. But statistically significant
2 does not necessarily mean a dramatic difference. And
3 the dramatic change in the incarceration rates of
4 Black men in this country in particular has been
5 attributable to severe and unmitigable sentences in
6 both the states and the federal system.
7 Next, I think a more practicable goal for
8 guidelines is uniformity of sentencing policy, and
9 that advisory guidelines are sufficient to achieve
10 this goal and are in fact achieving it. In the
11 pre-guidelines era, the most significant problem was
12 that judges were free not only to differ in the
13 relatively small matter of adjusting sentences for
14 individuals according to individual facts, but were
15 free to differ more systematically and fundamentally
16 with respect to (a) what leniency and severity meant,
17 and (b) how serious a given offense was.
18 In a purely discretionary system, you can
19 favor a war on drugs and I can be a conscientious
20 objector and we can both sentence accordingly. That
21 has been eliminated by the guidelines. It continues
22 to be eliminated by advisory guidelines. We do not

1 typically see dramatic differences in sentencing from
2 judge to judge or district to district on a
3 policywide basis; what we see are relatively minor
4 adjustments in sentencing in individual cases.
5 Congress and the Commission have mandated
6 a severe approach to sentencing, have emphasized in
7 particular tough sentences for drug dealers, white
8 collar offenders, and child pornography viewers.
9 These policies are being effectively carried out,
10 whether you like them or not, by judges even if there
11 is some variation.
12 The last point I want to make — and I see
13 that the red light is on — is my most significant
14 concern with the advisory guideline system, and the
15 one proposal that I think is particularly important,
16 is that the *Kimbrough* case was a case of bad
17 guidelines leading to bad law.
18 Of course it was important to get the
19 crack disparity changed. That was a horrible rule
20 and a horrible system. But the result that judges
21 are free, individually, to disagree with the policy
22 of the guidelines is what strikes at the heart of the

1 guidelines system.

2 Now fortunately I don't think many judges

3 are in revolt against many guidelines, child

4 pornography being the only possible exception to that

5 I think, but I think it is important that if the

6 Judiciary is going to dissent from guidelines, that

7 it do so uniformly. That means that this should not

8 be a function for individual judges.

9 I think it is a good idea that policy

10 disagreements, however defined, should be subject to

11 *de novo* review in the courts of appeals, and

12 ultimately in the Supreme Court, so that we do not

13 have a system where some judges think that child

14 pornography is not to be sentenced as severely, and

15 others take a completely different approach.

16 I think that's the biggest problem with

17 the current system, and I would like to see stronger

18 appellate review in those cases.

19 I am happy to answer any other questions

20 or comment more specifically on specific proposals.

21 CHAIR SARIS: Thank you. Now I leave it

22 up to Professor Klein. Would you like to go now?

1 MS. KLEIN: That would be great.
2 CHAIR SARIS: You're doing okay?
3 MS. KLEIN: I'm feeling a little bit
4 better. Thanks very much for the opportunity to be
5 here.
6 I am one of the other perhaps two fans of
7 the guidelines on the panel — maybe there's more. I
8 think they've been wonderfully successful in reducing
9 unwarranted disparity.
10 My issue with what the Commission wants to
11 do is just the constitutionality, and what perhaps
12 might be a backlash from the courts.
13 Can you hear me?
14 COMMISSIONER HINOJOSA: I would bring it
15 [the microphone] closer.
16 MS. KLEIN: Okay. I agree with Judge
17 Lynch that we don't want to have 600 judges deciding
18 I think pornography sentences are too high, I think
19 they're too low, I think drug sentences are too high,
20 I think they're too low. The purpose of the
21 guidelines is policy is decided for the national
22 system.

1 I am not as bothered by Judge Lynch — by
2 the disparate sentence between state and federal
3 defendants. I think there are lots of different
4 reasons why defendants are brought to the federal
5 court, lots of good reasons, and I don't see any
6 problem with having two systems operating
7 separately.
8 But within one system, it seems to me
9 unfair to have two defendants who are identical
10 receiving different sentences. And so the question
11 is: What do we do about that?
12 Well I think the Commission's proposals
13 are a reasonable method of dealing with it. I can
14 certainly see the impetus behind wanting to do
15 something about what I see as increasing disparity in
16 the wake of *Booker*, *Kimbrough*, and *Gall*. Judges are
17 feeling more free to sentence as they wish.
18 I'm just not sure you can get there by
19 changing the standard of review. It's possible. It
20 would be a risky venture, I think. You could try it.
21 I think you run the risk, if you do it at the
22 guideline level of a court later saying this is a

1 Sixth Amendment problem. We'll develop a common law
2 of appellate review, and certain things will turn
3 into factors that judges have to use, or can't use,
4 and those things might harden into elements of
5 offenses — mandatory guidelines — that then have to go
6 to the jury. So I worry about that.
7 I also worry about if Congress or the
8 commissioners try to cabin judicial discretion by say
9 enacting a statute — judges, you can't sentence based
10 on the vocation of the defendant, or based on the
11 defendant's post-conviction rehabilitation — you might
12 get a Supreme Court saying that's a separation of
13 powers issue. We don't want to tell judges exactly
14 how to sentence. We may be able to tell them what
15 crimes are worth, but we shouldn't be telling them
16 things about the offender that might be important to
17 judging.
18 So I think there's some risk involved in
19 pursuing a heightened standard of review on appeal,
20 but I applaud the impetus behind it.
21 Thank you.
22 CHAIR SARIS: Thank you. And if you're

1 not feeling well and disappear before the end of the
2 panel, we'll — I mean, if you can't stay —
3 MS. KLEIN: Thank you. I'll try to tough
4 it out.
5 CHAIR SARIS: All right. Thank you.
6 Judge Davis.
7 JUDGE DAVIS: Judge Saris, and
8 commissioners, thank you very much for having us and
9 for the very difficult and challenging work that you
10 all do.
11 I appreciate the opportunity to have
12 submitted some written testimony, which I believe you
13 will have and I appreciate your attention to that.
14 I thought I would take a few minutes here
15 this morning in the beginning not so much to address
16 policy — we'll have plenty of opportunity to do
17 that — but to remind us, as if we needed to be
18 reminded, of really one of the fundamental
19 background, if you will, wallpaper problems with the
20 Sentencing Reform Act that we've all known all along
21 was present.
22 Sentencing discretion is kind of like the

1 water in an impenetrable but malleable balloon. And
2 so when you shift sentencing discretion from judges,
3 with good reason, great motivations, great goals, to
4 prosecutors, as we all know we sometimes create
5 problems simply that substitute for the existing
6 problems that we were trying to solve originally.
7 So I want to just serve here in my opening
8 three minutes as a reminder that whatever the
9 Commission and Congress ultimately undertakes to
10 achieve, that that reality remain in the forefront.
11 Now lest I'm misunderstood, let me go on
12 record as celebrating my own service as an assistant
13 United States attorney in pre-guideline days, and let
14 me go even further and celebrate the fact that of the
15 six United States district judges in regular active
16 service in the District of Maryland sitting in
17 Baltimore, five of those judges are former assistant
18 United States attorneys. Three of them, indeed,
19 formerly served as "the" United States Attorney for
20 the District of Maryland.
21 My point being, that we have a rich and
22 deep tradition in our district of service, of public

1 service, and you'll forgive me for immodesty if I say
2 that I believe in my district, the District of
3 Maryland, we have probably the best United States
4 Attorney's office in the country. And that's been
5 true for many years.
6 So when I wave the caution flag about too
7 much discretion to prosecutors, it comes in that
8 context.
9 When I was an assistant United States
10 attorney back in the early '80s, fodder for federal
11 prosecutions unfortunately were bank tellers who
12 stole money from the bank. Bank larceny
13 prosecutions, again, back then and continuing to
14 today are a part of every U.S. Attorney's office's
15 portfolio.
16 Typically these were, quite typically,
17 women; quite typically working class families,
18 grossly underpaid for the work that they did; and
19 typically back then taking a little cash out of the
20 till.
21 One of my last cases on the district court
22 was a woman, a young woman from a working class

1 neighborhood outside of Baltimore, at the time of the
2 prosecution probably just turning 21, high school
3 graduate who'd been working as a bank teller, who
4 took a little money from the till. The problem is,
5 in 2009 those bank tellers — now of course a former
6 bank teller with a felony conviction on her
7 record — don't get charged just with bank larceny;
8 they get charged with aggravated identity theft —
9 this peculiar statute that Congress gave us a few
10 years ago in which there is one, and only one
11 sentence: two years, which must be served
12 consecutively to any other sentence.
13 And what the prosecutor in the case I'm
14 alluding to was able to do in the form of a (C) plea
15 was handcuff the defense attorney and require this
16 young woman to serve an 18-month sentence of
17 incarceration on a bank larceny prosecution, lest the
18 government would proceed to trial on the identity
19 theft prosecution.
20 My hands were tied. The defense
21 attorney's hands were tied. The young lady got and
22 served the 18 months. This is not right. It's not

1 just. It's inconsistent with substantial justice.
2 And this is just one story of many, many that
3 implicate both mandatory minimum sentencing policies
4 as well as guidelines policies.
5 I commend your hard work. My hope is what
6 will inform all of your work is what the doctors
7 learn: First, do no harm.
8 We've only really had about five years of
9 post-*Booker*. When you really cut it to what judges
10 have been doing, we've only had about five years of
11 post-*Booker* experience. We had more than 20 years
12 under the Sentencing Reform Act before the
13 infirmities in the statute and in the guidelines were
14 identified in *Booker*.
15 So let's not rush to fix what might not be
16 broken. Let's see how judges do. But I look forward
17 to the dialogue I know we will have.
18 Thank you.
19 CHAIR SARIS: Thank you. Mr. Bemporad.
20 MR. BEMPORAD: Thank you, Judge Saris,
21 Commissioners:
22 I am very, very happy to be here on behalf

1 of the Defenders, although I do need to say, like the
2 old political joke, I don't represent a cohesive or
3 coherent position. I'm a public defender.
4 (Laughter.)
5 MR. BEMPORAD: I have prepared remarks
6 which I'm abandoning because I thought that the
7 conversation in the earlier panel was just so
8 important, and some of the questions the
9 commissioners asked really I think struck to some
10 very, very interesting issues that I would like to
11 address in my initial remarks, and then I'm happy to
12 answer any questions about my testimony or the
13 questions that the Commission had.
14 In particular there was a question from
15 Commissioner Jackson that I thought was an
16 essentially important question. As I understood the
17 question, it was this: Why? Why fix the guidelines?
18 If we have a *Booker* system where we have variances
19 and judges can impose whatever sentence they want
20 after considering the guidelines, well then there's
21 no reason to fix the guidelines because they'll just
22 consider them but then they'll consider all the other

1 factors in 3553.

2 And I think that's an important question

3 for this reason: I think this is an essential time

4 to fix the guidelines. That's because I believe

5 there's two ways you can fix them. And by "fix

6 them," I want to be very specific what I mean.

7 Two ways that you can have more sentences

8 fall within the guidelines range, if you want more

9 sentences to fall within the guidelines range or an

10 approved departure at those steps in the process.

11 How can one do that?

12 There are two ways to do that. One is,

13 the *de facto* way, making those guidelines a place

14 where more judges in exercising their discretion,

15 fall. That's by lowering guidelines that are too

16 high, making guidelines fair when they're not fair;

17 explaining parts of the guidelines that remain

18 unexplained; particularly clarifying guidelines so

19 that there's not tremendous disparity in application

20 of those guidelines.

21 It also means accounting for the things

22 that judges are doing now. When judges again and

1 again vary on certain grounds, the Commission should
2 look at those grounds and say, you know what, maybe
3 we should include these. Maybe we should include
4 these factors so that they will no longer be
5 variances they will be guideline sentences.
6 That is a way to *de facto* increase the
7 number of sentences that are imposed with the
8 guidelines. In my view, what the Commission has
9 suggested — and of course there's not proposals yet,
10 but from Chair Saris's testimony — are a *de jure* way
11 of trying to get more sentences to fall within the
12 guidelines by changing the standard of appellate
13 review, and by changing the factors in some ways, or
14 the approach that certain judges, that sentencing
15 judges have to apply the guidelines when they're
16 exercising their discretion where that sentence
17 should fall.
18 And I share Professor Klein's and a number
19 of other of the people, the panelists and other
20 people who are going to testify, I share their
21 concerns that the *de jure* way of doing it is going to
22 leave to at least constitutional uncertainty, at

1 worst a declaration that the system is
2 unconstitutional, throwing us into the kind of chaos
3 that I think all of us want to avoid.
4 I want to make the rest of my remarks to
5 be very specific about what I see as the
6 constitutional problem, or one of the constitutional
7 problems. Because I think a lot of people have
8 talked about, well, these could be unconstitutional,
9 there's constitutional uncertainty, but I think the
10 Commission should hear exactly what that
11 constitutional uncertainty is going to be, or where
12 it could be. I think it is important because this
13 ties into Judge Lynch's, I thought, very, very
14 important point, also said by Judge Barbadoro — I
15 can't say his name.
16 CHAIR SARIS: Barbadoro.
17 MR. BEMPORAD: Barbadoro, any better than
18 anyone can say my name — about this issue of policy
19 decisions. And policy decisions being made by
20 district judges to go outside the guidelines. And
21 that is a matter of concern from some judges you've
22 heard today.

1 The issue is this: Looking at it as an
2 appellate lawyer, if judges are not free to disagree
3 with the guidelines on the basis of policy — and this
4 is one of the proposals I think the Commission has,
5 to have heightened review, strict scrutiny, de novo
6 review of that — if judges on the court of appeals are
7 substituting their judgments on this factor, it is
8 going to lead to unconstitutional sentences. And I
9 would like to make that clear in my remaining couple
10 of minutes.
11 Take a case where a judge is looking at,
12 say — and this is in my testimony — an involuntary
13 manslaughter case and says the guideline is too low.
14 I disagree with this guideline. And the
15 circumstances of this person's offense make me want
16 to impose — make me feel that under 3553(a) I need to
17 impose a higher sentence.
18 Under the current sentence, there is a
19 fact finding being made about the circumstances of
20 that case, but that fact finding is not necessary to
21 the higher sentence. In other words, it doesn't
22 violate the Sixth Amendment necessarily because,

1 though the judge made a fact finding, the jury didn't
2 make that fact finding. That fact finding wasn't
3 needed to impose the higher sentence becuase the
4 judge is free to disagree with the guideline and
5 impose the higher sentence anyway.
6 Under the Sentencing Commission's
7 proposal, the court of appeals would be substituting
8 their judgment on this point. They would say: We
9 disagree with you, district court. You can't make
10 that policy disagreement. You are not free to
11 disagree with the guideline.
12 In that circumstance, in that case, the
13 only basis upon which to impose a higher sentence
14 would be upon fact findings. That is the
15 constitutional problem. Judges can't make fact
16 findings that are the sole basis that would permit a
17 higher sentence, or require a higher sentence. And
18 that would not just be in that particular case on
19 appeal at that time.
20 Once the judges on appeal say, the court
21 of appeals says you can't disagree with that
22 guideline in that case on remand, and in all future

1 involuntary manslaughter cases, the only way to go
2 above the guideline range, or the only way to raise
3 the guideline range and go to a higher sentence that
4 way, would be through fact finding.
5 If facts are necessary to impose a higher
6 sentence, that is a Sixth Amendment violation unless
7 those facts are found by the jury.
8 So this is not just thinking in the air —
9 and I'll end with this — this is not just the kind of
10 vague, this is a constitutional problem. There's a
11 very significant, severe constitutional problem that
12 I think the Commission needs to consider when
13 proposing legislation.
14 I will end by saying I do believe,
15 however, that a *de facto* approach to guideline
16 strengthening by lowering, making guidelines more
17 fair, making guidelines less severe, and that account
18 for what judges are really doing, is the way to have
19 more guideline sentence. A *de jure* way is I think
20 too uncertain and could lead to unconstitutional
21 sentences.
22 I'm happy to answer other questions, and I

1 thank the Commission.
2 CHAIR SARIS: Thank you. Mr. Miner.
3 MR. MINER: I thank the Commission for
4 inviting me to testify at this important hearing.
5 And as well on this panel, because I think the views
6 that have been stated have been diverse but also very
7 interesting and on the constitutional points
8 important.
9 I disagree on a few of the points and
10 perspectives, but we can talk about that later on the
11 panel.
12 I come to this hearing with a perspective,
13 as Chair Saris, Judge Saris, noted, as a former
14 federal prosecutor, someone who is now in white
15 collar practice, but served a half decade focused on
16 criminal law policy issues for the Senate Judiciary
17 Committee.
18 I served in that role, in that capacity on
19 the Committee post-*Booker*. It's interesting, because
20 during that period of time, not withstanding the fact
21 that Justice Breyer and the Court in a remedial
22 holding left a tennis ball in our court and the ball

1 didn't move very much. And it's probably, if it's
2 still there, resembles one of the tennis balls that
3 my dog works on in the backyard; it's probably not in
4 great shape.
5 I think that if you look at what was
6 considered initially, I think the House Judiciary
7 Committee held some hearings. The Commission has
8 obviously issued some reports and studies. There
9 were some legislative proposals. The Department of
10 Justice at the time did take a position and advocated
11 for the topless guidelines consistent with the *Harris*
12 case.
13 But since that time, and the Commission
14 also said, much as Judge Davis has said today,
15 there's not the same urgency on this because if we do
16 it wrong it could wind up being a bigger problem.
17 Let's study *Booker*. Let's study the impact of *Booker*
18 going forward and then figure out what to do later.
19 Well now, almost seven years later, I
20 think we have a record. We have a sense as to where
21 things are going. We also have had a sense for quite
22 some time as to what the Court did. I mean, the

1 Court struck down portions of the statute that still
2 sit there, and there is no statutory appellate
3 standard. And so to the extent that we're concerned,
4 as Professor Klein said earlier, that individual
5 courts are going to make decisions as to what the
6 appellate standard should be — and there could be
7 divergence — well, we've already experienced that.
8 I think that the policy makers need to
9 engage on this and at least fill in those gaps that
10 are known, and do so in a way that's been informed by
11 the Supreme Court's decisions over the past few
12 years.
13 I — without divulging what was in any of
14 this memo — I wrote a memo talking about these issues
15 when I was on the Hill, and it was just simply like
16 the movie "Educating *Rita*," it was just called
17 "Implementing *Booker*," and tried to find a way to
18 follow the threads of the cases and what was allowed,
19 and what the Supreme Court was saying, "These are the
20 bounds that courts can follow."
21 Now the Supreme Court isn't our national
22 legislature, and fortunately they aren't trying to

1 act like one here. And so the courts of appeal have
2 to follow this guidance, but they have flexibility in
3 how they do it.
4 And so there's been some divergent
5 approaches in terms of how that is going forward.
6 There should be some uniformity in terms of how for
7 instance an appellate standard is stated in the
8 statute books, and then the review that goes from
9 that would be more consistent.
10 And I think that it is not asking too much
11 to codify the appellate standard in view of *Booker*,
12 in view of *Rita*, and in view of the considerations
13 that the Commission outlines through Judge Saris's
14 testimony.
15 To the extent that there are concerns — and
16 I think this hearing is very helpful to identify
17 concerns with individual aspects of that review, or
18 what weight should be given to the guidelines by
19 district court judges in sentencing, I think that is
20 very important. But I think the question of whether
21 we need to address these gaps in the law post-*Booker*,
22 I don't think there's a question of "whether." I

1 think it's a question of "what."

2 What is going to be done? What needs to

3 be done? I think that there can be a significant

4 debate about long-term reforms. I think that some

5 have advocated very interesting long-term reforms. I

6 have ideas for a longer term reform. But in terms of

7 the short term, certain things need to be filled in

8 in terms of the gaps in the statute and can be

9 educated by what the Supreme Court has told us in the

10 rulings. And I think you can follow that.

11 In terms of other aspects of the statute,

12 I think that Judge Hinojosa and others have

13 identified some friction between the statutes and the

14 factors that judges are allowed to consider versus

15 what the Commission is allowed to consider. I think

16 that that should be reconciled. The question is how

17 exactly do you reconcile that? And who should

18 consider what?

19 I don't think it should be the case where

20 neither, or both parties can consider different

21 things but they can't consider others that the other

22 can. I think that makes absolutely no sense.

1 But let me conclude by just saying that
2 this debate, which was restarted recently by some
3 writings by the former Commission Chair, Judge
4 Sessions, I think it — I don't know wehhter it was his
5 article or other pieces that are out there, or
6 Professor Otis's speaking and writing on the subject,
7 but I think it is very welcome. Because there's not
8 a natural constituency to push for reform in this
9 area.
10 And if you think about all of the areas
11 that do get attention on Capitol Hill, there's
12 normally somebody pushing or advocating for it.
13 Here, there's not. The Department of Justice didn't
14 take a position earlier when asked. And so I think
15 it's important for someone to weigh in as a
16 constituency to push for reform. And I am glad to
17 see that the Commission is doing that.
18 Thank you.
19 CHAIR SARIS: Thank you. Judge Howell.
20 COMMISSIONER HOWELL: Well you all have
21 raised a number of issues, and I'll just start with
22 one for Mr. Bemporad.

1 And that has to do with a conversation
2 that we've had over the years with the Federal Public
3 Defenders about the point that you make about how we
4 garner more within-guidelines sentences by explaining
5 more the policy judgments and the reasons for the
6 guidelines we have, or any changes that we're making,
7 and reduce the severity.
8 The one thing that I find missing
9 regularly from the federal public defender's urging
10 or suggestions, constructive proposals, even, in that
11 area is that we are also bound to formulate the
12 guidelines consistent with federal law, and we are
13 guided by the directives of Congress. And to the
14 extent, oftentimes, that judges disagree with the
15 policy judgments reflected in the guidelines,
16 essentially what they're disagreeing with are the
17 Commission's expression or articulation of policy
18 judgments by Congress that we adhere to when we
19 promulgate guideline amendments in the guidelines.
20 So it's not just, frankly, policy
21 disagreements with the guidelines usually that judges
22 are having. It's also in the crack context. It was

1 policy judgments with congressional statutes.
2 The Commission can't ignore those policy
3 judgments. Our job is to mediate those congressional
4 statutory judgments in the guidelines.
5 So would the Federal Public Defenders have
6 us — how would the Federal Public Defenders have us
7 mediate that important role of interpreting penal
8 statutes in the guidelines?
9 I mean, it's also one of the fundamental
10 difficulties I have with the Federal Public Defenders’
11 deconstruction of the guidelines and the focus on
12 evidence — you know, focus on evidence and so on. You
13 know, that's all fine and good and we do an enormous
14 amount of data analysis when we promulage any
15 guidelines. But in the end, all of that data
16 analysis also has to be reconciled with the policy
17 judgments that we have been given by Congress, which
18 we take enormously seriously and are guided by as we
19 must be by law.
20 So how would you have us reconcile that?
21 MR. BEMPORAD: Well, Judge, let me say I
22 think that is a very important question. I think

1 there are a couple of answers to it.

2 First, I think you have to separate out

3 places where Congress has directed the Commission to

4 increase a guideline and places where Congress has

5 made its choice as to maximum sentences. And then

6 the Commission has to implement that.

7 *Kimbrough* talked about this and very

8 clearly said the fact that mandatory minimum

9 sentences were imposed for crack, or that maximum

10 sentences that were imposed for crack, did not bind

11 the Commission.

12 Similarly, with respect to illegal reentry

13 cases, the majority of cases in my district, there's

14 a 20-year sentence for aggravated felons. That did

15 not direct the Commission to put in the 16-level

16 increase that we suffer, frankly, suffer under in the

17 Western District of Texas and now throughout the

18 country, as we've been hearing about. And one of the

19 reasons why there's been a push for a Fast Track.

20 Those are places where I don't think there

21 was a directive from Congress to do it in the way the

22 Commission did it. I think the Commission has to

1 look at what Congress has set the penalties; it's a
2 part of your statutory mission, and part of the thing
3 that you look at, but that doesn't mean you have to
4 translate it in the way that you did with respect to
5 those.
6 Then there are other circumstances where
7 the Congress has directed the Commission to increase
8 a guideline, or directed the Commission to study
9 that. I think if they direct the Commission to study
10 it, obviously the Commission has, and usually does a
11 very good job of studying it, but the Commission can
12 also say: We've studied it, and we look at what's
13 happening out there, and we don't think we should
14 impose it.
15 If they direct the Commission to impose
16 it, the Commission has to impose it. I will leave it
17 to the Commission whether or not they can have a
18 policy statement, or a commentary that says this is
19 why we imposed it. Usually your background notes do
20 do that. And we're going to be pointing those out to
21 judges.
22 Then the final area is where the Congress

1 passes guidelines themselves, you know, and I don't
2 think you have a choice but those guidelines are
3 going to be guidelines. In all those circumstances,
4 though, in every one of those circumstances, judges
5 are going to have to remain free to disagree with the
6 sentence that the guidelines suggest within the
7 maximum and minimum penalties set by Congress. If
8 not, those things, whether they are directives,
9 whether they are passed by Congress, or whether they
10 are set by the penalty of Congress, if those things
11 are things that judges can't disagree from, they
12 become mandatory in the way that *Booker* talked about,
13 in the way that *Kimbrough* and *Gall* talked about, and
14 we are back in a situation where we are going to have
15 unconstitutional sentences and there's going to be
16 Sixth Amendment challenges.
17 So I don't envy the Commission's duty on
18 this, but I do believe there are at least a whole
19 area of cases where the Congress has not said:
20 Increase the penalty in this way, but the Commission
21 has increased those penalties. And some of those
22 cases, I particularly think of illegal reentry but

1 drugs are also one, are a place where I think the
2 Commission can do some work, some *de facto* work, to
3 lower the guidelines and *de facto* those sentences
4 within the guidelines without having to change the
5 entire system.
6 CHAIR SARIS: Judge Hinojosa, and then
7 Commissioner Wroblewski.
8 COMMISSIONER HINOJOSA: Well actually,
9 other than government-sponsored, the illegal entry
10 guidelines are the ones that are pretty high with
11 regards to within-guidelines, especially in your
12 district.
13 And the plus-16 really comes from the fact
14 that there has been a congressional decision that the
15 maximum penalty is 20 years. And the Commission
16 can't be in a policy disagreement with the Congress
17 on this 20 years is not really meant to be 20 years
18 like it is in another statute. There has to be some
19 sort of correlation and consistency within the
20 guidelines system when a maximum is 20 years for a
21 particular type of offense.
22 And I think that is probably one of the

1 reasons why the plus-16 comes into effect, because it
2 then puts it at the same level as other 20-year
3 maximums.
4 MR. BEMPORAD: I would say, Your Honor,
5 before the 16 was in place, my memory — because I was
6 around at the time — was that the court said you get
7 an increase for a felony, and if it's an aggravated
8 felony consider a departure. And there are many
9 circumstances where the Sentencing Commission sets a
10 guideline range that is well below a statutory
11 maximum, even an enhanced statutory maximum. They
12 can suggest departures in that circumstance. They
13 can look at it without just saying, blindly, Congress
14 has passed this law and increased the maximum,
15 therefore we have to do the same.
16 COMMISSIONER HINOJOSA: Well it's not
17 "blindly." It's the branch of government that sets
18 maximums and minimums. And so I guess under your
19 theory, the only solution for Congress is to pass
20 mandatory minimums because those will certainly pass
21 constitutional muster. And so therefore, if you're
22 in Congress and you want to have some effect as the

1 Branch of government that controls the penalties as
2 far as maximums, you are going to say, well, we have
3 a guideline system that people are saying is
4 unconstitutional and any suggestion that we give some
5 direction with regards to expressing our view
6 therefore is being met with it's unconstitutional, so
7 therefore mandatory minimums are constitutional. And
8 so is that the only option that Congress has under
9 the present system to affect sentencing, other than
10 setting the maximums?
11 MR. BEMPORAD: Well, Judge Hinojosa, I
12 know that the next panel is going to talk about
13 perhaps the mandatory minimums more than this panel
14 was going to, because that is not a propsal from the
15 Commission, but I do want to say that I take a little
16 bit of issue with saying those are "clearly
17 constitutional." I think we right now do not have a
18 majority opinion from the Supreme Court saying they
19 are.
20 We have Harris, which was a 4-1-4
21 plurality opinion, and one of the five, the
22 concurring Justice, Justice Breyer, has since said in

1 the *O'Brien* case that he is not absolutely sure he
2 was right in *Harris*. That is a pretty flimsy
3 foundation to build a structure for a sentencing
4 system. So I am not sure that mandatory minimums
5 would work.
6 But putting that —
7 COMMISSIONER HINOJOSA: So you think
8 they're unconstitutional?
9 MR. BEMPORAD: I think if more and more
10 are passed, and even the ones we have now, they're
11 going to be subject to the sort of challenges that
12 were made —
13 COMMISSIONER HINOJOSA: Well don't we have
14 them in a majority of the — well, certainly the drug
15 cases, which is a big portion of the docket. And we
16 have them in other areas: child porn. We have them
17 in, the one that Judge Davis mentioned —
18 MR. BEMPORAD: Firearms cases.
19 COMMISSIONER HINOJOSA: Right.
20 CHAIR SARIS: Aggravated identity.
21 MR. BEMPORAD: But the question is going
22 to be whether the jury is making the findings. And

1 sometimes they do, sometimes they don't. Those
2 challenges are being made now.
3 I think the Supreme Court has declined to
4 hear the challenges so far. But if a wholesale
5 revision of the Code is made to where there's a lot
6 of mandatory minimums, I don't think they will
7 decline. I think they will be called upon to review
8 those.
9 COMMISSIONER HINOJOSA: So you think
10 they're just allowing unconstitutionality to go on
11 because they won't take a case?
12 MR. BEMPORAD: Well, no. Let me be clear
13 about this —
14 COMMISSIONER HINOJOSA: I mean that's
15 basically what you're saying. I mean, until we have
16 more of them that are unconstitutional, they're just
17 not going to take a case.
18 MR. BEMPORAD: With respect, I disagree
19 and I would turn it around. In my view, because we
20 have a system that allows judges within the
21 maximum/minimum to disagree now with the guidelines
22 range, the Court isn't called upon to say, wait, this

1 sentence is a Sixth Amendment violation because they
2 say, well, that sentence is not absolutely necessary
3 based on a fact-finding, as I mentioned before. That
4 can be based on a disagreement.
5 If we cabin those disagreements too much,
6 either through increased mandatory minimums or a
7 finding or a suggestion by Commissioner Howell that
8 we have to impose these sentences because Congress
9 increased the maximum, or Congress directed this
10 guideline, or Congress passed this guideline, if we
11 do any of those things and say these guidelines are
12 now more mandatory than others, or these sentences
13 are more mandatory, that then raises an issue that so
14 far the Supreme Court hasn't had to address because
15 we have enough discretion — not a lot of discretion in
16 the system, a lot of guidelines are imposed within
17 the guidelines or with agreement from the
18 government — but we have enough discretion so that
19 they can say this is not a Sixth Amendment violation.
20 In my view, by pushing it towards *de jure*
21 either through mandatory minimums or through a very
22 much increased appellate review, you are going to be

1 in a situation where they can no longer avoid the
2 issue because the Sixth Amendment violations will be
3 happening.
4 And so I see these steps as things that
5 would invite those challenges, not that we're trying
6 to avoid them.
7 CHAIR SARIS: Thank you. Commissioner
8 Wroblewski.
9 COMMISSIONER WROBLEWSKI: Thank you, Judge
10 Saris, and thank you all for participating on the
11 panel.
12 Let me start with Judge Davis that I've
13 had the great pleasure of working with in the last
14 several years with several alumni of the Baltimore
15 U.S. Attorney's Office, including Mythili Raman and
16 Jason Weinstein and Steve Dettelbach, and they are a
17 great group.
18 I want to follow up on some of these
19 questions. I specifically have a question for Judge
20 Lynch and Professor Klein.
21 You talked about that you thought it was a
22 good idea perhaps to fix appellate review when there

1 is a policy disagreement. Now there have been — and
2 one of the issues that's been cited here today and
3 that we talked about yesterday all day was the child
4 pornography sentencing guidelines.
5 There have been some district courts who
6 have taken testimony on the basis for the guideline
7 who have ruled specifically on the policy values of
8 the guideline and have rejected explicitly as policy
9 the guideline. But the vast, vast majority of
10 district courts who sentence child pornography
11 offenders don't do that.
12 They make a decision which is complicated
13 and involves many, many factors, including their view
14 of the guideline, of whether it serves the purposes
15 of punishment, offender characteristics, many, many
16 factors go into it, and they come up with a sentence,
17 and 45 percent or so come to a decision below the
18 guidelines.
19 How do I determine whether that's a policy
20 disagreement or not? So that's one question for you,
21 Judge Lynch.
22 And Professor Klein, you said that thought

1 it would be unconstitutional to eliminate certain
2 offender characteristics. If the legislature said
3 that a vocational training, or your vocational
4 history was off limits, that you thought that would
5 be unconstitutional. And the reason I have a
6 question for you —
7 MS. KLEIN: Without going too far, I said
8 it would raise an issue. I don't know that the Court
9 would say that's unconstitutional.
10 COMMISSIONER WROBLEWSKI: Okay, I don't
11 mean to overstate it, but Judge Hinojosa points out,
12 I think correctly, that there are now mandatory
13 minimum sentencing statutes that eliminate not just
14 that factor, but all factors relating to — actually
15 all factors related to the offense and the offender,
16 and say this is the sentence that must be imposed.
17 And there have been challenges to those statutes, and
18 they've been found — the challenges have been
19 rejected.
20 So I'm curious, how do you come to that
21 conclusion?
22 MS. KLEIN: I think, as I said, I'm not

1 sure they're unconstitutional and I wouldn't place
2 any bets on it. I think it is one thing for Congress
3 to say you commit offense X, the sentence is Y. You
4 have no discretion. That's the sentence: Y.
5 It might be another thing to say, well, if
6 someone commits offense X, you the judge can sentence
7 within a 40 percent, or a 25 percent range based on
8 whatever you want, except the defendant's age. And
9 it may be okay, but if Congress starts placing limits
10 on what judges normally do in making decisions about
11 offenders, someone will — some defendant will
12 certainly claim that that's a separation of powers
13 issue. They might not win, but if the Court gets
14 angry enough about the Commission cabining judicial
15 discretion and the Court decides, as it did in
16 *Booker*, you know, we think judges should be allowed
17 to judge, then there would be a separation of powers
18 hook if the Court wanted to give judges their
19 discretion back.
20 COMMISSIONER WROBLEWSKI: Let me follow up
21 with one question, and then we have to let Judge
22 Lynch answer the question question. I'm sorry.

1 MS. KLEIN: Sorry.
2 COMMISSIONER WROBLEWSKI: What if the
3 legislature said here's the guideline range, and the
4 guidelines were drafted at our direction saying that
5 most offender characteristics shouldn't be
6 considered, we've now revisited that and we think
7 that offender characteristics should be considered,
8 but only to a limited extent.
9 So it wouldn't say that they're offlimits,
10 they're just — they can be factored in but only to
11 some extent. How do you feel about that, just from
12 the separation of powers —
13 MS. KLEIN: Well I mean that's what we
14 have now, isn't it?
15 COMMISSIONER WROBLEWSKI: No, I don't
16 think that is what we have now. Now we have a
17 guideline range, and then judges in step three of the
18 process go on to 3553 and are required to consider
19 all characteristics of the offense and the offender.
20 And if a judge feels that the offender
21 characteristics warrant a probationary sentence, or a
22 maximum sentence, largely that's permissible, it

1 seems like that.

2 MS. KLEIN: I guess I'm not sure enough of

3 the background of the law to isolate the question.

4 COMMISSIONER WROBLEWSKI: Okay, Judge

5 Lynch, how about policy disagreements?

6 JUDGE LYNCH: Yes, I think that's the

7 $64,000 question. I'm dating myself by using that

8 number, but my father —

9 (Laughter.)

10 MS. KLEIN: I remember that show.

11 JUDGE LYNCH: — used to call it "the $64

12 question."

13 (Laughter.)

14 JUDGE LYNCH: A radio program. But I

15 think that is a very hard distinction. I don't think

16 the problem is quite where you place it, though,

17 because I don't think that judges who are considering

18 individual characteristics of defendants in coming

19 out to a lower sentence are necessarily expressing a

20 policy disagreement with the guideline.

21 I think the result is typically an

22 adjustment of sentence, rather than an abandonment of

1 the principle that the Commission and Congress think
2 that this crime is to be punished extremely
3 seriously.
4 Once you have an explicit statement by a
5 court that this guideline is not entitled to respect
6 because it is, as a policy matter, incorrect, then
7 really all bets are off. And that I think is the
8 more troubling situation.
9 Now I think there's also a complication
10 that I suppose at some level any time one identifies
11 a factor that the Commission has not identified,
12 there is some sort of policy rationale for utilizing
13 that factor.
14 On the other hand, take as an example the
15 fraud guidelines. It's not clear to me that the
16 Commission has taken — but by putting so much weight
17 on the amount of loss, it's not clear to me the
18 Commission has taken a policy position that the
19 amount of loss is, philosophically, the thing that
20 matters the most.
21 It's a convenient tool. It gives a rough
22 estimate of what is more serious than what. And it

1 usually is, and stealing more money is worse than
2 sealing less money. But when you look at, for
3 example, the individual characteristics of
4 frauds — and I'm not talking about offender
5 characteristics — there's a difference, it seems to
6 me, between causing a million-dollar loss by doing a
7 sort of cheat around the fringes of a $100 million
8 government contract and causing a $1 million loss to
9 one person by defrauding them face to face.
10 There's a difference between walking into
11 a bank with a check for a million dollars that is
12 forged and walking into a bank with a loan
13 application for a mortgage for a million dollars that
14 has false statements in it.
15 There are quite a variety of ways to
16 affect a million-dollar loss. When a court looks at
17 those and says, well, this is a really egregious kind
18 of fraud in a way the guideline doesn't take into
19 account, or this is a more understandable sort of
20 fraud that has a lesser impact on society than the
21 other, I'm not sure that the court is expressing some
22 disagreement with the philosophy of the guideline.

1 Where you have courts saying, out of the
2 air, we don't think it's a sensible thing, that's —
3 and I'm not necessarily troubled that a court would
4 ultimately do that if it's the Supreme Court of the
5 United States. I think it's problematic that, unlike
6 every other administrative agency, the Sentencing
7 Commission doesn't get its product reviewed in any
8 way by the courts. But if each individual judge is
9 free to say, I just don't think it's that big a
10 problem, I don't think it's that terrible a conduct,
11 I think systematically the Commission is wrong, but
12 the judge in the next courtroom can say the opposite,
13 can say the Commission hasn't gone far enough in
14 going after these guys — and you know, another judge
15 says, like Goldilocks, the Commission got it just
16 right — and now you have three different sentencing
17 systems in three different courtrooms, that strikes
18 me as the thing that is problematic.
19 COMMISSIONER WROBLEWSKI: But if we put in
20 a higher standard of review for those judges who are
21 that candid, aren't we just ensuring that they won't
22 be — I mean, I think for example of the *Pepper* case

1 that was in the Supreme Court.

2 Those were two judges — the same defendant

3 in front of two different judges who I think, if

4 there were litigators who had prosecuted or defended

5 in front of those judges would recognize that they

6 have very, very different philosophies of sentencing,

7 yet neither of them said explicitly this guideline is

8 wrong, but they came out with vastly different views

9 about a particular case.

10 JUDGE LYNCH: Well I think the other way

11 in which I would favor beefed up appellate review is,

12 I'm not sure how to do this, is to encourage courts

13 of appeals to be more aggressive in dealing with

14 outlier sentences. I think that would be

15 significant.

16 I do think that most of these variances

17 are relatively minor in the grand scheme of things.

18 They're not systematic rebellions, or even

19 individualized rebellions against particular

20 guidelines. They're adjustments for particular

21 cases.

22 But you do see outlier sentences. And I

1 think that is a problem. But if you think the judges
2 aren't being candid, well frankly then the whole
3 system is in a hole, because under mandatory
4 guidelines, guidelines could be interpreted
5 differently, they could be applied differently, facts
6 could be found differently.
7 You know, when you measure disparity only
8 by saying here's within — the percentage that are
9 within guideline sentences, with all due respect,
10 you're missing the boat. Because an awful lot of —
11 there was disparity under mandatory guidelines. It
12 would not show up that way because judges were
13 saying, here's the guideline and I'm going to have to
14 sentence within it. But a guideline applied in one
15 courtroom could be very different than the guideline
16 in another courtroom. I think those were the product
17 of judges trying their best to actually interpret
18 guidelines. And some of them were more thoughtful
19 about it than others, and others may have taken a
20 more hands-off attitude to what the guidelines said.
21 But if the question is: Can judges evade
22 guidelines or can they evade systems by being

1 disingenous? Well, the answer is, yes, they can.
2 And if you think that they do, we might as well fold
3 up our tents altogether on this whole subject.
4 I don't think they are systematically
5 disingenuous, and I think the courts that are taking
6 that dramatic approach toward the child pornography
7 guidelines are doing it for a reason. They're doing
8 it because they think those guidelines are as a
9 matter of policy incorrect. And judges who are
10 saying, no, I accept that policy judgment, but if you
11 look at the individual characteristics of this case,
12 this defendant is not really the kind of person for
13 whom that policy is intended, that judge is doing
14 something different.
15 CHAIR SARIS: Judge Davis?
16 JUDGE DAVIS: I do want to acknowledge
17 with appreciation your saying out loud that there is
18 a risk of driving decision making underground. I
19 don't think Judge Lynch meant to suggest that judges
20 are disingenuous. I wouldn't use that word. But it
21 is certainly something that ought to be on the minds
22 of the commissioners, and on the mind of Congress as

1 it goes about its work.

2 MS. KLEIN: Can I just —

3 CHAIR SARIS: I think Judge Hinojosa

4 wanted to do one follow up, and then I'll go right

5 over to you.

6 MS. KLEIN: No problem.

7 COMMISSIONER HINOJOSA: A quick follow up.

8 Well first of all, I have to say the U.S. Attorneys

9 and the Federal Public Defenders in the Southern

10 District of Texas are great.

11 (Laughter.)

12 COMMISSIONER HINOJOSA: Back to this

13 characteristics, we talk about 3553(a) for example as

14 if it's something that's in the Bill of Rights. I

15 mean, it's only there because it's a congressional

16 statute. And we consider the offense, and the nature

17 and circumstances of it, and the history and

18 characteristics of the defendant, because it's in the

19 statute. But certainly we can all agree that

20 Congress would have the right to say, within that

21 statute you don't consider race, sex, national

22 origin, or creed. And certainly they also included

1 socioeconomic status. I mean, certainly that would
2 not raise any constitutional issues.
3 So why should the others raise any
4 constitutional issues, if Congress is making a
5 decision which they already have, as far as I'm
6 concerned, when they wrote the Sentencing Reform Act
7 and included that directive to the Commission that's
8 in the statutes, and you have to read 3553(a) like
9 you read any other statute, is there something else
10 that's written in the law that applies to this? And
11 certainly 994 did, 28 994. And certainly no one
12 would say that Congress doesn't have the right to
13 exclude those: race, sex, national origin, creed,
14 and they included socioeconomic status. Why can't
15 they put the others as ordinarily not relevant or
16 relevant under certain circumstances? They write the
17 statute, and it is not in the Bill of Rights or any
18 other place in the Constitution that these are the
19 things that judges — that judges have some
20 constitutional right to make these decisions without
21 some direction?
22 MS. KLEIN: I think it's just what judges

1 do. I mean, before 3553, judges still exercised
2 discretion, and they would look at offender
3 characteristics, and offense characteristics. You
4 didn't need — that existed before 3553(a).
5 And of course Congress can exclude things
6 like race and sex, which are unconstitutional for
7 judges to consider. So I mean it goes without saying
8 you can prevent judges from doing unconstitutional
9 things. I don't think it follows that you can
10 necessarily prevent judges from exercising
11 discretion.
12 Maybe you can. Maybe Congress could enact
13 a statute saying judges have no discretion. Here's
14 the sentence. Or, here's a range, but here are the
15 five things they consider — can consider in deciding
16 within this 25 percent range. And here are the ten
17 things they can't consider.
18 It may be that that would be
19 constitutional. I don't know.
20 COMMISSIONER HINOJOSA: Right —
21 MS. KLEIN: I see the argument on both —
22 COMMISSIONER HINOJOSA: I think it

1 describes the oddity of *Booker*, that as a judge you
2 can add whatever you want to raise a penalty and that
3 doesn't raise a fact finding by a jury, but that
4 somehow when there's something in the statute, or
5 something that gives you some direction as to what
6 you can consider, that that somehow raises the
7 constitutional issue. And I think that's probably a
8 tension that at some point the Supreme Court will
9 have to address again.
10 MS. KLEIN: I think *Booker* was wrongly
11 decided. I'd like to see the guidelines mandatory,
12 and I thought the Sixth Amendment —
13 VICE CHAIRMAN CARR: Could you sit closer
14 to the microphone?
15 (Laughter.)
16 MS. KLEIN: But I don't think we're going
17 to go back there, though. I mean, I don't think — the
18 Court's not going to change its mind.
19 COMMISSIONER HINOJOSA: They might.
20 CHAIR SARIS: Does anyone else want to
21 comment? It's an interesting — Judge Lynch?
22 JUDGE LYNCH: I agree, Judge Hinojosa. I

1 think there's no reason why Congress couldn't make
2 that kind of change, because I believe Congress can
3 set the policy.
4 Congress could decide to have a pure just-
5 deserts system, if it wanted to. Congress could
6 decide to have a pure tariff system of sentencing, if
7 it wanted to.
8 I think 3553(a) though is in there because
9 in the Sentencing Reform Act that Congress was
10 looking in two directions at once and didn't know
11 where it was going to wind up going. And it got
12 rediscovered by the Court in *Booker*, but it was
13 always there. And I think it's because ultimately it
14 would not make a lot of sense to have that kind of
15 system, and most people recognize that.
16 Most people recognize that there is
17 individual variation even in terms of fairness of
18 what should be done with individuals, as Judge
19 Davis's example suggested.
20 And I think it is also a question that
21 most people recognize that sentencing is about crime
22 reduction in some important way. You know, I thought

1 it was very strange for Mr. Axelrod this morning to
2 say that we have overcrowded prisons but we still
3 think we should advocate guidelines for what we think
4 is in the abstract right sentence.
5 Well with all respect, I don't know there
6 is an abstract right sentence. What there is, is
7 Congress makes a determination we're going to spend
8 this much on crime control. And then somebody's got
9 to figure out what's an efficient way to do that?
10 And that may mean that some crimes deserve more
11 attention than others, and some are going to have to
12 have their sentences reduced because otherwise
13 there's no way to enforce all these things in full.
14 And I think that most research suggests
15 that some attention to who are systematically likely
16 to be people who will reoffend is a significant way
17 of thinking about how efficiently to use our prison
18 resources.
19 You know, who do we want in jail? And who
20 do we not want in jail? And who do you want in jail
21 for a long time? And who not? And I quite agree
22 with you that Congress could decide to ignore that

1 and say all we care about is that this is more
2 serious than that, and that's what determines the
3 sentence. But I'd be very surprised if a rational
4 Congress would seriously do that.
5 CHAIR SARIS: Judge Davis.
6 JUDGE DAVIS: Briefly. And if it did,
7 what I am reasonably confident of is that our
8 existing doctrine of selective prosecution would
9 undergo a major change.
10 If Congress went down this path of
11 creating set sentences such as the aggravated
12 identity theft sentence of two years consecutive to
13 anything else, for 150 federal crimes, I can't
14 imagine a regime in which the existing selective
15 prosecution, discriminatory prosecution doctrines
16 that the Supreme Court has announced, could stay in
17 place.
18 It's difficult for me to imagine how
19 Congress could insulate Executive Branch
20 decisionmaking under a just deserts system of that
21 sort. But I'm speculating.
22 MR. BEMPORAD: If I could make one comment

1 on Judge Hinojosa's very good question, I thought
2 about couldn't Congress just knock out these factors
3 and say these factors are not relevant and you can't
4 consider these factors?
5 Congress absolutely can do that. The
6 trouble is not that Congress has removed those
7 factors. The trouble is what's left. That's what we
8 had in 3553(b)(2) which was excised by *Booker*,
9 because you could consider all these factors but when
10 it came time to sentence you could consider the
11 guideline range only, except in situations of
12 departures. *Booker* said that's not enough.
13 If 3553(a) was changed to say don't
14 consider offender characteristics, only consider
15 under 3553(a)(4) the guidelines, and under 3553(a)
16 the policy statements, and take out other factors,
17 then you're going to have a situation where
18 non-guidelines sentences are not available in some
19 cases.
20 And if they're not available in some
21 cases, you're back to a mandatory guideline system.
22 It's not that the Congress can't do that, but if

1 Congress does do that what's left in that statute?
2 And if the guidelines are left standing alone in that
3 statute, I think you're in a mandatory guideline
4 system, I think it does raise Sixth Amendment issues.
5 CHAIR SARIS: I think Mr. Miner wants to
6 jump in, and then Commissioner Jackson.
7 MR. MINER: Just a few points. First with
8 regard to Judge Davis's point about what would happen
9 if you got to the point where Congress would have
10 mandatory minimum sentences across a number of
11 different categories, and the discretion that that
12 would give prosecutors.
13 First of all I think that underscores the
14 importance of giving effect to the guidelines.
15 Because I think there's a real question among
16 policymakers as to whether the guidelines are having
17 that effect in guiding sentencing outcomes. And the
18 choices among those in Congress are limited. And one
19 of the choices that provides certainty is mandatory
20 minimum sentences.
21 In terms of prosecutors and discretion in
22 that space, that is a policy that the Department of

1 Justice has and struggles with, and the Department of
2 Justice had a policy under Attorney General
3 Thornberg, which was you charge the most serious,
4 readily provable offense. And there were certain
5 policies for departing from that, if you chose to and
6 you felt it was appropriate.
7 I believe that was Attorney General Reno
8 who issued a memo changing that policy. Attorney
9 General Ashcroft put the Thornburgh policy back out in
10 a memo. And then I believe that Attorney General
11 Holder has changed that.
12 That's something that I think the
13 Department of Justice needs to manage in terms of how
14 consistently it applies these mandatory penalties
15 where they exist. And I think that there's a real
16 question about how consistently they are applied.
17 And Judge Lynch, I know you had an
18 experience with that as a District Court Judge, and
19 the lack of consistency and guidance in some of those
20 cases can cause some inconsistent application of
21 those penalties.
22 JUDGE LYNCH: It's not always under the

1 control of the Department. In the Southern District
2 of New York, we had the situation, I believe it still
3 applies, where most of our gun cases came from
4 Manhattan and the Bronx. We had a few suburban
5 counties that don't count.
6 (Laughter.)
7 JUDGE LYNCH: The district attorney on the
8 Bronx had a policy of referring all prior felon gun
9 cases from the streets of his county to the federal
10 prosecutor, and they were subject to mandatory —
11 severe mandatory minimum sentences and to harsh
12 guidelines.
13 The district attorney in Manhattan did not
14 believe in those penalties and did not cooperate in
15 that program.
16 So the determinant of whether you were in
17 the federal system or the state system was which side
18 of the Harlem River you were on if you were a
19 convicted felon with a firearm.
20 As Judge Davis said, the discretion
21 appears in all kinds of places. Judges aren't the
22 only place where discretion and disparity rule in the

1 system, from the police officer on the street, to the
2 local district attorney, to the United States
3 Attorney, to the Judiciary. It's everywhere in the
4 system.
5 MR. MINER: Judge Lynch, wouldn't you
6 agree, though, there's a difference between
7 sovereigns and those who are working for separate
8 sovereigns making a decision to treat a crime in one
9 way versus different policymakers within the same
10 sovereign who happen to sit on those same geographic
11 dividing lines?
12 JUDGE LYNCH: James Madison thought so.
13 Tell that to the guy who is going to prison for a
14 longer time based on that kind of decision making.
15 MS. KLEIN: I'll tell him.
16 (Laughter.)
17 JUDGE LYNCH: In the real world, that
18 causes much more resentment, much more hostility,
19 much more disrespect for the system than a difference
20 between something that happens in New York and
21 something that happens in Texas.
22 JUDGE DAVIS: I couldn't agree more. I

1 aboslutely couldn't agree more.

2 CHAIR SARIS: Commissioner Jackson.

3 VICE CHAIR JACKSON: Judge Lynch, I was

4 just wondering whether you share Mr. Bemporad's

5 optimism that changes to the guidelines might help to

6 reduce the disparities that we see within the federal

7 sovereign?

8 JUDGE LYNCH: Well, yes and no. Yes, in

9 the following way: I absolutely believe that it is

10 important for the Commission to get the guidelines

11 right, because the guidelines do direct most

12 sentences.

13 It is important to remember, other than

14 government-sponsored departures, the departure

15 rate — I still call the departures, sorry — the rate of

16 non-guidelines sentences is something like 17

17 percent. So most of the sentences are being directed

18 by the guidelines. And even those variations are

19 mostly variations of a relatively minor extent. Oh,

20 the guidelines are 20 years? I'm giving the guy

21 probation. They're mostly the guidelines are 60

22 months and I'm giving 48 months.

1 So getting the guidelines right is
2 critical, because the guidelines are what drive most
3 sentencing. And I think in those few areas where
4 judges are systematically unhappy with the severity
5 of the guideline, or the structure of the guideline,
6 enough judges aren't systematically unhappy — I don't
7 say the judges are necessarily right and the
8 Commission wrong, but the Commission should take
9 a look at those and see whether the judges are telling
10 them something.
11 Where I say "not quite" is, remember the
12 dynamics of the system. Wherever the guideline is,
13 I'm confident that Mr. Bemporad is going to come in
14 for his client and advocate a lower sentence. That's
15 his job. And is going to find things about this
16 individual that aren't taken into account by the
17 guidelines, whatever the guidelines are.
18 And the government may take a strong
19 countervailing view, or it may not. When the judge
20 decides the sentence, Bemporad is always going to
21 appeal. If there is any nonfrivolous basis for doing
22 to the court of appeals and seeking review, that's

1 again his job. The government is remarkably risk-
2 averse.
3 One reason why I'm not sure about
4 proposals to change the standard of appellate review
5 having much effect, since most of the variation is
6 downward — and I say this as somebody who generally
7 favors more lenient sentences, so I'm not here
8 complaining of it's terrible we have such low
9 sentences — but the fact is, since most of the
10 variation is downward and the government doesn't
11 appeal much, changing the appellate standard of
12 review is not going to have a big impact on what the
13 ultimate sentences are unless it's coupled with the
14 government taking a more aggressive approach to
15 appealing sentences.
16 So, yes, it's very important to get the
17 guidelines right. Yes, if the judges agreed with the
18 guidelines there would be less fiddling around with
19 guidelines. But no, in the sense that one thing that
20 drives the differences is individual variation.
21 You're never going to get around the fact
22 of individual variation, and you're never going to

1 get around the fact that defense counsel's job is to
2 find those individual variations and press them as
3 aggresively as possible. And there's not always —
4 especially the federal system — you don't have a
5 crying victim in a lot of these cases.
6 You have narcotics cases. You have
7 immigration cases. You have fraud causes with
8 disparate — dissipated effects on a white class of
9 victims, so you don't have a countervailing emotional
10 charge on the other side to argue for change.
11 So I expect, whatever you did with the
12 guidelines, frankly, if judges have grounds to
13 deviate there will be some modest deviation downward
14 from any kind of guideline system, probably. But
15 modest.
16 CHAIR SARIS: Judge Howell. Or was it
17 Judge Friedrich, we'll have both.
18 COMMISSIONER HOWELL: We can both follow
19 up since we've got a few minutes left.
20 CHAIR SARIS: No, we have plenty.
21 COMMISSIONER HOWELL: I wanted to ask a
22 question that I was holding off to see that everybody

1 would have time. But it follows up on something that
2 you just said, Judge Lynch, and it's a question that
3 was sort of prompted by the Department's testimony in
4 the last panel. Which is, that evaluating any
5 proposal they're going to have to weigh the benefits
6 from any proposal.
7 So the question I have for the whole panel
8 about the Sentencing Commission's proposal, which we
9 are hopeful if enacted would help reduce the
10 perception if not the reality of growing unwarranted
11 disparity across the country in sentences.
12 In putting aside the constitutionality
13 issues, which are significant and this has been most
14 interesting for all the commissioners to hear
15 people's perspctives on this, but do you think the
16 proposal would work?
17 I mean, would the burden — burdens being
18 increased litigation, testing its constitutionality
19 in all of its various permutations — do you think that
20 the benefits from it, that it would actually work?
21 And so — because that's a question that, as
22 the Commission was considering the proposal, we

1 thought that since it was just making some minor but
2 we thought significant — with the potential to having
3 significant impact around the edges of the current
4 advisory system, that the burdens wouldn't be too
5 much and that the benfits could have the potential of
6 outweighing the burdens?
7 But I'm also interesed in that assessment
8 from you all. We can just start down the line.
9 Start with you, Professor Klein.
10 MS. KLEIN: Sure. I don't know how to put
11 aside the constitutionality in assessing whether the
12 benefit outweighs the burden. I mean, I think if all
13 Congress is going to do is put, what is it, 37, the
14 part of the statute that *Booker* excised —
15 COMMISSIONER HOWELL: 3742.
16 MS. KLEIN: Yes, 3742, if all you're going
17 to do is enshrine reasonablenss review, I can't see
18 any harm in that.
19 If you're going to start putting in
20 heightened standards of review on appeal, then I
21 worry that the burden will be the Supreme Court
22 saying later that was unconstitutional. And then

1 having to go back and redo all those sentences that
2 were then sentenced under that standard.
3 So I'm a little nervous about it. I think
4 there should be some statute. We shouldn't just be
5 operating under a system of is it reasonble. I guess
6 we limped along that way for the last five years, so
7 it's not the worst thing. But it would be nice to
8 have a statute telling judges what the standard of
9 appeal was.
10 But if you start trying to make it
11 something that's not abuse of discretion but not de
12 novo something in between, I just get a little
13 nervous about what courts are going to do with that.
14 COMMISSIONER HOWELL: No, but I appreciate
15 that you think that you can't just separate the
16 constitutionality from making that assessment of
17 whether or not the potential that we see in our
18 proposal —
19 MS. KLEIN: And appeals are such a small,
20 I mean every plea agreement that I've seen, and I've
21 been looking at a lot of them, has an appeal waiver.
22 So there are not many appeals. It's really just the

1 people who went to trial. You know, the government
2 rarely appeals. If you have a plea, you don't
3 appeal. So there's such a tiny percentage of cases
4 that appeal.
5 COMMISSIONER HOWELL: Judge Lunch?
6 JUDGE LYNCH: I think I agree with most of
7 that. We went through an enormous disruption in the
8 *Blakely* — *Booker* era, and I would rate the costs of
9 going through that again to be relatively high.
10 So the real question is what are the
11 benefits? And I see relatively few for most of these
12 proposals, even ones that in the abstract I am
13 inclined to agree with.
14 I don't think we're limping along. I
15 don't think that an increase from 12 percent
16 non-government sponsored non-guidelines sentences to
17 17 or even 20 or even 25 is some kind of disaster,
18 especially if one factors in — and I think it's a very
19 important thing for the Commission to study — what are
20 the extent of these variances.
21 It's not a question of how many; it's a
22 question of are we seeing a radical undermining of

1 sentencing policy? Or are we seeing a case-by-case
2 adjustment? And I don't that there's a problem.
3 The last thing I'd say is, I agree that
4 the appellate standard is not probably the most
5 important thing. Relatively few appeals get taken.
6 Maybe with a more aggressive standard of review the
7 government would appeal a little more. But it's not
8 in the courts of appeals where this is going to
9 happen.
10 And I guess I'd say one thing, without
11 trying to reveal anything from within the
12 confessional, in going from the district court to the
13 court of appeals, my sense of the desirability of
14 more appellate review of sentences has drooped.
15 (Laughter.)
16 JUDGE LYNCH: It's not because my
17 colleagues are not good at this; it's because now I
18 see it also from that perspective, and I see that we
19 don't have the same degree of information, the same
20 of feel for the case. I think appellate judges are
21 very reluctant to get pushed into this.
22 I still think maybe we should be more in

1 it than we are. That's what I thought from the
2 district court perspective. I still think it. But
3 it's going to be a tough sell to appellate judges to
4 get them to scrutinize any but outlier sentences.
5 JUDGE DAVIS: I really agree with Judge
6 Lynch, and of course I speak only for myself, I'm not
7 here representing my court, but we really have
8 settled into a comfort level I think in the Fourth
9 Circuit. It ain't broke. You know, we've pretty
10 much gotten rid of departures. If it's a variance,
11 it works. And we have the presumption of within
12 guidelines, the appellate presumption. And I think
13 the court is really quite comfortable with where we
14 are.
15 MR. BEMPORAD: I would just make one
16 point. Of course I agree with Judge Lynch and Judge
17 Davis, but I would say that there's one point where I
18 think that there are additional costs besides the
19 constitutional costs. And that's the situations
20 where Judge Lynch I think already mentioned, the idea
21 that guideline application disparity will become
22 hidden.

1 And so I would give one example. If you
2 have — and to finish out — if you have a situation
3 where substantial weight is given to the guidelines,
4 that's one of the proposals, or you have more review
5 of non-guideline sentences, you're going to force,
6 conceivably, force more cases into, or more judges to
7 make their decisions as guideline decisions, and then
8 that disparity happens in the application.
9 The big example we have in my part of the
10 country is minor role, where the same courrier coming
11 across the border in some divisions gets minor role,
12 in some other divisions doesn't; with some judges in
13 one division gets minor role, other divisions
14 doesn't. And as the Commission knows, that can have
15 a huge effect in large drug cases where minor role
16 also caps the amount of levels.
17 Now I think this is a big problem in —
18 COMMISSIONER HOWELL: We tried to fix
19 that.
20 MR. BEMPORAD: I'm just getting to that
21 point, and this is where I thought a *de facto* fix is
22 working much better than a *de jure* fix.

1 The Commission explaining what 3B1.2
2 means, and changing its language in the application
3 notes to try to encourage more application of the
4 minor role guideline is a perfect example of a place
5 where the Commission can, by changing guidelines, not
6 by *de jure* changing the legislation, can really get
7 rid of disparity that a more mandatory system, or a
8 system where there are more guidelines *de jure*, that
9 sort of disparity will continue to be hidden, and I
10 don't think that's something that we should push for.
11 CHAIR SARIS: Mr. Miner.
12 MR. MINER: I think that — and I think it's
13 interesting to hear the comments from judges who
14 think this is working well, and perhaps in some ways
15 it is. But it doesn't change the fact that we have a
16 statute that provides guidance in terms of appellate
17 standards elsewhere.
18 And although you may have it under control
19 within the Third Branch, the other two Branches may
20 fee a little bit left out.
21 In terms of just speaking briefly to de
22 facto and *de jure*, I don't know that it has to be an

1 either/or. I think that the guidelines should be
2 well calibrated regardless of whether we have more
3 robust review or not.
4 I would say if you have more robust review
5 and judges are expected to follow the guidelines, at
6 least in terms of how they're going to be reviewed,
7 then I think it's even more important to make sure
8 the guidelines are *de facto* calibrated the right way.
9 I don't think that that consideration
10 should ever go away. In terms of the proposals, I
11 thik that the proposals, you know, not to make a
12 Swiftian comparison, but it's a modest proposal. I
13 think what you've set forth here is something that
14 tries to track what the Supreme Court has set out in
15 guidance. There have been some bread crumbs that
16 have been laid out there, and some of this tracks
17 what the Court has said.
18 Some of it perhaps, as you insist on
19 particular levels of weight being given, might you
20 run into some constitutional concerns? Yes. But I
21 think that you have to, in regaging in this area,
22 take some risks. This is not, though, topless

1 guidelines or something like that where you really do
2 face that sort of rupture in the sysem like we had in
3 *Blakely*. You're talking about small changes around
4 the guidelines, and if a particular level of weight
5 is found to be inappropriate, the Court will say so;
6 and then you'll adjust it.
7 But the components that are suggested here
8 I think are modest. I think they're reasonable. I
9 think they track not just what the Court has said,
10 but they also track what the considerations are that
11 the various cases have shown. And I think that there
12 are inconsistencies in the statutes, as well, that
13 need to be addressed.
14 CHAIR SARIS: Thank you. Did you have —
15 you okay? Anybody else?
16 (No response.)
17 CHAIR SARIS: Thank you. Wonderful panel.
18 We'll come back here at 12:45. We've a lot to do
19 this afternoon, so eat up. We've a lot to do, so
20 thank you.
21 (Whereupon, at 11:47 a.m., the hearing was
22 recessed, to reconvene at 12:45 p.m., this same day.)

1 AFTERNOON SESSION
2 (12:52 p.m.)
3 CHAIR SARIS: All right. We're all here.
4 Thank you all for coming. We are on this panel on
5 Restoring the mandatory guidelines, and I would like
6 to introduce our panelists.
7 The Honorable Theodore McKee —
8 JUDGE McKEE: "Ted" will work.
9 (Laughter.)
10 CHAIR SARIS: Ted is the chief judge of
11 the United States Court of Appeals for the Third
12 Circuit. Currently, Chief Judge McKee is a member of
13 the Criminal Law Committee of the Judicial Conference
14 of the United States.
15 And at this point I'm just going to jump
16 in and say we've had a number of panelists from the
17 Criminal Law Committee, and I thank so much the
18 Committee for taking the time to have people come and
19 testify.
20 The Honorable William K. Sessions, of
21 course our former chair, a judge on the United States
22 District Court for the District of Vermont. He

1 served as chief judge of that district from 2002 to
2 2010. Judge Chair was of course our chair from 2009
3 to 2010, and vice chair from 1999 to 2009.
4 Michael Nachmanoff is the Federal Public
5 Defender for the Eastern District of Virginia.
6 Previously he served as acting defender and as an
7 assistant in that office.
8 Frank Bowman, a name that everyone
9 recognizes, Frank Bowman III, a professor of law
10 currently at the University of Missouri Columbia
11 School of Law, and previously at the Indiana
12 University School of Law, Indianapolis. He also
13 practiced law in a number of capacities, including as
14 an assistant United States attorney in the Southern
15 District of Florida, and as an attorney in the
16 Department of Justice's Honors Program, and a
17 detailee to the Sentencing Commission.
18 Professor Michael Volkov, someone who
19 speaks a lot in this area, a partner in the firm of
20 Mayer Brown in DC. Previously he served as a
21 federal prosecutor in the United States Attorney's
22 Office in the District of Columbia, and as a trial

1 attorney in the Antitrust Division of the Department
2 of Justice. He also served as the chief crime and
3 terrorism counsel for the Senate Judiciary Committee,
4 and chief crime, terrorism, and homeland security
5 counsel for the Senate and House Judiciary
6 Committees.
7 So welcome to all of you. If you weren't
8 here this morning, and as I'm sure Judge McKee — I
9 don't know if they do this in the Third Circuit, but
10 we have this little light system —
11 JUDGE McKEE: We have them, but they're
12 just kind of for trappings.
13 (Laughter.)
14 CHAIR SARIS: I might say the same here,
15 but basically the yellow goes off when it's almost
16 done, the red goes off when you're done, and there's
17 a big panel so I actually would — you know, sometimes
18 when I just have two, it's not such a big deal, but
19 when I have five, you know, we're really hot. We've
20 been very engaged all morning. So I just want to
21 make sure that we have time for Q&A.
22 Judge McKee.

1 JUDGE McKEE: I'm not used to being on
2 this side of the red light, but if I've timed this
3 correctly I should end just as the hook is coming out
4 and the red light is coming on. And I will try and
5 be deferential and certainly respect your time
6 limitations.
7 I just want to mention just briefly that
8 these are very, very sketchy remarks to try to stay
9 within the five-minute time limit, and I would refer
10 you to the more thorough written remarks that should
11 have been submitted to you yesterday.
12 Judge Saris and members of the Sentencing
13 Commission, on behalf of the Judicial Conference
14 Criminal Law Committee, I appreciate the opportunity
15 to provide our views on different sentencing schemes
16 you may be considering to address some of the
17 controversy that has arisen in the wake of Supreme
18 Court decisions giving sentencing judges more
19 discretion in determining appropriate sentences.
20 In February 2005, following the *Booker*
21 decision, the Committee convened a special meeting to
22 consider the need to seek a Judicial Conference

1 position on federal sentencing policy changes.

2 The Committee concluded that there were no

3 readily available superior alternatives to an

4 advisory guideline system. It specific considered a

5 number of potential legislative responses, including

6 the "topless guidelines," as I'll call them,

7 proposal, the *Blakely*ization of mandatory sentencing

8 guidelines, and the expanded use of mandatory minimum

9 sentences, and concluded that none of these were

10 superior to the system of advisory guidelines in

11 place after *Booker*. And I would like to briefly

12 touch on each of those possible alternatives.

13 The Committee expressed concern as to

14 "topless guidelines" that they depended in large part

15 upon the continuing viability of the Supreme Court

16 decision in *Harris v. United States*, and it is not at

17 all sure after *Booker* and its progeny that *Harris*

18 remains a viable option.

19 In addition, I would submit that even in a

20 "topless guideline" system, the thing which seems to

21 be driving the concern in the criticism now would not

22 be abated and would similarly be a different place in

1 which the judicial discretion would begin to operate,
2 but it would not eliminate the concerns over
3 inappropriate sentencing disparity.
4 As to the second alternative,
5 *Blakely*ization or mandatory sentencing guideline, the
6 Committee discussed the incorporation of the right to
7 jury factfinding into the sentencing guidelines
8 system as would be suggested by a system of
9 *Blakely*ization and concluded that it would be
10 impossible to immediately require that all of the
11 enhancements that would be required to be considered
12 under such a system be alleged in the indictment and
13 submitted to a jury.
14 I would like to add that a system of jury
15 factfinding would inevitably elevate some facts while
16 ignoring others, such as employment history,
17 attitudes of neighbors who may know the offender,
18 these things would never, ever be submitted to a jury
19 but yet it's someting that a sentencing judge might
20 be very interested in and might consider very
21 relevant.
22 Three, the expanded use of mandatory

1 minimum sentences. The result of mandatory minimums
2 would be a sentencing regime that is even harsher and
3 far more costly than the one we have now, at the
4 expense of the individualized sentencing response to
5 criminal behavior that continues to be the focus of
6 sentencing under 18 U.S.C. 3553(a). Disparity
7 would not disappear, because judges would have to
8 decide who gets only the mandatory minimum, and which
9 offenders deserve more severe penalties.
10 Mandatory minimum penalties are applied
11 inconsistently, and I think studies have shown that
12 when you transfer a sentencing power from the courts
13 to prosecutors, even more than some of the other
14 suggested alternatives do.
15 Fourth, the advisory sentencing
16 guidelines. Although the Judicial Conference has not
17 revisited its position on advisory sentencing
18 guidelines in recent years, the Committee is aware of
19 a survey sponsored by the Commission in which 75
20 percent of the district judges who responded believed
21 that the current advisory guidelines system best
22 achieves the purposes of sentencing.

1 The Committee is also aware of
2 congressional concern that mandatory guidelines may
3 open the door to inappropriate sentencing disparity.
4 However, at least one peer-reviewed study by very
5 knowledgeable and experienced respected researchers
6 at Penn State has concluded that, and I'm quoting:
7 "There is insufficient empirical support
8 for broad-based policies that would globally
9 constrain federal judges' sentencing discretion as a
10 remedy for disparity." End of quote.
11 I realize that conclusion differs somewhat
12 from the conclusion reached by your own recent study.
13 Whatever the reason for the very different outcomes
14 in those studies, the very fact of the disagreement
15 in these two different studies, whatever the reason
16 may be, suggests that no change should be made,
17 certainly no sweeping change, until there's enough
18 solid data in peer-reviewed analysis to support
19 reasoned action.
20 The Penn State study that I referred to
21 clearly suggests that the best way to obtain fair
22 sentencing, while minimizing disparity, is to allow

1 experienced judges to continue to impose sentences
2 using the guidelines as a starting point, while
3 considering all of the other factors set forth in
4 3553(a).
5 Thank you for your time, and I look
6 forward to the opportunity to answer any questions
7 that you may have.
8 CHAIR SARIS: Thank you. Judge Sessions.
9 JUDGE SESSIONS: Well thank you for
10 inviting me back. It is deja vu, that is for sure,
11 although I never was quite on this side of the table.
12 I am told — I don't remember another commissioner,
13 ex-commissioner ever coming back to testify, so I
14 feel particularly honored, since really my service on
15 the Commission was the highlight of my legal career.
16 So I feel particularly honored and thank
17 you for the invitation.
18 So I was going to start to talk to you
19 about things you've recommended and give you my
20 comments about those proposals, and then I read a law
21 review article on my proposal, and then I read
22 Michael's comments, and I just came to the

1 recognition that I must have done a terrible job at
2 explaining my proposal.
3 I read these comments and just thought, we
4 are on different planets. So rather than go through
5 what you did, I would like to at least talk about why
6 I came up with a proposal, what I was thinking about,
7 what it actually means, how it would be translated
8 into the community today, at least make my statement
9 as to what exactly I was trying to do, and then I'll
10 go back to Vermont and sell goat cheese —
11 (Laughter.)
12 JUDGE SESSIONS: — and just have a
13 wonderful life.
14 (Laughter.)
15 JUDGE SESSIONS: So five or six years ago,
16 *Blakely*ization was being talked about and so I,
17 together with Ken, and Allen, developed what was then
18 referred to as "the Sessions simplification," or "the
19 Sessions *Blakely*ization idea." It essentially was
20 broader ranges, more discretion up and down for
21 judges, but a mandatory or a presumptive guideline
22 system. It's essentially the same thing that Jim

1 Felman was talking about, the Sentencing Project was
2 talking about.
3 But what I've learned about a sentencing
4 policy while serving on the Commission is, everything
5 has a time and a place. And it was not the time and
6 the place at that point for *Blakely*ization. And as a
7 result, that proposal essentially was never released
8 and remained secret.
9 But why a proposal for a simplification of
10 the guidelines system? Why something which would
11 pretty dramatically change the guidelines structure?
12 And my view of what has been happening over the past
13 decade, or more than that, is that we essentially are
14 engaged in a conflict of branches of government. And
15 it's Congress against the Judges, and it's the DOJ
16 also in the mix. It is, it is various people and
17 agencies and branches who have an interest in
18 sentencing policy.
19 We, as we talk about how are the judges
20 reacting to this and that, forget that in fact
21 Congress has a very keen interest and responsibility
22 in regard to sentencing policy, and they are more

1 than willing to express that.

2 Judges have the same interest in

3 sentencing policy, and they are most interested in

4 expressing that.

5 If we never meet, if we never talk, if we

6 never compromise — that is, between branches of

7 government, or among branches of government — or

8 between DOJ and the defense establishment, if there

9 is no effort to make some permanent solution to

10 sentencing policy, we will be continuing to deal with

11 the ups and downs of changes in political parties

12 forever. And that will have a direct impact on the

13 sentencing process.

14 So what I was looking for — and I thought

15 perhaps when I left in 2010 this was the time — it

16 looked like perhaps at this particular juncture,

17 Congress might be willing to negotiate with judges,

18 and in particular I thought DOJ might be willing to

19 negotiate with defense lawyers, and defense lawyers

20 negotiate with DOJ, and by setting out this policy I

21 encouraged the beginnings of discussion and

22 deliberation.

1 The articles comes out. DOJ responds very
2 lukewarm to the article. And I think you can see
3 from the defense's reaction they have no investment
4 at all in negotiating over a process like this. But
5 I do want to just describe to you why it is a
6 compromise.
7 The defense has said this is not a
8 compromise; they're not getting anything from it?
9 They're getting a lot from it. I mean, first, it is
10 no question this is a presumptive guideline system.
11 Unlike what was represented, you still have the right
12 to depart. You have the right to depart under the
13 same terms and conditions that existed before, no
14 question about that.
15 But when you start talking about, in this
16 particular proposal, broader ranges, lowering, and
17 also increasing penalties, it has a number of direct
18 impacts of things that I felt were unfair about the
19 system. Relevant conduct becomes much less
20 important, because whenever you have relevant conduct
21 you can consider it within that range. But if it
22 goes to the next range, you have a jury trial right

1 and it has to be proven beyond a reasonable doubt,
2 significantly reduces the impact of relevant conduct.
3 The ratcheting up of penalties. I was
4 quoted once about saying how these penalties are
5 being ratcheted up point by point by point. That's
6 gone, except in issues of drug quantity — except in
7 issues that actually change the total range.
8 In fact, what they become are guidelines
9 within a *Booker*ized system in a much broader range.
10 So then you have much broader judicial discretion.
11 And when we talk about judicial discretion, 54
12 percent of all of the cases are within-guideline
13 range, and in fact the guidelines impact every
14 sentence.
15 And if you in fact include more discretion
16 in the determinaton of the guideline range, it has a
17 dramatic impact upon what is the ultimate sentence to
18 be resolved. Those have direct impact on a vast
19 number of defendants, no doubt.
20 And, you know, frankly, acquitted conduct
21 could be resolved, other issues could be resolved in
22 the negotiations, but I want to say that this is a

1 policy that in fact combines the interests of all
2 concerned. It's meant to be a starting point for
3 discussion. I'm disappointed that no one feels at
4 this point, and quite frankly this is a policy that
5 could never get adopted by Congress without a joint
6 effort, perhaps led by the Commission, but with
7 defense, and prosecution, and Members of Congress and
8 the Judiciary meeting to come to conclusion.
9 And if they can't do that, you know, then
10 we'll just continue on and ultimately who knows where
11 the next battle will be fought?
12 So thanks.
13 CHAIR SARIS: Thank you.
14 MR. NACHMANOFF: Thank you. Good
15 afternoon. Thank you, Judge Saris, members of the
16 Commission, and thank you for giving me the
17 opportunity to testify. I realize I'm now the third
18 federal defender to testify today, and I know you've
19 heard a lot from us in writing and in speaking, so
20 I'll try and be brief.
21 And a lot of what I had written down to
22 say has already been said by my distinguished

1 colleagues, Mr. Bemporad and Mr. Moore. And as Judge
2 McKee said a moment ago, looking at the subject of
3 this roundtable, restoring mandatory guidelines, I
4 began to review all of the material.
5 And it's clear, based on work that the
6 Commission has done, that a large majority of judges
7 are very satisfied with where we are — 75 percent
8 believe that the system we have now is working well;
9 86 percent of judges in that same survey indicated
10 that they were not in favor of the proposals that
11 were laid out in the abstract for this roundtable,
12 the notion of returning to mandatory guidelines with
13 jury factfinding.
14 And there was a question earlier this
15 morning, and Mr. Axelrod addressed it a little bit,
16 regarding whether or not federal prosecutors preferred
17 this advisory system to a mandatory system. And
18 while there was some discussion about silence on the
19 part of the Department of Justice, and in this case
20 perhaps silence truly is golden, federal prosecutors
21 have said — Lanny Breuer, the assistant attorney
22 general — that really there is no enthusiasm for a

1 return to a mandatory guideline structure from the
2 rank and file of federal prosecutors. And I'm sure
3 there's a variety of opinions within that
4 organization, as there are in many places.
5 As the Commission knows, we don't stand
6 alone in our views. The ABA, NACDL, FAMM, ACLU, have
7 all submitted in connection with this hearing and in
8 other hearings their view that this advisory system
9 is working well. Not that there are not areas for
10 improvement, but that a return to mandatory
11 guidelines would not be good for the criminal justice
12 system.
13 So it should come as no surprise that I am
14 here to say that a restoration of mandatory guidelines
15 is something that we as federal and community
16 defenders adamantly oppose. We didn't like the
17 guidelines when they were mandatory the first time
18 around. We certainly don't want to see mandatory
19 guidelines resurrected, with or without the kinds of
20 systems that have been proposed.
21 And we understand entirely that these are
22 talking points. These are ideas. This is how a

1 conversation is started. But the question is: What
2 is the purpose of the conversation?
3 And if the purpose of the conversation is
4 to solve a problem, federal and community defenders
5 take issue with the premise of the question.
6 Representative Scott has taken a great interest in
7 the subject and has some really wonderful quotes.
8 One that I think you're all familiar with is that
9 *Booker* is the fix, not the problem, it's the fix.
10 And another one that I think is apropros
11 for today is that sometimes you just need to follow
12 the wisdom of don't just do something, stand there.
13 We as federal defenders —
14 (Laughter.)
15 MR. NACHMANOFF: — believe that the
16 position we're in now as a result of *Booker* is
17 arriving at more just sentences, and the discretion
18 that has very moderately been exercised by judges
19 around the country has been good, and in fact has
20 reduced disparities.
21 I want to just talk for a brief moment
22 about the issue of race, which I know was raised on

1 the prior two panels, and the multivariant study and
2 the Penn State study, and I certainly even more so
3 than the questions asked and the answers given
4 before, feel like I am not an expert in this area. I
5 went to law school because I'm terrible at math.
6 I do want to point out, though, that
7 really the numbers don't lie; that post-*Booker* more
8 African American defendants have been able to get the
9 benefits of the discretion that judges can use to
10 impose lower sentences where they feel that the
11 guidelines have been too harsh.
12 With regard to career offender sentences
13 between 2006 and 2010, judges imposed below-
14 guideline sentences in 2,500 cases involving African
15 American defendants, which saved them a total of more
16 than 8,000 years in prison. That is a significant
17 and real and concrete fact about the way *Booker* has
18 affected sentencing and has in many ways been
19 beneficial for defendants, African American
20 defendants.
21 In addition, we know, and the Commission
22 knows, from the 15-year report from the mandatory

1 minimum report that was just issued, that African
2 American defendants are more likely to be charged
3 with mandatory minimums, are more likely to have a
4 criminal history, and as a result of that criminal
5 history are more likely to be subject to 851
6 enhancements, are less likely to be eligible for the
7 safety valve, are less likely to be given Rule 35s
8 and 5Ks.
9 And so the fact that judges can now
10 address disparities in sentencing is a positive
11 thing, not a negative thing. And so the premise of
12 returning to a mandatory guideline system in the
13 light of all of that information is something that we
14 feel strongly should not be done. Should not be
15 done.
16 I have submitted detailed information
17 about the issue of the compromise and the fact that
18 the idea of a trade of mandatory guidelines in the
19 hopes that Congress would then be less likely to
20 interfere with the sentencing process through
21 mandatory minimums or directives to the Commission,
22 we don't believe would be the case. Based on the

1 history of what the Congress has done, those
2 political pressures will continue.
3 And so we don't want to trade some
4 mandatory minimums which we oppose for mandatory
5 minimums in all cases.
6 Thank you.
7 CHAIR SARIS: Thank you. Professor
8 Bowman.
9 MR. BOWMAN: Thank you very much.
10 Thank you, Judge Saris, for inviting me.
11 It's a pleasure to be back. I was reflecting that
12 the first time I came to this building was I think
13 1995 when I was detailed here from the Justice
14 Department. And if you've been around federal
15 sentencing debates as long as I have, to some extent
16 you can't help but smile, listening to the positions
17 that many of the folks here are espousing today.
18 I started off, for example, as one of
19 the — after I got out of the Department and became a
20 pointy head — I started out as one of the few sort of
21 lonely academic defenders of the old guidelines. And
22 here I am today about to tell you to scrap them and

1 start all over again.

2 The defense community, and many judges,

3 and academics, spent the first 18 years or so of the

4 guidelines era lambasting the guidelines as

5 irretrievably flawed. It was, they said, the product

6 of a Commission — you — whose rulemaking processes were

7 too opaque and not subject to APA rules or judicial

8 review. It was far too complicated. It had too many

9 rules subdividing conduct with too many unduly fine

10 distinctions.

11 The rules mapped onto a 258-box sentencing

12 grid that gave the illusion of rationality to a

13 poorly conceived and often irrational classificatino

14 of sentencing considerations. The system was bad

15 because post-conviction judge-found facts were more

16 important than the jury's verdict, thus rendering the

17 guidelines a tail that wagged the sentencing dog.

18 Even though judge-found facts drove the

19 final sentence, defendants had only minimal due

20 process rights to contest those facts at sentencing.

21 And worst of all, the guidelines started off higher

22 for many classes of offenses than had historically

1 been the case when the guidelines were adopted back
2 in 1987 and kept rising year after year. Because of
3 the design of the Commission and its position
4 relative to the political branches, the guidelines
5 became a one-way upward ratchet.
6 And then came *Booker* and advisory
7 guidelines, which leave virtually every single one of
8 the features that the defense community in particular
9 said that it hated about the old guidelines in place.
10 And now the defense community and others
11 are fighting for the guidelines like a wounded
12 tigress for an endangered cub.
13 (Laughter.)
14 MR. NACHMANOFF: Now of course the
15 apparent position switches here are, on closer
16 inspection, not really switches at all.
17 From the beginning, the defense community,
18 and many academics, have believed that the sentences
19 prescribed by the guidelines are generally too high.
20 And as efforts to lower sentences through Commission
21 action failed over the years, they saw judicial
22 discretion as the best available mechanism to lower

1 those sentences for at least some defendants.
2 *Booker* preserved all the old rules but
3 gave district judges effectively unlimited discretion
4 to use or ignore them. And yet, judges continued to
5 sentence within-range just over half the time, and
6 when they depart or vary they usually don't go all
7 that far outside the range.
8 So if you look at the statistics, average
9 sentences at least, haven't declined all that much.
10 Still, it's certainly true that some thousands of
11 defendants every year are getting somewhat lower
12 sentences than they probably would have under the old
13 guidelines.
14 The defense community, not surprisingly,
15 have used this as a relative improvement and I don't
16 necessarily disagree as far as that goes. However
17 much folks might prefer a wholly different system,
18 less complex, more rational, with complete
19 recalibration of sentencing lengths, the defense
20 community in particular, and judges I think also know
21 that a complete rewrite of the system means going
22 back to Congress. And therefore folks fear that

1 political considerations would produce sentence
2 severity as high or higher than at present, plus
3 significant constraints on judicial discretion.
4 And so they embrace an imperfect system as
5 the best they're likely to get.
6 I started out supporting the guidelines
7 because I believed that wholly unfettered judicial
8 discretion is a bad thing. And because for a long
9 time I saw the guidelines as providing reasonable
10 constraint on judicial discretion and as prescribing
11 reasonable sentencing levels, except in some classes
12 of cases, particularly in drugs.
13 I believed then, for a long time, that the
14 rulemaking system that was centered on the Commission
15 could over time correct the substantive difficulties
16 with sentence length. But in fact, as time went
17 along, the system did not correct its substantive
18 mistakes.
19 The guidelines became ever more
20 complicated, and with the rarest of exceptions ever
21 more severe for most types of crime. The system was
22 indeed a oneway upward ratchet.

1 So around 2004 or so, just before the
2 *Blakely*-*Booker* explosion, I began to advocate that
3 we start all over again. Blow up the guidelines and
4 try to create a system that places reasonable but not
5 excessive constraints on judicial discretion and
6 prescribe sentences that would achieve crime control
7 but would be closer to most people's moral intuitions
8 about sentence severity.
9 I do not believe that the post-*Booker*
10 advisory system is that system. To the contrary, I
11 think the system we have maintains most of the vices
12 of the pre-*Booker* guidelines, while restoring and
13 indeed worsening one of the biggest flaws of the pre-
14 guideline sentencing error, which is effectively
15 unreviewable district court judge discretionary
16 sentencing.
17 Before 1987, district judges had
18 unreviewable discretion to set sentences within the
19 available range. But the power to determine how long
20 a defendant would actually serve was shared with the
21 parole commission that controlled back-end release.
22 After 1987, sentencing authority was

1 shared between the Commission, which made rules,
2 district judges who applied them, and appellate
3 courts who reviewed those applications.
4 Now, district court judges need no longer
5 comply with the guidelines and they need no longher
6 really worry about meaningful appellate review. And
7 there's no parole commission to smoothe out errors
8 and inequities at the back end.
9 District judges now have effectively
10 absolute sentencing power, and I think that is a bad
11 thing. Moreover, *Booker* does not improve the
12 Commission's rulemaking processes.
13 The Commission's institutional
14 relationships with the Department of Justice and
15 Congress are essentially unchanged, with the
16 structural features of the guidelines and the
17 fundamental political calculations that led to the
18 one-way upward ratchet effects remain.
19 Supporters of advisory guidelines point to
20 the transformative power of increased judicial
21 feedback from variances from the guidelines. I have
22 to say, I'm somewhat skeptical. I do not believe,

1 and my experience over the last nearly 20 years
2 suggest, I don't believe that the previous
3 Commissions have been impeded by any absence of
4 information about how judges or anybody else really
5 felt.
6 The Commission has been — and I commend the
7 Commission with the guidance and leadership of Judge
8 Sessions and the folks here today — the Commission has
9 been quite successful in passing some beneficial
10 changes in recent years. But I have to say that I
11 think that your ability to do that has probably had
12 more to do, first, in the case of crack, with a long
13 nationwide evolution of opinion on that subject; and
14 second, on some recent changes in control of the
15 political branches. More to do with those factors
16 than with any permanent alteration in the nature of
17 the guidelines process.
18 And current political alignments to
19 control the various branches of government are not
20 going to last forever.
21 So finally, let me just conclude for the
22 moment by saying this: The current system is

1 logically absurd. It is a complex set of rules
2 explicitly designed to tightly constrain judicial
3 discretion that is married to a constitutional
4 mandate for completely unconstrained judicial
5 discretion.
6 The odds are that, although it's jogging
7 along reasonably well right now, sooner or later it's
8 going to degrade in the sense that judges will adhere
9 to its rules less and less, and sooner or later that
10 anomaly is going to I think prompt poltical
11 intervention.
12 I think that the basic system that was
13 first outlined by The Constitution Project, endorsed
14 by Judge Sessions, and is I might say fully
15 articulated in an issue of the *Federal Sentencing*
16 *Reporter* which came out a few years ago, copies of
17 which I have for the Commission in case you don't
18 have it, is I think at least in its broad outlines
19 the best alternative model.
20 I am happy to answer any questions that
21 the Commission might have.
22 CHAIR SARIS: Thank you. Mr. Volkov.

1 MR. VOLKOV: Well it's good to see you,
2 Madam Chair, and distinguished members. Thank you
3 for allowing me to come here and testify. It's great
4 to see former colleagues, people that I worked with
5 in the past.
6 It's also great to be unconstrained and to
7 have discretion. As a non-DOJ, or non-Capitol Hill
8 employee, I do get to speak my mind. And I tend to
9 take a pretty aggressive view of the situation right
10 now. And I think we are all talking about somewhere
11 where there's somebody missing. There's a branch of
12 government that has abdicated its role. And that's
13 Congress.
14 We all know it. We all know they're not
15 doing their job. I saw Mr. Vassar here, and I said,
16 what are you doing here, Bobby? You should be at a
17 meeting on coming together with legislation to
18 address this problem.
19 You are doing terrific work here,
20 Sentencing Commission. Every one of you. When I
21 worked with you, it was the best work I ever saw in
22 this area, and I enjoyed working with you. But you

1 cannot — the ball is not in your court. The ball is
2 on Congress's court.
3 The Justice Department is never going to
4 say anything. That's the way they operate. It
5 takes — I have an e-mail that I've saved from my days
6 at the Justice Department that started at the ceiling
7 of this high, and a chain that went all the way to
8 the floor, on one issue. So I know the process, and
9 the meat whatever grinding process. But let's talk
10 about some of the political realities, and let's get
11 Congress to do something.
12 I appreciate Judge Sessions's proposal. I
13 love the word "compromise." But the compromise has
14 got to start first with the Republicans sitting down
15 with the Democrats, and the professional staff
16 sitting together in the House and Senate Judiciary
17 Committees, and working as professionals — instead of
18 setting this up for political points, anecdotes, and
19 threats to come and arrest judges and bring them
20 before, you know, the committee. This is stupid.
21 What needs to be done is, we're working
22 right now in the context of a declining crime rate.

1 That's the most important fact. It gives everyone an
2 opportunity to not be political, because as soon as
3 that rate starts to go up, everything changes. The
4 calculus changes.
5 Judge Sessions says time is — there's a
6 right time. The time is now. The time is now.
7 Because if that crime rate starts to go up for
8 whatever reason, we're not going to be sitting here
9 talking about reasonable compromises. We're going to
10 be talking about mandatory minimums.
11 It is an absurd system, folks. This is
12 absoutely absurd. And I'm going to start with just
13 one issue. You have three books in front of you.
14 There is no reason that there should be three books.
15 Pick one, and fill it. Cut the other two, and do
16 your job.
17 Professor Bowman makes a very good point.
18 This complexity is ridiculous. It's absolutely
19 ludicrous, and hopefully Congress will get the point
20 that they need to rewrite — and I spent a lot of time
21 doing this up there — the Criminal Code, which is over
22 there before Commissioner Friedrich, a little too

1 thick for what the job is right now.

2 So my hope is that there can be a lot of

3 issues brought to the table. I'm not saying that

4 mandatory minimums may be on the table, but in the

5 context of some type of presumptive system, be it

6 what you want to call it mandatory or whatever, there

7 has to be a solution that's reached.

8 And there has to be good faith. And

9 people have to give a little. Of course the judges

10 love this system. If I were a judge, I would love

11 it. I can do what I want.

12 Judge Harold Greene, one of my heroes,

13 said to me while I was in court in front of him,

14 "This is my kingdom. What do I care about the three

15 yahoos upstairs and what they're going to say? I get

16 to do what I want."

17 (Laughter.)

18 MR. VOLKOV: Well of course he feels that

19 way. Or another judge who said to me, while under

20 the mandatory system, said I know that's what the law

21 requires, Mr. Volkov, but I'm not going to do that.

22 I'm going to sentence him this way.

1 Judges want the discretion. We've been
2 down this road 40 years, prior to the Sentencing
3 Reform Act, too much discretion. Now they love the
4 discretion. Of course. There's no meaningful
5 appellate review. Of course.
6 The bottom line here is public safety, and
7 there's no clamor for it. So I would urge the
8 Commission to lead, like it usually does. It did in
9 the crack/powder issue, and I thought it did a
10 terrific job. And I think it can lead here.
11 Your proposals are modest. They're all
12 justified. They're all reasonable. But you don't go
13 far enough. You've got to start with cutting your
14 guidelines. You've got to start with taking a
15 reassessment and calling it like you see it. That's
16 where you're the best.
17 Your data — everybody tries to disarm your
18 data, but they don't really have that great a role in
19 doing that.
20 Now I will — and I love to associate myself
21 with Judge Howell because I think she made probably
22 the most important point this morning in a question.

1 Everybody's bellyaching about "the guidelines." Well
2 guess what? Congress gave you an intent. That's
3 your job, is to carry out their intent.
4 All those people who bellyache about it,
5 go throw those people who are your representatives
6 out of Congress. That's the solution. Everybody uses
7 buzzwords, we don't want to let this go into
8 political considerations? The last I checked, it's
9 Congress's right and Congress's province to set the
10 penalties for federal crimes.
11 You carry that out faithfully, absolutely
12 faithfully. So everybody wants you to just sort of
13 forget Congress, start reducing all of these. Well,
14 that's not the right way. You are carrying out your
15 mandate. And I think you should be commended for it.
16 And I think Judge Howel made a very good point:
17 That's our job. That's your job, is to carry out
18 that intent.
19 If they don't like it, go to Congress.
20 And the judges need to get up there and start
21 bellyaching a little bit more while they ask for a
22 raise.

1 (Laughter.)

2 MR. VOLKOV: Right? One other point in
3 terms of — and this is just one last point. I
4 actually believe very strongly in the Second Chance
5 Act. I work very hard on it. It seems to me that
6 the Justice Department, rather than sitting and
7 tinkering with, you know, credits, and whatnot, let's
8 start with the pilot program that we created.

9 Sixty-five-year-old offenders are released
10 early. Let's lower the age to 60 years old. What
11 happens? Less risk of recidivism. Reduced medical
12 care costs. What's the most effective way to reduce
13 the population?

14 I don't see anybody talking about that.
15 Why isn't the Justice Department talking about that?
16 They're the ones that worked with me to put in the
17 provision. And Mr. Vassar and I tried to get it down
18 to 60, but we couldn't. That's a — you want to talk
19 about a good-government proposal, after you reduced
20 the guidelines and cut them in half, this is
21 something that needs to be done to effect prison
22 population.

1 Thank you.

2 CHAIR SARIS: Thank you. All right.

3 Questions? Judge Howell.

4 COMMISSIONER HOWELL: I guess I'll

5 start — I always start. I don't know why that is. It

6 gives everybody else enough time to really formulate

7 excellent questions.

8 The question of timing is one that the

9 Commission has struggled with, for whether changes

10 are appropriate to the guidelines, and so on.

11 Certainly after *Booker* the Commission, despite, as

12 Judge Sessions says, working very steadily and

13 hurriedly on putting together possible alternative

14 proposals to address the *Booker* decision, took a

15 wait-and-see attitude and cautioned Congress about

16 taking a wait-and-see attitude under the leadership

17 of then-Chairman Hinojosa to see whether the system

18 would fall apart, whether it would work, and how it

19 would work before rushing to legislate.

20 I think that was a position that a number

21 of people took at that time. And as somebody pointed

22 out, we are now seven years later. Timing is

1 everything when it comes to sentencing policy.

2 There are some policymakers on the Hill

3 who clearly think that, even though they can't get

4 together a legislative coalition to pass legislation,

5 they clearly think the time is ripe now to pass

6 legislation.

7 Federal public defenders have made it

8 clear on all their different panels that they think

9 that the system now is working well. Judges think

10 it's working well.

11 So the Commission, as we're looking at the

12 variance rate as its going up despite the fact that

13 there's been within-guidelines framework counting

14 government-sponsored motions, still over 80 percent,

15 has thought that the time might be ripe now, which is

16 why we put forward our proposal.

17 And part of the purpose of this hearing is

18 to see, one, what do people think of our proposal?

19 Namely. And it's been very instructive on that

20 already.

21 But, two, whether other people are also

22 thinking that the time is ripe now, in part, as Mr.

1 Volkov pointed out, because we have a crime rate that
2 isn't skyrocketing and sort of a calm arena on that
3 front to actually consider calmly proposals.
4 So my question is sort of twofold. Do you
5 think that the time is ripe now to consider changes?
6 I know what the federal public defenders' position is
7 on that, so you don't have to answer that question.
8 But the question — the second question I have — and
9 this I would like to hear your response to, is: At
10 what point, at what stage of either the variance
11 rate, if you want to focus on that — which is at
12 around 17-plus percent now — within guidelines
13 framework rate of hovering at a little bit over 80
14 percent, at what point do you think it does become of
15 serious concern to prompt action?
16 If the variance rate gets to 25 percent,
17 and with government-sponsored motions we're only at
18 65 or 70 percent, I mean is that the point that you
19 all think that it will be of a sufficient
20 significance in terms of outside the guidelines
21 framework sentencing that you think action should be
22 taken?

1 So you could start with that question, and
2 then I'll hear from everybody else.
3 MR. NACHMANOFF: Sure. No, I'd be happy
4 to answer —
5 COMMISSIONER HOWELL: On the timing.
6 MR. NACHMANOFF: — that, and first,
7 though, I need to correct the record. Which is, I'm
8 delighted to be referred to as a "tiger," but it's
9 tiger not tigress.
10 (Laughter.)
11 MR. NACHMANOFF: So we can be clear on
12 that.
13 CHAIR SARIS: We heard your roar.
14 (Laughter.)
15 MR. NACHMANOFF: So right now we have, as
16 you've described, judges following the guidelines 80
17 percent of the time, or a little bit more. And
18 variances of 17 percent. I think it's absolutely
19 critical, and I'm not quite sure why there's often
20 this breakdown of when the government joins versus
21 when they don't.
22 COMMISSIONER HOWELL: And I would

1 personally like to talk about within a guidelines
2 framework, because certainly government-sponsored
3 motions are certainly recognized under the
4 guidelines. So it's all within the guidelines
5 framework.
6 MR. NACHMANOFF: Right. And I think one
7 extra thing to keep in mind, which I think is in our
8 papers, is that of that 17 percent, a substantial
9 number of those are, I said before silence is golden,
10 in the face of silence from the government. So
11 government-sponsored 5K, Fast Track, other government-
12 sponsored are broken out, but in the ones that appear
13 to be non-government sponsored, it's often with the
14 acquiescence or at least the silence of the
15 government. And so I think trying to understand
16 where the parties are and what this means when a
17 judge imposes a sentence like that is important to
18 keep in mind.
19 But the premise of the question is that
20 the measure of whether or not the system is working
21 well, or whether or not sentences are appropriately
22 calibrated, is based on how many fall within the

1 guidelines.

2 And what I would say is, just like my

3 example of the career offender, the fact that there

4 may be 17 percent, or 20 percent, or 14 percent, or

5 whatever number it is, is not the measure of whether

6 or not the system is out of whack, or not well

7 calibrated.

8 On the contrary, it may well be that where

9 judges are varying or departing outside of the

10 guidelines, they're fulfilling the very purposes of

11 sentencing that are set out in the sentencing

12 statute. The only way to understand that is to

13 collect the information and to see. And that is why

14 we keep talking about the importance of feedback.

15 In other words, the fact that there may be

16 variances, I don't think at all relates to the timing

17 issue as to whether or not there should be action, or

18 whether or not things need to change.

19 What we need to understand is why judges

20 are making these decisions. And we can understand

21 that much better now in the post-*Booker* world than we

22 ever could have before.

1 COMMISSIONER WROBLEWSKI: I'm with you,
2 what's the measure?
3 MR. NACHMANOFF: Well, I think Congress
4 has told us. Which is, there's a sentencing statute
5 that now, as a result of Booker, judges must follow.
6 This idea that judges are unconstrained and can
7 impose sentences by throwing darts at a board, I
8 think is not the case. And what we have is a system
9 in which appellant courts do review for both
10 procedural and substantial reasonableness —
11 COMMISSIONER WROBLEWSKI: And if they —
12 MR. NACHMANOFF: — Based on whether or not
13 the sentences, as articulated by the court, further
14 the purposes of sentencing.
15 COMMISSIONER WROBLEWSKI: Right, and if a
16 court spells out the 3553(a) factors that they looked
17 at, that's sufficient? There can't be any disparity
18 in that situation. So if two judges look at the same
19 defendant — I brought this up in several panels
20 because we have a case that was at the Supreme Court
21 where two judges looked at the exact same defendant
22 and came to very, very difference conclusions. Both

1 of them considered the 3553(a) factors, both
2 calculated the guidelines correctly, both came up
3 with very, very different results. Disparity, no
4 disparity, warranted, unwarranted, and how do we
5 measure that? That's what I keep asking, because I
6 understand the criticisms of the measures that have
7 been used. I understand they're imperfect — whether
8 it's regression analysis or the fact that the
9 District of Vermont is 30 percent with guidelines
10 range, and —
11 JUDGE McKEE: It's 31.
12 COMMISSIONER WROBLEWSKI: Thirty-one. And
13 in some other districts, 75 or 80. I understand
14 those are imperfect. I'm just trying to find out
15 what's a better one — better measure.
16 JUDGE McKEE: Don't you think — I think
17 we're getting a bit off the track, and let me back
18 up, because a number of things are going through my
19 head.
20 First of all, in terms of whether or not
21 this is a good opportunity or the opportune time, Mr.
22 Volkok said this is an opportunity to be political

1 because the crime beat is going down. Why — I submit
2 to you the opportunity to not be political. That
3 they said that we believe there's an opportunity to
4 not be political, we would buy a raffle ticket to win
5 a dinner with Peter Pan. There's never an
6 opportunity — there may be an opportunity to not be
7 political, but it's going to get political. Whether
8 it's an opportunity or not. The fact — the problem
9 is, going down I don't think is that important of a
10 factor, because people don't feel any safer now. And
11 as long as they turn on the evening news, and they
12 still hear about the rapes, and the shootings, and
13 the stabbings, they're not going to take time to pull
14 back and say, "well, look the mean age of the
15 offender's going down and there's demographic reasons
16 to account for that, and most of the population is
17 aging out." So they don't want to hear about that.
18 They still note the night, if they have an alarm
19 system, they're going to set it, they got to bolt the
20 door. They really don't care about crime trends.
21 And that's the same whether it's the suburbs or it's
22 smack-dab in the inner-city where the guns are going

1 off. In terms of the measure of effective
2 sentencing, and that's different from say the measure
3 of disparity.
4 I think we might as well admit, unless you
5 have a sentencing scene, which says, if you commit
6 offense A, you get sentence B period. So if the
7 career offender commits offense A, he or she gets
8 sentence B. If the first time offender commits
9 offense A, he or she gets conviction offense B, and
10 we can eliminate the judges, we can free up an awful
11 lot of court time, because we can then just program a
12 PC or Dell, whatever your choice, and let that
13 computer spit up the sentence, and you only need two
14 things. One, the crime that was committed, and the
15 actually substance, the violation, and the grading of
16 the offense, that's all you need.
17 If that's not the system that we envision-
18 -I hope it isn't — there's always going to be room for
19 disparity. Where there's room for disparity, there
20 will be disparity. An example of this, when I share
21 the Pennsylvania guidelines, we wrestled for a while,
22 but with that we have a list of aggravating and

1 mitigation factors built into the guidelines, we
2 decided against that. And we asked judges to list
3 those things they find aggravating, and those things
4 they found mitigating. Some judges would put down
5 drug addiction as an aggravating factor, and I'm sure
6 you've come across this. Some judges would put down
7 drug addiction as a mitigating factor. That kind of
8 discrepancy and disparity will always be there. I
9 would submit to you there may well be situations
10 where given defendant A, drug addiction is an
11 aggravating factor; given defendant B, drug addiction
12 may a mitigation factor, there's so many things that
13 go into the equation that there's absolutely no way
14 to eliminate sentencing disparity.
15 So, if the idea is to eliminate a
16 disparity — or disparity, then you really don't need
17 judges at all at sentencing. I believe it is get a
18 program in here — programmer in here, pay him high
19 enough so that he's not going get stolen away by
20 Intel or some other company, and let the programmer
21 crank out a code that will sentence everybody that's
22 convicted. But again, that's not what we're looking

1 for. I think in terms of looking if it's the right
2 time, I don't think it is the right time because we
3 still don't have a good empirical sense as to what's
4 going on out there. I think a lot of discrepancies
5 we have now in sentencing, is probably the big — going
6 through the python of crack cocaine. A lot of judges
7 after *Kimbrough* are using sentencing disparity where
8 there's not been a change of charging policy to level
9 out this 100-to-1 thing. And until that 100-to-1
10 disparity is out of the system, I don't think we —
11 read much from the sentencing disparities unless you
12 can come up with a construct, which may work, where
13 you take that as the dependent variable and figure
14 out what goes into the formula to try to insulate the
15 impact of the crack cocaine/powder cocaine
16 discrepancy and get at the sentencing.
17 If you could do that, then maybe you'd get
18 to an actual level of disparity. But I don't know
19 what that tells you other than human beings are
20 imposing sentence. The issue has got to be
21 inappropriate disparity, and I think we all agree on
22 that. I submit to you 100 percent of that will

1 never, ever, rung out of the system. It can be
2 managed, and I think it's being managed, and it's now
3 under channeled discretion. And that's what we have
4 where the guidelines are one part of a channeling of
5 a discretion system under 3553(a). And I know that's
6 not very helpful to the Commission, but I think it's
7 probably the best that can be humanly hoped for.
8 JUDGE SESSIONS: So, I would disagree with
9 you —
10 JUDGE McKEE: You may, I don't know if you
11 can —
12 JUDGE SESSIONS: — without you reversing
13 me?
14 JUDGE McKEE: I'm one of those yahoos, you
15 don't care about what I say.
16 (Laughter.)
17 JUDGE SESSIONS: That's right, it's those
18 yahoos —
19 MR. CARR: Since I have been in your
20 circuit, there's been a long tradition — even since
21 before you were the chief judge — no more than one
22 yahoo per pound.

1 (Laughter.)
2 JUDGE SESSIONS: What Michael said,
3 actually, was an incredible point, it was not that
4 the crime rate, because it's down impacts the way
5 people feel in the community about crime, it is
6 because the legislators are going to be more flexible
7 because they don't have the political driving force
8 of a crime rate increasing. And when you have more
9 flexibility with members of Congress, isn't that the
10 time to speak with them about what you think may be
11 in the best interest of sentencing policy in the
12 future.
13 I mean that's what we're literally talking
14 about. It's not the fact that the crime rate
15 necessarily makes people feel a lot better, it is
16 because at this particular juncture — according to
17 what Michael is suggesting here — this might be a time
18 in which there can be discussion.
19 So I do want to talk about the timing
20 issue that we addressed with post-*Booker*. And, you
21 know, may I can — I'm a little freer to talk now —
22 since I'm here and not there. Post-*Booker* we had

1 these same discussions. Do you think we should come
2 up with a statement or try to get Congress to say,
3 the guidelines in sentence is presumptively
4 reasonable. Remember, we all talked about that.
5 The decision was made, frankly, and I think to the
6 benefit of our policy in general, to hold off. To
7 wait and see exactly what happened here in terms of
8 the fairness — whether in fact there was going to be a
9 dramatic increase in the variance or the perjure
10 rate. At, you know, to some extent, it's a mixed
11 story. I appreciate the fact that there are people
12 who feel that the variance rate and the departure
13 rate has become excessive. When I left, and that was
14 like one year ago — actually, one year, one month, and
15 15 days ago.
16 VICE CHAIR JACKSON: Who's counting?
17 JUDGE SESSIONS: Yeah, who's counting?
18 The depart — the within-guideline range had been up —
19 it was 62 percent, roughly, within two years it was
20 down to about 54 to 55 percent. We were taking — I was
21 taking — bets on when it was going to go above 50
22 percent. It stabilized. There is not that kind of

1 rush. And what I find that to be assuring —
2 reassuring, is that I think that the guideline
3 structure has really been accepted by all the judges
4 across the country. So, there's not a — There's not a
5 dramatic change. Having said that, the proposal that
6 I would make — that I had made — is in the long-run to
7 begin the discussions and to begin talking about what
8 is the ultimate solution. And the one thing that I
9 would perhaps bring to your attention, my concern, is
10 when you start talking about offender
11 characteristics. I mean, my feeling, and you know
12 this — My feeling was that it is in the best interest
13 of sentencing policy to move the factors of 3553(a)
14 into the guideline structure. That's why we started
15 with roughly five factors. Move them into the
16 structure, because then every judge, everywhere, even
17 if they don't vary, will consider those factors, and
18 they become relevant. And when in fact we talk about
19 a broader range — you know, the defenders have said,
20 well — The only thing that's being considered in the
21 broader range are aggravating factors.
22 Now, I don't think there's a person in the

1 world who would think that I would propose guideline
2 system that only considered aggravating factors.
3 That would be fair to say wouldn't it Will? I would
4 think. In fact, if you start using 3553(a) factors
5 into this broader structure, you're essentially
6 melding variances and departures — you're getting back
7 to a departure world with some standards and then
8 appellate review, to make sure that there are no
9 outliers. And by incorporating offender
10 characteristics within the guideline structure, then
11 you can move from variance, you can then move to
12 departure and then there can be standards by which
13 the departures are granted. Anyway.
14 JUDGE McKEE: Can I just say this is not —
15 depending on what kind of position — we haven't
16 discussed it. Of all of the proposals that I have
17 seen, and I haven't studied Judge Sessions' proposal
18 in great detail, but given my knowledge of it, if
19 there is to be a change, it seems to me his proposal
20 moves us closer to being in the right kind of place.
21 Because of the increased ranges, it does simply, that
22 allows again for controlled and channeled discretion.

1 It reminds me, very much, of the Pennsylvania
2 guidelines. I think it's somewhat like the Minnesota
3 guidelines. When I looked at the concept of it, I
4 mean, the first thing I thought of is, this is kind
5 of a state guideline system. That's not bad. I'm
6 not saying we should go in that direction, I still
7 think there's not enough doubt to suggest a change is
8 warranted. To the extent there's been a
9 predetermination that changes got to come for
10 whatever reason, be it political or whatever, then it
11 does seem to me that approach is the one that seems
12 to make the most sense.
13 JUDGE SESSIONS: Could I put those on my
14 resume?
15 CHAIR SARIS: And then Judge Hinojosa. So
16 we'll go Professor Bowman, could you?
17 MR. BOWMAN: I just want to make a couple
18 points, just following up on what the judges have
19 said. First — The first thing I want to say is, all
20 of this conversation — the whole conversation that
21 we're having, and we'll probably continue to have, is
22 necessarily constrained, intellectually,

1 psychologically, by the fact that we've all been
2 living with this system for decades. And so, there's
3 a tendency to assign rationality to outcomes that
4 we're familiar with. And there's a tendency to be
5 afraid of moving away from a system that we've now —
6 that is now second nature.
7 The first question I would ask all of you
8 to consider when you are trying to decide whether or
9 not you think we need, or at least be desirable, to
10 move away from the current system, is would you if
11 you were sitting down alone or in company, and were
12 asked to devise a sentencing system from scratch,
13 would any single one of you come up with a system
14 that looks anything like what we've now got? I will
15 lay large bets that I couldn't get a single taker for
16 that.
17 That being so, the question then becomes,
18 alright, is what we've got bad enough — in some sense-
19 -that it merits change and facing the necessary
20 political risks that go with any alteration? I can't
21 answer that question for you, but I think I can — to
22 go back to Commissioner Howell's question, at least

1 in part, say that, one, I think a tipping point —
2 which you should be asking the tipping point
3 question. And of course, I don't know, I mean, we're
4 all making guesses about political calculations of
5 other people and other institutions.
6 I think Judge Sessions was right in — I
7 think he indicated, that if you start getting close
8 to a point where half or fewer of the guidelines of
9 sentences are actually imposed within the range, I
10 don't care — I know all the distinctions, and all the,
11 you know, the ways we try to carve out the pieces.
12 Well, some of these are substantial sentences, and
13 some that the government is asking for, and all that
14 sort of stuff. But to the political observer, to the
15 Congress person, when you have a system that is being
16 complied with — at least in the gross sense — less than
17 half the time, I think at that point folks are going —
18 on the Hill are going to start saying, you know,
19 this makes no sense. And we really need to consider
20 some alternatives.
21 And the final point I want to make — and
22 then let the commissioners ask questions, of course —

1 and it goes back, I guess, to the first one, the
2 first observation, everybody is talking in terms of
3 judicial behavior in relationship to these guidelines
4 that have grownup. Often times, like the accretion
5 of barnacles on a ship, okay? And talking about
6 whether or not these sentences are good or bad, or
7 rational or irrational, in relationship to these
8 levels, which I submit to you in many cases are the
9 irrational accretion of a lot of niggles over time.
10 Often times driven by congressional directives, and
11 often times driven by policy choices. Some of which
12 went awry, but step back for second and ask
13 yourselves how many of the sentences that are imposed
14 under the guidelines, or 10 or 15 percent away from
15 the guidelines, really make sense in the abstract?
16 And if you can't answer that question by saying, you
17 know, I think by in large most of the time the
18 sentences that are being imposed under this system
19 are good, not in relationship to this arbitrary
20 standard, but in relationship to the real objective
21 in sentencing. Not in relationship to whether or not
22 you can spill out sentences that say they relate to

1 some factors on 3553, but in the sense that they
2 actually make sense in terms of the real moral
3 culpability of offenders, and in terms of whether or
4 not they really promote crime prevention. Unless you
5 can say, we think the system works well on those
6 grounds, then you have a system that needs to be
7 fixed. And the only question ultimately is when and
8 how you fix it.
9 MR. VOLKOV: With regard to the tipping
10 point. When I was on the Hill, the Commission every
11 quarter would ship me a report on statistics in terms
12 of variance rates. I felt like I was getting my SATs
13 or LSATs back because I would open it and immediately
14 look at what is the variance rate. Because why?
15 Because we were absolutely key to that fact, in terms
16 of watching it creep. Now, I — Knowing what we know
17 now, and with the testimony that the Commission
18 provided to the House Judiciary Committee recently,
19 and the facts that we have now, I don't see how
20 anybody can defend this picture that we have right
21 now. I mean, I never thought we'd have a situation —
22 although we used to call it the Sovereign District of

1 New York when were AUSA's, that 49 percent of the
2 sentences are handed out below the guideline range?
3 You got to be kidding me. And the fact that — and I
4 thought Matt Miner's testimony before the Committee
5 was pretty telling, the fact that you go across
6 another district in New York, and it's four percent.
7 I mean, what are we saying here? Granted, I know we
8 want to try to fix all the problems. Judge Lynch
9 wants to talk about state sovereignty and try and —
10 you know, try to meld all the sentencing, but that to
11 me, that's beside the point. We have a very narrow
12 issue here. Within the federal system, is justice
13 being handed out fairly? We can bicker over
14 unwarranted disparities, but the picture that you
15 have portrayed is very compelling when you have a
16 variance rates that's going up, you have geographic
17 disparities — and I know everybody has an excuse as to
18 why they're occurring — but to me, it's a pretty basic
19 fact. And you have percentage of sentences that are,
20 in terms of the decreases, that are fast increasing
21 because we all know the truth, judges don't like the
22 child pornography guidelines, judges don't like the

1 drug guidelines, and judges don't like the firearms
2 cases. The judges used to say to me, "We're not a
3 police court here, Mr. Volkov, in the federal court.
4 I don't want to see this gun case here." So they've
5 made it very clear how they feel about this. This is
6 not a defensible system. We're way beyond the
7 tipping point. I don't think we should — Judge
8 Howell, I don't think we should say 17, 19, 20. The
9 picture you've portrayed, that the Commission has put
10 out in terms of this data, is very compelling about a
11 problem. And I urge us to take the political
12 opportunity, and I'm not trying to turn this into a
13 political issue, I'm telling you what the reality is.
14 We have a chance to work together in a bipartisan way
15 to do something that is right, as opposed to
16 something else. And let's take advantage of it — Lead
17 Commission. Do what you've done before, and lead on
18 this and say, we're ready to scrape the guidelines
19 and make them simple, but what we want is a system
20 that works fairly.
21 Judge Sessions has put out a great
22 proposal. The fact that he's from Vermont makes it

1 even more important — because of the constituency we
2 have to deal with, but I think that that is something
3 that you know the political realities you've
4 calculated every day in your job. And I think that
5 that is a great first start, and let's sit down and
6 work out a solution.
7 JUDGE McKEE: Can I just say —
8 CHAIR SARIS: Yes, and then Judge
9 Hinojosa.
10 JUDGE McKEE: Okay, I just went ahead
11 because I get my mind spins when I hear members being
12 tossed out, my head spins very quietly. But until we
13 factor in somehow the charges factors and the
14 discrepancies between jurisdiction A and jurisdiction
15 B, and jurisdiction C, and what's being charged and
16 how we're being charged — how they're being charged — I'm
17 underwhelmed by numbers which suggest that there's
18 some kind of disparity between different
19 jurisdictions. I need to know what's being charged,
20 and how it's being charged, before I can make any
21 sense out of those numbers.
22 CHAIR SARIS: Judge Hinojosa —

1 COMMISSIONER HINOJOSA: Part of my
2 question was going to be what Mr. Volkov just
3 addressed, which is the fact that it's disparity.
4 Yeah, nationally its 17 or 18 percent or whatever it
5 is, but — and Judge McKee in some cases it's within
6 the same jurisdiction and the same division of a
7 district. Which means they have the same charging
8 practices that we have these huge differences with
9 regards to the variance rate. And so, then the
10 question follows, have we decided as nation that the
11 whole process and the reasons for the Sentencing
12 Reform Act, which really brought together Ted
13 Kennedy, Strom Thurmond, and Orrin Hatch, those three
14 together to come up with a sentencing reform act and
15 certainly it took them a while, but their concern
16 was, this is a national system, we do have serious
17 disparity, there is no transparency, there is no due
18 process, there is no appellate review, have we
19 decided that those are really no longer of interest
20 to us, and that was a bad experiment and a bad idea
21 and that we should just drop that. And then the next
22 question is really to Mr. Nachmanoff, the idea that

1 we have appellate review. Well we might on the
2 procedural side of it, but there really is no
3 substantive review. There are very few cases that
4 are being reversed on substantive. I know we're great
5 as district judges, but are we really that right that
6 nobody's being reversed on substantive? Actually,
7 there's no appeals from the U.S. Attorney, basically,
8 because they don't feel they won't win on anything.
9 And so it isn't like we have an appellate review at
10 the present time. You can't really believe that,
11 other than on the procedural aspect of it. That when
12 you look at anybody that's been substantively
13 reversed, it's such a small number that it's not even
14 worth talking about. And so, I guess I'll start off
15 by, have we really decided that the whole purpose of
16 the Sentencing Reform Act is no longer viable and no
17 longer something that we should pursue, and then, do
18 we really have appellate review? And that was one of
19 the big reasons why we had the Sentencing Reform Act,
20 to have some appellate review and some transparency
21 in due process. And are those issues that we no
22 longer should be concerned with?

1 MR. NACHMANOFF: Well, let me see if I can
2 answer some or all of that question for you. I
3 respectfully disagree, I think we clearly do have
4 appellate review, and I think it is meaningful on
5 both sides —
6 COMMISSIONER HINOJOSA: Well, I have to
7 say that the appellate judges that appeared in front
8 of us when we did our national tour, with regards to
9 getting opinions from everyone about what the present
10 system was, disagreed with that. Most of them said,
11 there is really no appellate review.
12 MR. NACHMANOFF: Well, I won't speak for
13 the appellate judges, and we have one here and we had
14 others this morning, but I will say this, certainly
15 from my personal experience. I've seen substantive
16 review, I've seen cases reversed. They've been from
17 my office. We've seen them from around the country.
18 We've also seen them —
19 COMMISSIONER HINOJOSA: Well, how many are
20 we talking about? Are there thousands of cases?
21 MR. NACHMANOFF: Well, I'm very proud of
22 my office, and it's been very few.

1 COMMISSIONER HINOJOSA: Very, very few —
2 MR. NACHMANOFF: I don't think the answer
3 to the question about whether appellate review is
4 meaningful, should be based on the number of cases —
5 COMMISSIONER HINOJOSA: I don't think the
6 statement should be made that there is serious
7 appellate review when we all know that other then on
8 the procedural bases, that basically the appellate
9 courts have been told — a lot on Supreme Court
10 decisions, of really you shouldn't be in on this.
11 MR. NACHMANOFF: Well, we just have a
12 fundamental disagreement about what meaningful
13 appellate review is. We think in the federal
14 defender community, the procedural review is very
15 important. Not only because it requires judges at
16 the trial level to articulate why they're giving the
17 sentence and how that sentence relates to the
18 purposes of sentencing. But if they don't do it
19 right, it gives them guidance. And what we see is
20 that judges on remand give different sentence after
21 procedural review. So it does have meaning. On the
22 substantive side, the idea that there should be more

1 reversals in order to determine that there's meaning
2 to it, I don't think is correct at all. The Supreme
3 Court was very clear. The Supreme Court made clear
4 in *Booker*, and *Gall* and *Kimbrough*, that it is trial
5 courts that are in the best position to determine
6 sentences and that there should be a deferential
7 standard. Because trial courts are the ones that sit
8 in front of defendants and victims, and witnesses, and
9 families, they're the ones that see these cases and
10 can individualize sentences and impose appropriate
11 sentences. Under the sentencing statute it is a
12 command to them, to the district court.
13 COMMISSIONER HINOJOSA: Right, right. I
14 think that's true. I think the Supreme Court has said
15 that. The question is, the Sentencing Reform Act
16 said something different, and so the question is,
17 should Congress take action since they're that give
18 jurisdiction, including at the appellate level, and
19 should they have any roll in deciding whether they
20 should be in the appellate review?
21 MR. NACHMANOFF: Well, again, and I don't
22 mean quarrel over semantics, but it's not a matter of

1 any appellate review. There is appellate review, and
2 it is meaningful appellate review. It is not second
3 guessing trial courts, it is a deferential standard,
4 and that is appropriate. And just as a factual
5 matter, and I think it's the record, the number of
6 appeals has not changed dramatically. I know they're
7 in here somewhere, I can try to find —
8 COMMISSIONER HINOJOSA: No, I would say
9 it's mostly from the defense side. The number of
10 government appeals has changed dramatically.
11 MR. NACHMANOFF: Well, I'll try and find
12 that as we're addressing these mattes, but I'm quite
13 sure that our testimony reflects that the number of
14 government appeals has remained constant and that a
15 substantial percentage of those are on sentencing
16 issues.
17 JUDGE SESSIONS: Can I just make a couple
18 of observations about appellate review? There was
19 earlier discussion this morning, suggesting that a
20 more rigorous appellate review standard would not
21 have that big an impact. Fact is that it has a big
22 impact. I mean, from the judges perspective, if you

1 know you're subject to sentencing review, you're a
2 whole lot more thorough in regard to disclosures of
3 what you're thinking about, and why you're making
4 that decision. It's a much more significant process,
5 frankly. I like the idea of your modified appellate
6 review with regard to the extent of departures. I
7 think that's extraordinarily helpful. The only thing
8 that I would recommend is that this is an area of
9 grave sensitivity with judges, I think it is fair to
10 say — district court judges, in particular. And it
11 would be most helpful if, just like any other
12 proposal, this is a part of much larger picture
13 that's presented in regard to changes. If all of a
14 sudden you just — okay, we're changing the appellate
15 standard in particular, if you go to *de novo*. And
16 there's going to be a very strong reaction among the
17 judges in the country. Why don't you put that a part
18 of a big picture about changes in the broader
19 process?
20 CHAIR SARIS: Commissioner Friedrich.
21 MR. BOWMAN: If I can just follow up on
22 with — excuse me — just a point to page 41 and 42 of

1 Mr. Moore's testimony that addresses government
2 appeals, pre-*Booker* and post-*Booker*, the number is
3 the same.
4 COMMISSIONER HINOJOSA: Post-*Booker* as
5 opposed to in the last two years or — We've had *Booker*
6 and then other decisions that have really told the
7 appellate courts where to go basically.
8 (Laughter.)
9 MR. BOWMAN: There were 100 —
10 COMMISSIONER HINOJOSA: In a very polite
11 fashion told, but —
12 MR. BOWMAN: In fiscal year —
13 COMMISSIONER HINOJOSA: We told them what
14 their role is.
15 MR. BOWMAN: In fiscal year 2010, there
16 were 100 —
17 COMMISSIONER HINOJOSA: Don't get me
18 wrong, I'm a district judge, I'm not here to defend
19 the appellate courts, I'm just saying you can't use
20 the post-*Booker* numbers, just like — I don't know,
21 this twenty-five hundred number that you gave us for
22 the career offenders over a three-year period that

1 were African American received lower sentence — I
2 don't know that there twenty-five hundred cases, but
3 I'm sure Amy Baron-Evans will let me know for sure
4 later. I hope she does it politely. She still has
5 to explain to me where she got that from. But, you
6 know, we're not going agree on this, so let's go on
7 to something else, probably.
8 CHAIR SARIS: Commissioner Friedrich, go
9 ahead.
10 COMMISSIONER FRIEDRICH: Thank you,
11 Professor Bowman and Mr. Volkov, I appreciate the
12 point, I think both of you made in your testimony.
13 The important one that — In this debate we need to
14 separate the severity debate from the, sort of,
15 fairness and certainty debate. And too often they
16 get conflated and one of the witnesses at one of our
17 regional hearings made the point, I think it was a
18 district judge, he said, if we took the current
19 guidelines and slashed them so that they are a third
20 as severe as they currently are, and we had
21 defendants sentenced above the guidelines through
22 departures and variances — 40 percent, as we have in

1 the other direction now — we'd have the defenders
2 coming and saying what we need is a binding system.
3 And so, I think all the stakeholders
4 should agree that like defendants should be sentenced
5 alike, and that show the individual sentencing judge
6 in a case really shouldn't matter, as much as it does
7 right now. And we see this problem at the circuit
8 level, we see it at the district level, and we see it
9 within courthouses. Similar cases being sentenced
10 dramatically differently based solely on the
11 sentencing judge. And to me, that's very contrary to
12 the very core purpose of the Sentencing Reform Act.
13 So, I for one am very much in favor of a legislative
14 change, and the panel before you raised some
15 considerable issues with regard to the
16 constitutionality of the Commission's proposal and
17 whether they would be that effective. So, I am very
18 open to a binding guidelines system, like that
19 proposed by Judge Sessions.
20 One of the hurdles is not just the
21 political one, we also hear judges, prosecutors,
22 raise the issue — defense attorneys certainly — how

1 complex is this going to make trials. And I'm
2 wondering if any of you on the panel can speak to
3 that period between *Blakely* and *Booker*, when my
4 understanding is that the government was proving up
5 things like fraud and drug weight and gun use, and
6 how much more — how much longer were the trial, how
7 much difficult were the issues that were presented.
8 If any of you could comment on that.
9 MR. VOLKOV: Let me address just the last
10 point if I could. And I think that it's interesting
11 how sometimes we like juries and we don't like
12 juries, and we don't trust juries and we do trust
13 juries. We trust juries to make findings of
14 aggravating circumstances in a death penalty case
15 beyond a reasonable doubt. And we have them find
16 mitigating circumstances by preponderance of the
17 evidence. And those are pretty weighty decisions
18 when you think about it. In the period after *Booker* —
19 I know in the U.S. Attorney's Office in DC, we put
20 more and more factor to the jury. We put drug weight
21 findings, we put other — even loss calculations.
22 Although, to me that — the instructions on that are so

1 complex, because imagine trying to break down all the
2 notes and everything, in terms of definitions and et
3 cetera, et cetera.
4 CHAIR SARIS: Excuse me, you do that now,
5 or you —
6 MR. VOLKOV: No —
7 CHAIR SARIS: — right after —
8 MR. VOLKOV: It was right after *Booker*.
9 CHAIR SARIS: I see, I see.
10 MR. VOLKOV: We did that after, and we did
11 that for a while, and, in particular drug quantities,
12 which is not a very hard issue. Particularly when we
13 were trying, let's say, relative conduct to get the
14 weight up higher then the mandatory minimum. So,
15 what I'm suggesting is that if there's a simplified
16 system, we can make sure that the jury determinations
17 are limited to certain basic issues. And I think
18 that can be done. There are a lot of creative — and
19 there are a lot of smart people behind me, who I know
20 could come up with good ideas in this respect, and
21 the department has to be engaged. But there's no
22 reason not to trust juries in these circumstances.

1 I'm not saying — And by the way, we already asked
2 them — and granted I wasn't the best at doing this, I
3 used to violate the policy with regards to asset
4 forfeiture issues, after you got the conviction you
5 were supposed to ask for, you know, now I want the
6 criminal finding with regards to the asset forfeiture
7 account. And sometimes I'd say, forget it.
8 But in any event, that added a little bit
9 to the trial, but what I'm saying is, these factors
10 are not going to be that much more significant. I
11 really think it can be done —
12 MR. BOWMAN: If I can. I think on the
13 first one, on the question of how much more
14 complicated it would be in terms of trials to do
15 something like Judge Sessions is suggested, and what
16 others have suggested. Again, I mean, I would like
17 to reiterate that while, you know, for good reasons —
18 particular their positions — a lot of folks who
19 worked on the simplified system early on, post-
20 *Booker*, and now — at least for the moment in favor of
21 going that way. I understand that. But I also have
22 to say that some smart folks on — prosecutors, ex-

1 prosecutors, academics, defense lawyers, defense
2 policy folks — work very hard on thinking of
3 principles to design such a system. And in fact,
4 again, I'll refer to this issue of the *Federal*
5 *Sentencing Reporter*, which we actually —
6 MR. VOLKOV: He gets a percentage of that-
7 -and call 1-800, and subscribe now.
8 MR. BOWMAN: But if you look at it, I
9 think you'll find — although it's not perfect, heaven
10 knows there's things that now I would change, and
11 others that worked on this project would change if we
12 were going to do it again — in light of what we now
13 know from the Supreme Court and other factors, we'd
14 change it, sure. But I think that you'll see that if
15 you do this drafting exercise, it's by no means
16 impossible to create a simpler — a much, much simpler
17 system, that has a relatively small subset of factors
18 that would actually be given to juries that would be
19 marginally more complicated or lengthy to try then a
20 current case, but I do not — I personally — and you
21 know, before I became an academic, I was a prosecutor
22 for, and occasionally a defense lawyer, for a really

1 long time. I've tried a lot of jury trials, and I do
2 not see this as being a significant impediment to
3 trying juries at all.
4 CHAIR SARIS: Would you bifurcate it and
5 make it two-part trials? Although, you'd have one
6 that was guilt or innocence and —
7 MR. BOWMAN: Yeah, you have to do it that
8 way.
9 CHAIR SARIS: — and you'd bring the jury
10 back for the sentencing?
11 MR. BOWMAN: I actually don't —
12 VICE CHAIR JACKSON: You could lean juries
13 for the sentencing phase and not —
14 MR. BOWMAN: No, no, no. You use the same
15 juries —
16 VICE CHAIR JACKSON: — cases or how — or
17 you'd plead out these back?
18 MR. BOWMAN: No, you'd use the same jury
19 and then you'd just argue — You stand up and argue the
20 sentencing determinations.
21 MR. VOLKOV: I think, that is a debatable
22 issue. I think there are ways to design the system

1 to do as essentially unitary trial, or you could do
2 it as a bifurcate trial. Even if it were bifurcated,
3 the additional time involved, I think, would not that
4 great. And frankly, given the trial rate in this
5 country right now, which is 3.1 percent in the last
6 year, I think we can do it. It's not that much more
7 real time, in terms of the burden on federal courts.
8 The final point — the other point I wanted
9 to make, which is responsive to several things that
10 have been said, and it really has to do with the idea
11 of severity. Part of the suggestion, I think that
12 comes, quite understandably, from the defense bar and
13 policy groups is, we need — What they're really saying
14 is, we ought to keep this system because on severity
15 grounds, yeah, there are some defendants every year
16 who are getting a benefit from this system they
17 wouldn't otherwise get. But they’re also saying, quite
18 paradoxically, in a way, gosh, we shouldn't change it
19 because the benefit isn't that much, because it's
20 really staying stable. They're only getting a little
21 benefit. Well, if you think that the guidelines
22 structure that we have now, and the severity levels

1 that we've created right now, are about right, then
2 that's a really good argument. But if you think, as
3 I suspect most of the people privately do who are
4 making this argument, that the severity levels are
5 too high in the first place. As suggested by the
6 way, by the fact that all of the variances are down,
7 then maybe what we ought to be thinking is the whole
8 system is set way too high, and I suggest to you that
9 if that's what you think is true — and at least
10 leaving to one side the political question of whether
11 this is doable. If that's what you think is true,
12 then the only way to solve it, really, is to
13 recalibrate the whole system downwards. And I think
14 that the only way that that happens is as — you can't-
15 -I don't think you can do that as a Commission, one
16 guidelines as at a time. I think that takes too
17 long, and you have to fight too many individual
18 battles, some of which you are going to lose, and
19 some of which risk putting you into political
20 headwinds that ultimately imperil the whole project.
21 To the extent that you really want to affect a
22 wholesale recalibration of sentences, I think the

1 only way that ever happens is it's part of,
2 essentially, a grand bargaining negotiations among
3 all the interested political parties and sentencing
4 actors. And maybe, and only maybe, do you get that
5 result. Then the question that you have to ask is,
6 can you keep it? And it's the thing -- the question
7 that I asked in the last part of my written
8 testimony. Assuming that you can you build such a
9 system, can you build it in a way that makes it at
10 least resistant to the same kinds of institutional
11 pressures that created the upward ratchet effect in
12 the first place. And I think that's a very hard
13 question. I do think -- I agree here with Judge
14 Sessions, that the proposal that he makes and others
15 have made, makes it easier for the system to resist
16 the upward ratchet effect. For the reasons that he's
17 described. I'm not sure it's perfect, and I've
18 suggested in my written testimony, I think there
19 might need to be other things that you would do. But
20 in the end, if you really want to fix the severity
21 problem across the board, fixing it guideline by
22 guideline, level by level, ain't going to do it.

1 JUDGE SESSIONS: Just a bifurcated
2 question. What I had thought was, drug quantity,
3 loss amount, use of guns, violence, are those factors
4 which should be proven to a jury, because that would
5 increase the offense level. Most of the others, in
6 fact, all of the others I would think, would be
7 within a *Booker*ized range. And, frankly, I don't
8 think that would be a severe burden on the courts.
9 CHAIR SARIS: So what you do is a part-two
10 trial, bifurcated trial?
11 JUDGE SESSIONS: Well, I'm not sure if
12 drug quantity would necessarily have to be
13 bifurcated, I'm not so sure loss amount would have to
14 be bifurcated —
15 JUDGE McKEE: It would not have to be.
16 JUDGE SESSIONS: So, violence — Those are
17 the things that I think warrant jumps. I mean, other
18 people may have other thoughts, but —
19 CHAIR SARIS: Commissioner Friedrich.
20 JUDGE McKEE: There's a couple of things,
21 because the 2:15 light’s going to go on. First of
22 all, so that I'm clear on this, if I think I speak

1 for everybody in this room, that if I thought that
2 the discrepancies that we see in the sentencing room,
3 race-based — or based upon the inappropriate exercise
4 of discretion, I'd be leading the charge to do
5 something to make sure we get less variances and more
6 uniform sentencing. What I'm trying to say, is that
7 I don't think there's enough really honed in analysis
8 yet to reach that conclusion. I just do not know.
9 The discrepancies that are there, the disparity is
10 there. One, I'm not sure what it's based on. I'm
11 not at all sure it's based upon an inappropriate
12 exercise of discretion, and I don't think there's
13 been enough study that would allow anyone to say that
14 is. If they were, then I would say, yes, let's get
15 rid of them and even go to something that would get
16 rid of discretion all together, and we could maybe be
17 fair to a lot of folks in order to [get] racism out of
18 the system. So I wanted to make that point very clearly.
19 This is difficult, because even if you put
20 Judge Sessions' formula on the table and put certain
21 things before the jury, all of us who have imposed
22 sentences know how incredibly individualized

1 sentencing is. You're going to look at whether or
2 not — what's this guy been doing with his free time?
3 I'll use the master one for now. He's been looking
4 for a job, he's been working.
5 I will never forget, I will tell you this
6 very quickly. A case that I had years ago where I
7 ready to really slam a guy who was a crack addict.
8 Until — there was a women in the courtroom who was
9 there just to testify as to what a good guy this was.
10 I knew he wasn't a good guy because what his record
11 looked like, and she came up and talked about how she
12 lived next door to him and how he would run errands
13 for her. So I started thinking, I asked her how many
14 times had he done groceries for you? He'd done
15 groceries — He'd go to the store, she's about 80 years
16 old. He would run to the store for her and get her
17 groceries. I asked, did he bring back a receipt?
18 Yeah. Did you give him the money up front? Yes.
19 Did you ever compare the receipt with the change he
20 gave you? She said, I always did that because I
21 don't trust the store he was going to. Nothing to do
22 with the defendant, she didn't trust the store. So

1 she'd always make sure the change she got back was
2 consistent with the receipt. Seven or eight years of
3 this guy going to the store and getting groceries for
4 this woman — a couple times we — He had never ripped
5 her off and he had a crack habit. Now, how in the
6 world do you put that factor into a mathematical
7 construct? Now, to me that was a gigantic signal
8 saying, this guy’s is redeemable, get him help, deal
9 with this underlying crack addiction, but this guy is
10 totally redeemable. Now, another guy without that
11 little old lady coming in, that he's going to get
12 groceries for, would have gotten whacked in the
13 sentencing sense — not in the Tony Soprano sense.
14 (Laughter.)
15 JUDGE McKEE: But I don't know how you can
16 do it. And I think what we're trying to do is sit
17 around and define something that considers every bit
18 of minutia, and that's why they're so complex now, it
19 simply can't be done. Nationally discrepancies. And
20 let me give you an example of this, you might
21 disagree with this and it goes back to something
22 Judge Hinojosa said, and I might be taking the vest

1 for this, a car theft is not a car theft and there
2 are geographical differences. If somebody steals a
3 souped up car from 42nd Street and Third Avenue in
4 the middle of Manhattan, they stole a car and that
5 means that guy’s going to have to worry about where
6 he's going to park the car the next morning, and all
7 that. If someone steals a pickup truck from a cattle
8 rancher in the middle of — wherever they range cattle-
9 -
10 (Laughter.)
11 JUDGE McKEE: — I know they don't do it in
12 Vermont. Texas or wherever it is, you've take that
13 guy's livelihood away. Knowing the phase of it,
14 they're both vehicle thefts, but there's a great big
15 geographically imposed distinction. How do you
16 capture that in a set of rigid mathematical
17 guidelines? The car being stolen in Manhattan versus
18 the livelihood being taken away by the pickup truck.
19 COMMISSIONER HINOJOSA: We probably have
20 more pickup trucks in the cattle area then you have
21 cars in New York.
22 (Laughter.)

1 JUDGE McKEE: I wouldn't disagree with
2 you.
3 COMMISSIONER HINOJOSA: And they might be
4 more valuable in New York.
5 JUDGE McKEE: I wouldn't disagree with
6 you.
7 MR. NACHMANOFF: If I could make one brief
8 point, just —
9 CHAIR SARIS: One brief one, because we
10 all need —
11 COMMISSIONER HINOJOSA: Yes, I know you
12 were sent a note, so what is it?
13 MR. NACHMANOFF: I was sent a note to
14 correct the record. I'd flipped two statistics, the
15 8,000 years of time saved was for reductions off the
16 crack guidelines between 2006/2010. There were 1,000
17 African America defendants who were sentenced below
18 the guidelines in career offender cases. It saved
19 them 5,685 years.
20 COMMISSIONER HINOJOSA: But that was on
21 crack cases?
22 MR. NACHMANOFF: Eight-thousand years on

1 crack, 5,685 for a 1,000 defendants —

2 COMMISSIONER HINOJOSA: So it's a 1,000 on

3 twenty-five hundred?

4 MR. NACHMANOFF: For career offenders,

5 correct.

6 CHAIR SARIS: Thank you very much to

7 everyone. We'll come back.

8 (Recess.)

9

10 CHAIR SARIS: Welcome, this best part is

11 always schmoozing in between, so I hate to shut it

12 down. But there's so much information. And now

13 we're going to hear the academic perspective. So, I

14 see Professor Tonry just sort of ducking here, but —

15 Let me introduce the panel. Sara Sun

16 Beale, joined the Duke Law faculty in 1979. Prior to

17 entering academia, Professor Beale served in the

18 Office of Legal Counsel and the Office of the

19 Solicitor General in the U.S. Department of Justice.

20 Michael Tonry is a Professor of Law at the University

21 of Minnesota School of Law. Previously he was the

22 director of the Institute of Criminology and was a

1 professor of law and public policy at the University
2 of Cambridge. He also previously held academic posts
3 at the University of Chicago, the University of
4 Birmingham, England, and the University of Maryland.
5 Last, but no one could possibly say least, is Douglas
6 Berman. Professor of law at Ohio State University's
7 Moritz College of Law, where he has taught since
8 1997. Before entering academia, Professor Berman was
9 a litigation associate at Paul, Weiss, Rifkind,
10 Wharton & Garrison. Welcome Professor Beale.
11 MS. BEALE: Thank you very much, Judge
12 Saris and members of the Commission. This is really a
13 privilege to be able to sit and listen to the
14 comments that have already been made, and to try to
15 contribute to these important issues. Perhaps I
16 don't need to emphasize this, but I would like to
17 say, I'm here only as an individual, not as some
18 others are, representing different groups, or
19 committees, or whatever, for which they are
20 affiliated.
21 So, I want to try to frame how I think we
22 should approach the specific issues that the

1 Commission and other speakers have raised. I think
2 the proponents of change have to bear the burden of
3 persuasion. That's always true as a general matter,
4 and I think even more so in the case of such a large
5 and complex system that effects so many people. And
6 so I begin with that as a really important ultimate
7 judgment point.
8 Second, I think that section 3553(a) of
9 the Sentencing Reform Act should serve as a benchmark
10 for evaluating the current sentencing statistics to
11 determine whether we have a problem. And I want to
12 note that it begins with the admonition that courts
13 shall impose a sentence sufficient, but not greater
14 then necessary to comply with the statutory purposes
15 of sentencing. That parsimony principle is more,
16 rather than less important, in 2012, then it was in
17 1984, because of two factors that are very well known
18 to the Commission that have already been mentioned
19 today. The very substantial increase in the size of
20 the federal prison population, and the need to take
21 account of the fiscal costs that are involved. So,
22 it's not merely a matter of concern to individuals

1 who might serve a sentence that exceeds what is
2 necessary to satisfy the appropriate purposes of
3 sentencing. Mr. Axelrod, Professor Bowman, and
4 others, have rightly called our attention to the
5 tradeoffs. The fiscal tradeoffs, the budget is not
6 unlimited and, as Mr. Axelrod, Mr. Bowman and others
7 have noted, the portion of the pie devoted to
8 criminal justice, is not unlimited and if we spend
9 more on imprisonment, we'll be spending less on
10 investigation on prosecution of new cases. Most of
11 the social science literature, I imagine the
12 Commission is familiar with, suggest that for
13 deterrence purposes, for example, the certainty of
14 apprehension and punishment is more important than
15 longer sentences. So, I think we really need to be
16 careful that we're not spending too much on longer
17 terms of imprisonment, and to pay attention to the
18 parsimony principle. So that's first.
19 Next, in considering the question of
20 whether changes are necessary to respond to what many
21 have referred to as increasing disparity in the
22 federal system in the wake of *Booker*, I would urge

1 that we consider together two elements of the
2 statutory directive in 3553(a). So, it contains the
3 statement that imposing sentences, the courts shall
4 consider the need to avoid unwanted sentence
5 disparity among defendants with similar records who
6 have been found guilty of similar conduct. And
7 questions from Mr. Wroblewski, and others, have
8 indicated a pervasive concern that the current
9 statistics indicate that there's more unwarranted
10 disparity. However, that provision cannot, and it
11 really should not, be considered in isolation.
12 3553(a) begins with the — the first thing, that
13 instructs courts to consider, is the nature and
14 circumstances of the offense, and the history and the
15 characteristics of the defendant. So, parsimony
16 requires courts — and consistent with the statutory
17 directive, courts are obliged to consider the kinds
18 of factors that relate to the individual defendant.
19 Judge McKee and others have been talking about these
20 cases.
21 I want to come back to a case that Mr.
22 Wroblewski referred to, the Supreme Court's decision

1 in *Pepper vs. United States*. By the time of his
2 resentencing on drug charges, the defendant was no
3 longer a drug addict, he was enrolled in community
4 college where he had achieved very good grades, he
5 was working part-time, and slated for promotion.
6 He'd gotten married, he had a family, he'd reunited
7 with his father. His probation officer testified
8 that he now presented an extraordinarily low risk of
9 recidivism, and reoffending. Under 3553(a)(1), I
10 would hope that there would be agreement that those
11 factors about that individual were probably
12 considered. His rehabilitation and the like of lower
13 risk of reoffending. But if you simply looked at the
14 drug quantity and his criminal history, you would be
15 blinded to that factor.
16 Now, my point in citing *Pepper* is not the
17 technical point regarding the propriety of
18 considering post-sentencing rehabilitation, but the
19 much more general point, that it's critical not to
20 equate sentences outside the guideline range with
21 disparity that is unjustified. Such sentences may be
22 fully in accordance with the statutory mandates, and

1 the language that describes them as outside the
2 guidelines range, and suggest that they are
3 inappropriate, that they warrant consideration, masks
4 that compliance with statutory factors. *Pepper* is by
5 no means an unusual case. Another one of the cases, as
6 this Commission well knows, that came before the
7 Supreme Court — The *Gall* case — was similar, didn't
8 involve resentencing. By the time the defendant had
9 been indicted for conspiracy to distribute ecstasy,
10 cocaine and marijuana, he had stopped using drugs,
11 quit the conspiracy, graduated from college, moved
12 out of state, and started a very successful business.
13 So, if the Commission's proposal that the guidelines
14 should be presumptive, were adopted, would it be
15 permissible to consider to these offender
16 characteristics? Does anyone on the Commission or
17 the other speakers, feel that these sentence — Taking
18 this into account in the case of sentencing these
19 individual defendants, is inconsistent with the
20 statutory mandate, bad public policy, or otherwise?
21 So, how does the Commission's proposal relate to
22 that, and how does it relate to the — I think, the

1 concern as well to spend our criminal justice dollars
2 wisely.
3 Now, it's for that reason — this idea that
4 some factors, such as offender characteristics,
5 should be included in the analysis and not treated as
6 inappropriate as contrary to statutory directives —
7 that I applaud the Commission's recent efforts to
8 provide for consideration of some offender
9 characteristics, such as age and mental condition.
10 And also, it's assumption of some responsibility for
11 monitoring social science research on individual
12 characteristics and other factors that may be highly
13 relevant to public safety, to the risk of
14 reoffending. I think that bringing that kind of
15 information into the sentencing matrix is really, and
16 I think you are the people who are best situated to
17 do that. To call on academics and to bring that in.
18 I also would like to say that the
19 additional flexibility provided to the district
20 courts as a result of the *Booker* decision, provided
21 those courts with an enhanced ability to achieve true
22 consistency, rather than disparity in sentences

1 imposed on individual defendants by using the ability
2 to sentence below, or in some cases above the
3 guideline range. To take account of differences that
4 are attributable, not just to individual
5 characteristics, but to differences among prosecutors
6 and their practices. I'm sure that you've read
7 Professor Tonry's — or have available to you,
8 Professor Tonry's testimony, which includes some very
9 nice graphs that illustrate, one picture is worth a
10 thousand words, he will save us a lot of time because
11 he's illustrated so graphically the significant
12 difference from district to district. So, one of his
13 points, of course, is that there kind of
14 microclimates in different districts, and that that
15 was true before *Booker* as well as after *Booker*. The
16 part of the graph I would like you to look at, and I
17 want to remind you of, is the enormous variation in
18 prosecutorial practices from district to district.
19 And that variation existed before, and existed as
20 well, after *Booker*.
21 So, we know that significant differences
22 in prosecutorial practices affect government

1 sponsored departures. They effect individual initial
2 charging decisions as well. And those factors have
3 occasionally, at least, been noted in the
4 Commission's own work, and their effect on
5 sentencing, I think, should be something that we take
6 account of here. So, I want to re — excuse me — remind
7 you — gosh I did get that out — remind you of your
8 working area of mandatory minimums. For example,
9 where studies — your own studies revealed long
10 standing practices that may create disparity. For
11 example, in 1995, the Commission found that less than
12 one-half of the defendants whose files indicated that
13 the facts of their case would warrant the imposition
14 of a mandatory sentence under 924(c), less than half
15 of those were sentenced under that provision. It was
16 not a result of actions by judges, it was a result of
17 actions by prosecutors not charging it initially or
18 bargaining it away. So, the bottom line, I think, is
19 that in many cases, judicial action may be in
20 response to differences in prosecutorial action.
21 That may even things out that may account of some
22 factors that prosecutors are also responding to and

1 failing to charge a mandatory minimum in the first
2 instance.
3 So I don't mean to be pointing fingers,
4 but I mean to be suggesting that the kind of bare
5 assumption that, as Mr. Wroblewski said, what number
6 do we hit? If we hit a number of variances that is at
7 a certain level, will that show a dangerous signal?
8 And I think it's more complicated than that.
9 The Commission has rightly been asking
10 questions about racial disparity, and its own study,
11 the Penn study and a new working paper by Professor
12 Sonja Starr and Marit Rehavi, should be taken into
13 account, and suggest the need for further work. The
14 Commission's probably aware of this working paper,
15 which focuses on prosecutorial charging practices,
16 and finds that the effective of prosecutorial
17 charging practices on Black arrestees are the result
18 that they will serve significantly longer sentences
19 and are more likely to be charged with mandatory
20 minimums. And that finding was termed "very
21 striking" by the researchers.
22 So, these general observations lead me to

1 a number of conclusions. I'm seeing that my time is
2 up, so I'm just going to refer briefly to the
3 fundamental question raised by Judge Sessions, Mr.
4 Bowman — Professor Bowman, and others. I think the
5 hardest question is how to access the need for
6 proposals for fundamental change. To say that the
7 current system is working fairly well and allows for
8 needed flexibility, is not to say that it is ideal.
9 I agree that we could in theory have a better or a
10 more close to ideal system. Many elements are those
11 that have already been touched on. Such a system
12 would be simpler, it would enhance the reliability of
13 fact finding on key elements. It would preserve
14 needed flexibility. It would insulate the system
15 from congressional micromanagement. My list would
16 include the Bowman recalibration, and it would
17 correct structural problems, such as, perhaps,
18 subjecting a Commission's work product to an APA type
19 system. But I'm not persuaded that it's time to
20 initiate the process of fundamental redesign. Not
21 everyone agrees on the key element of the choices,
22 and of course, the ultimate decision would have to be

1 made by Congress. Congress does not approach
2 sentencing from the perspective of those that work
3 day to day in the system, or pour over the statistics
4 from an academic or an expert perspective. Congress
5 is, as it was intended to be, a political, non-expert
6 lay body. And such a body's view of the needed or
7 desirable changes have in the past focused on two
8 elements, the need for harsher sentences, and the
9 need for less judicial discretion.
10 I don't see anything that has
11 fundamentally changed in the current system, and I
12 think again, that the burden of change should be on
13 the proponents. I'm hoping that during the question
14 and answer period, that someone will ask me about —
15 Commissioner Howell will ask me about the lower crime
16 rates. I do a lot of work in this area, and on
17 public opinion, and so forth, and I'm dying to tell
18 that, but my light is on.
19 COMMISSIONER HOWELL: Consider it done.
20 MS. BEALE: Thank you.
21 MR. TONRY: My name is Mike Tonry. Like
22 everyone else who's had the privilege of speaking,

1 I'm most grateful to Judge Saris and the
2 commissioners for having me. Those of you sitting
3 behind me, most of you don't know, so you don't know
4 that I'm a white-haired guy with a white beard and an
5 open collar. A few minutes ago during the break
6 Judge Saris came walking up to me, with a friendly
7 look on her face, but fairly determinately looking.
8 And I stepped back and I said, alright, I'll go put a
9 tie on if you think that's — And she said, Oh I was
10 wondering who that guy was sitting out there, maybe
11 he was a journalist, maybe he was an academic — Well,
12 I'm going to take advantage of that to try to talk
13 for nine minutes now, from an outsider's perspective.
14 I once was the editor of a small country newspaper,
15 and I lived in Bologna, Italy, so that does make me an
16 outsider in a variety of ways.
17 And in doing that, I'm going to take you a
18 little bit through classics and a little bit through
19 some historical stuff, and a little bit through some
20 comparative stuff, down to a "what's the beef" —
21 what's the problem you folks have before you, I
22 think, and how should you address it.

1 Here's the classic stuff. In
2 Aristophanes' play *The Frogs* he describes two small
3 boys playing by a stream. The boys find a frog in
4 the stream, and he says, "The boys killed the frog in
5 jest, but the frog died in earnest." Now, if you are
6 trying to put a gloss on that, you would say, "Well,
7 it's the frog's perspective on what happened that is
8 probably important to understanding that event by the
9 stream that sunny day. And my view has always been
10 that in a certain sense, it's the offender's
11 perspective that's important in thinking about
12 justice and what happens in criminal courts. Not the
13 defendant's perspective in the sense of, what does
14 the offender think ought to happen, but trying to
15 figure out what the just thing to do in relation to
16 that particular frog. So, I'm bringing the frog's
17 perspective.
18 Trying to figure out what justice
19 requires, however, is an impossible problem. I mean,
20 God knows if — For those that believe in God, and
21 believe in omniscient, probably, God knows what is
22 deserved by this particular person under these

1 particular circumstances, in light of that knowledge,
2 and so on. But we don't know, so we have to get at
3 it the best ways we can.
4 COMMISSIONER HINOJOSA: He's in the
5 guidelines.
6 (Laughter.)
7 MR. TONRY: Well, maybe. Well there are
8 those in the past who have believed that to be true
9 and I think that's maybe been part of the problem.
10 But, the problem that is the predicate for this
11 meeting, and the proposals, is that there are two
12 different sets of views of what is justice — that have
13 been put forth. There's the Sentencing Commission's
14 view of what justice was. Not quite fly locked and
15 amber, but over a whole variety decisions, normative
16 decisions, political decisions, were made in the late
17 1980's and early 1990's, to create a particular
18 apparatus. And there's one perspective that says,
19 that if we're worried about the frog, we know what
20 justice is, by looking at the guidelines and figuring
21 out whether the guidelines have been appropriately
22 applied.

1 The other perspective though is, I think,
2 of many, but of particularly of judges who say, my
3 job is to do justice, and I want to look at that
4 particular frog and figure out what the just
5 disposition in this case is, in light of all those
6 things God would care about. With the problem, as
7 Commissioner Friedrich points out, that human beings
8 are different, and different human beings are going
9 to reach a different judgment about that. But that's
10 what's going on. And I think that's where our
11 conflict has been for all these many years now with
12 the federal sentencing guidelines. So the disparity
13 of the dissonance between the wish of federal
14 district judges, and defense lawyers, and prosecutors
15 often, to try to figure out what's just in an
16 individual case, and often seeing that what the
17 guidelines direct them to do is not reconcilable with
18 that.
19 Alright, that's a little bit of
20 Aristophanes. Now a little comparative stuff. So
21 there's two fundamental differences between
22 sentencing laws and practices. I should say, I do a

1 lot of consulting with European governments about
2 this stuff, and that's what I'm drawing on. There's
3 two huge differences between European — really
4 developed country — and American sentencing policy and
5 practices. One is just the grotesque difference in
6 severity in the U.S. from anywhere else. In Sweden
7 recently there was an incredibly controversial
8 politically motivated decision to increase the normal
9 sentence for rape by one-third. And there were
10 spirited debates, political and ideological, about
11 the justification of increasing penalties for rape by
12 one-third, for essentially political reasons — to
13 respond to what could be described as feminist calls
14 for more attention being paid to rape. Well, it was
15 one-third from 18 months to 24 months, for rape.
16 Now, that wouldn't be a big controversy in the U.S.,
17 to increase rape penalties by six months, but it
18 would be huge controversy to be talking about those
19 kinds of numbers. In most of the rest of the world,
20 sentences of longer than a year, are very rare, and
21 so on.
22 The second big difference is that other

1 countries care about proportionality. Not in airy-
2 fairy abstruse academic sense, but in the bottom line
3 sense that the one injustice a system should never
4 reek upon human beings, is to punish people more
5 severely than they deserve. And now if you think
6 back to the two frames of reference, that of the
7 Sentencing Commission's guidelines and its implicit
8 values and that of individual judges, the guidelines
9 often required judges to impose sentences in this
10 country that violated their sense of that European
11 absolute limit on what you do with people — punishing
12 people more severely than they deserve. Those are
13 big, big difference.
14 Now, so why are we so different? Now we
15 switch to history. If you go back to 1890 to 1930,
16 in every developed country there were big debates
17 about adopting completely indeterminate sentencing —
18 zero to life for every offender. And the rationale
19 in those days was, that we don't believe in free
20 will, to me crime is about conditions and psychology.
21 And the public policy question is, how do we minimize
22 crime, and you need to let experts make those

1 decisions.

2 In every country there are Harvard and

3 Yale law review articles, the turn of the century,

4 the debate went on for a very long time. Every other

5 developed country, except the U.S. decided

6 indeterminate sentencing on what we would now call,

7 human rights grounds, is indefensible. Because it

8 breaks the connection between what some human being

9 willingly did, that seriousness of what that was, and

10 their punishment. We did not — we did not — we

11 actually bought the indeterminate sentencing

12 rhetoric. And as you know, in two states, California

13 and Washington, for a time every prison sentence was

14 one year to the statutory maximum, with the parole

15 board making — Well, that's all fine, and its history

16 and it's something that happened in the 1920's, but

17 when you fast forward to the modern determinate

18 sentencing movement in the 1970's, we were using a

19 currency of punishments — 10 years, 15 years, 20

20 years, 30 years — that had no significance, for the

21 most part, in determining how long people actually

22 spent in prison, because parole boards decided that.

1 But when we abandoned the parole board
2 idea, and started making new sentencing regimes, we
3 did it using the numbers that were part of our
4 national mental vocabulary for — So, ten years for
5 robbery. Well, 12 years is the maximum for any crime
6 of any seriousness, except murder, in most
7 Scandinavian countries. Ten years for robbery,
8 alright. So we got into this situation where we have
9 this tradition of very long sentences, partly for
10 this anomalous historical reason, that we culturally
11 made a decision 70 years ago different from decisions
12 other people made. That's produced all the things
13 that we know about.
14 U.S. Sentencing Commission, last little
15 historical bit, in the 1980's made a whole series of
16 decisions, presumably in good faith, representing
17 their notion of what justice requires for the frog.
18 They decided, unlike most states, to divide crimes in
19 to 43 levels, rather than 10 or 12. They decided to
20 incorporate into the guidelines a whole serious of
21 non-statutory element-like considerations as
22 rationales for moving up and down through those 43

1 grids. They decided to try and take out of the
2 equation, most of those individualizing things that
3 most judges want to put back into it. Well, that
4 goes back to this radical difference that I mentioned
5 in the beginning in different ways of thinking about
6 what the just sentence is for that frog. And ever
7 after we've been in this situation, and you know the
8 tortured history better then I do, judicial
9 resistance, followed by *Mistretta*, followed by the
10 series of cases of *Blakely* and *Booker* and the ones
11 that had followed, in which finally the Supreme
12 Court — in sort of a very backwards kind of way — tried
13 to restore to judges the possibility, not of behaving
14 unduly leniently, which was the phrase that Judge
15 Lynch used — which always drive me crazy. If you ask
16 a judge, what are you doing, Judge? "Well, I'm
17 imposing an unduly lenient sentence." That isn't
18 what they say, they say what Ted McKee said, "Oh, I
19 was imposing a sentence on a particular offender who
20 bought the groceries for eight years, and never — ",
21 that's what they say, they don't say, I'm doing
22 something that's lenient, they say, "I'm doing

1 something that is just." So, if we get to the time
2 where we are now, with these sentencing guidelines
3 for which judges are supposed to go through a
4 calculus every time they impose a sentence, but on
5 which review standards are pretty weak, and try to
6 figure out what the problems is. I think the problem
7 you have is, the real problem, is not the downward
8 departures — that 80 percent of sentences either
9 within the guideline ranges are subject to
10 prosecutorial control is extraordinary. Given how
11 narrow the federal sentencing guidelines are, that 80
12 percent of cases in one of those two senses are
13 consistent with the guidelines is remarkable. In
14 states that have six, or five, or eight guideline
15 ranges of severity, and have 80 percent or 70
16 percent, or 65 percent consistency. Well, that's
17 sort of accepted that it's working reasonably well.
18 But you have 80 percent consistency on a highly,
19 highly, highly specific system, is a —
20 So, what's the problem? The problem for
21 me is not the downward sentence, it's the upward
22 sentences. Because they violate that almost

1 universal injunction in most countries, against ever
2 punishing people more severely then they deserve in
3 an individual case. And with the weak appellate
4 review standard, if you get the outlier judge who
5 just doesn't like this kind of offender and imposing
6 a 15 year sentence when everybody else would have
7 done five, that system that doesn't have a way to
8 deal with that risks profound injustices to lots of
9 frogs.
10 And so, in my outsider sort of ramble, I
11 think the frog's perspective is really careful. That
12 people in rolls like yours ought to try to keep the
13 mind on the frog, doing justice to the frog, even
14 though it's highly contentious figuring out exactly
15 what justice is, and how a system can be devised that
16 assures it most of the time. And to worry about that
17 small number of cases of people who get punished more
18 severely than, arguably, they deserve.
19 CHAIR SARIS: Thank you. Professor
20 Berman.
21 MR. BERMAN: Thank you, Judge Saris.
22 Thank you Commissioners for allowing me to share my

1 thoughts today. As you know, I have few
2 opportunities to let people know what I think about
3 sentencing, and so, it's a pleasure to have this
4 microphone. Also, I hope you have all learned as
5 much as I have, I think I've now completely figured
6 out why there's only policy disagreements about the
7 guidelines, as we just apparently figured out. Some
8 people think God is in the guidelines, whereas, other
9 people believe the devil's in the details.
10 So, with those —
11 COMMISSIONER HINOJOSA: It's celestial,
12 believe me.
13 MR. BERMAN: Yes, exactly. With that kind
14 of — I don't know what I want to say, Gingrich'ian
15 vision of what kind of perspective we might want take
16 on these issues, I want to try to both pull out just
17 some of the themes of my own written testimony, and
18 try to tie that a little bit to some of what's
19 already been discussed.
20 First and foremost, the problem isn't
21 disparity, the problem’s severity. Severity is the
22 issue, that's what we are hearing from every

1 dimension. I think Commission Friedrich had it
2 exactly right, that if the guidelines recommended
3 sentences that were 75 percent less, we would have
4 the defenders demanding greater compliance, we'd have
5 the prosecutors complaining about the failure to
6 consider every case individually. How do I know
7 that? Because it's exactly what is happening in
8 Missouri. It is precisely the debate in Missouri.
9 Missouri has advisory guidelines that are pegged
10 fairly low, and prosecutors spend all their time
11 moaning about the extent to with the judiciary tries
12 to keep lower judges within those guidelines. And, I
13 don't know what they say to their legislature
14 elsewhere, but every case is different. How can we
15 keep these lower guidelines, and the defenders go,
16 "No, it's important to be consistent." And so, we
17 would be through the looking glass. We don't have to
18 go through the looking glass. We can just go to
19 Missouri. And notice that it's severity that drives
20 the terms of these debates, and it's severity that is
21 why the federal system, right now at this moment in
22 time, is so dysfunctional. I do think it's much too

1 complex, I'd love a simpler system. I'd love a
2 system that actually complies with *Blakely* right, so
3 please understand when I say, don't radically change
4 the status quo, it's not because I adore the status
5 quo, it's because of deep concern that the system has
6 shown an incredible inability to deal with the
7 problem of severity effectively.
8 We can look at, we should look at, the
9 crack cocaine historiography, for lack of better
10 word, is an example of that. This Commission said
11 quite forcefully, quite effectively, quite
12 dynamically, quite repeatedly, over and over, and
13 over, and over, and over again. Drawing on data,
14 drawing on experience, drawing on every bit of power
15 they have, that the crack sentences were too severe,
16 and they had to say it, what, five, six, seven times?
17 And as result, Congress finally — only because of
18 changes in political forces and a variety of
19 incredible efforts by a number of these people in
20 this room, made them slightly more severe — less
21 severe, only slightly. That's a little bit of an
22 overstatement, you might say a lot less severe, but I

1 believe they ultimately embraced the least reductive
2 of the recommendations essentially that this
3 Commission put forward in all of its reports and many
4 of those reports themselves were driven by the real
5 politic of Congress being unwilling to do what this
6 Commission initially recommended.
7 And what fascinatingly — and this is the
8 important point to understand about the problem of
9 severity, that our current administration, the
10 Justice Department, went to the Hill to recommend.
11 They called for a complete elimination of any
12 disparity. So, even when — and it's a remarkable
13 development, and you guys had a hard time this
14 morning getting the Justice Department to articulate
15 a single thing that they want to reduce now, even
16 though I would think they ought to say, we still
17 crack sentences are too long. After all, they went
18 on the Hill and said, we want one-to-one. They didn't
19 get one-to-one. Why they're not saying crack
20 sentences are too long? Let's start there. Why
21 they're not saying, high loss frauds sentences are
22 too long, given that they don't go and try to defend

1 a life without possibility of parole sentence in many
2 of those cases. Frequently, because they recognize
3 that everybody understands that in some of those
4 cases, it's too long, they have to — this is what you
5 heard about, the Holder Memorandum. We can't go in
6 there and ask for a guideline sentence in front of
7 judges, we'll look foolish. That must be because the
8 guidelines are too severe, and it's foolish to
9 assert, in some cases, that that guideline complies
10 with the requirement of 3553(a) to impose a sentence
11 sufficient, but not greater than necessary to achieve
12 the purposes of punishment.
13 And I not only speculate, I think there's
14 evidence to support it, although it's hard to mine
15 the data, and maybe you all can more effectively, if
16 you were to run disparity populations — whatever you
17 want to do — just with the child porn cases, just with
18 the fraud cases, just with the high amount, but low —
19 high quantity, but low real role on the offense,
20 i.e., those settings where a bunch of not so
21 obviously valid factors drive guideline ranges way up
22 in the air, you'll find the greatest disparity. And

1 it's not because judges are being unduly lenient,
2 it's because they make different reasonable policy
3 judgment about whether to follow guidelines that
4 seem, by all reasonable accounts, to be too long.
5 Notwithstanding they recognize the appropriateness of
6 how they came to be, and why it's important to follow
7 the guidelines against the backdrop of a requirements
8 that they're still beholden to, set forth by
9 Congress, and not changed since *Booker* to impose a
10 sentence sufficient, but not greater than necessary
11 to comply with the purposes of punishment. You put
12 those factors together, it's not only not surprising,
13 it's inevitable, we will have increased disparity
14 unless and until you drive down the severity of those
15 sentences that everybody thinks are too severe. The
16 problem, of course, is not that's a good idea, it's
17 I'm not sure we can get that to work politically.
18 Okay, then you need to say that. You need to say, we
19 think, and here's the evidence to back it up whether
20 it's judicial evidence, the judges aren't following
21 these guidelines because they think they're too
22 severe. Whether it's research evidence, there's no

1 suggestion that these are reducing recidivism rates
2 or otherwise doing anything but driving up,
3 extraordinarily, the cost of justice and forcing us
4 to spend less on prosecutors, less on police, and
5 more on keeping old people in bed, then giving them
6 the free medical care that apparently is very
7 controversial to give to anybody other then federal
8 felons.
9 Tell Congress that. Tell them now. Tell
10 them over and over again, and tell them that the only
11 way to reallocate, reinvest the dollars they are
12 willing to spend on justice, to achieve a lower crime
13 rate from your expert perspective, is to drive down
14 the severity in some settings and to maybe move up at
15 the margin of severity in some other cases. That's
16 the package deal. It's not, do this with
17 mandatoryness or whatever else. I feel very
18 confident, you drive down the severity of the
19 punishment in those cases where judges are varying a
20 lot, and they'll vary less. Again, the crack
21 experience seems to echo that. The data's still
22 coming in, but my expectation, notwithstanding —

1 again, this is the remarkable part — Notwithstanding
2 that the Obama administration and this Commission,
3 and most judges who have thought a lot about it, sill
4 think 18-to-1 is crazy, and has no basis either in
5 the 3553(a) factors or in a more global sense of
6 achieving racial justice in light of the work you all
7 have done.
8 Still you are going to get greater
9 compliance with those guidelines than you had the
10 previous one, because not only do the guidelines have
11 gravitational force, judges want to give the
12 guidelines as much respect as they feel they can in
13 light of the statutory mandates that they're also
14 confronting, and the arguments made by the defendants
15 and their counsel in front of court. And so, it's
16 not disparity based on undue leniency, or this is my
17 thief-dom and I'm going to control it the way I want,
18 it's their following a set of laws that are built in
19 with a bunch of very hard policy choices, and they
20 understand. And this is where they're shrewd
21 political actors — they didn't get to be judges
22 without having a sense of the politics. If they

1 don't make the sentences lower in this individual
2 case, they ain't going to get lower. And the
3 person's going to sit in there in part, because we
4 don't have parole, in part because even doing a
5 Barber fix to add seven more days of good time
6 credit, is controversial and challenging. Even a
7 pilot program to let people out at 60 instead of 65?
8 Apparently no, those extra five years locked up,
9 that's going to keep us all safe. With all due
10 respect to my parents, they —
11 CHAIR SARIS: And to us!
12 (Laughter.)
13 MR. BERMAN: I was going to say, they
14 worried me more at 70 than they did at 65, and even
15 more after that. Right, they have less to lose, so
16 why not go crazy. Right, that C-E-G, that George
17 Burns movie where he commits a robbery at 90.
18 And so, all of those things that I
19 encourage you think about. I want to unpack a couple
20 of important issues with respect to the racial
21 disparity issue that's profoundly important, and yet
22 I still think is unanalyzed in a variety of ways.

1 One is that there are sets of factors that
2 play into a discretionary system, whether it's
3 discretion in the hands of prosecutors, or discretion
4 in the hands of judges. That's it's incredibly hard
5 to quantify, and I'll put it in terms of just pure
6 sweat resources. The reality is, sad reality, but
7 the reality, is that more white upper middle class
8 defendants — men mostly we're talking about here — have
9 more of an ability to get more money and/or more
10 energy put in by their defense attorney and by
11 others, to put together a mitigating file that
12 includes other white middle class people saying nice
13 things about them, that will lead a judge at the
14 margins to be a little likely to be slightly more
15 merciful. I think what the statistics suggest, to
16 the extent that they're valid — and I don't want to
17 get into that debate — as we may have — I think we
18 likely do have discrimination in mercy. It's true in
19 the death penalty system, it's probably true in our
20 system, it's going to be true in any discretionary
21 system. Although again, I return to a point made by
22 others earlier, my fear is that discrimination in

1 mercy is much greater in the hands of prosecutors, in
2 the charging of mandatory minimum terms, and the
3 like, then it is in the hands of judges. Who at the
4 very least are being told by a corresponding
5 representative that they shouldn't be merciful. And
6 so, I encourage, whether we'll be looking at the
7 child porn cases in particular, or a set of cases
8 where there's lots, and lots of downward movement to
9 see if it's the size of mitigating file, the amount
10 of money spent on defense counsel, the amount of
11 money spent on putting together a risk factor report,
12 or the like, before we make any conclusions that it's
13 more than just those who work extra hard and have
14 extra material to work with to get mercy, seem to get
15 it at the margins slightly more.
16 Last important point, I hope we can talk
17 more about this, how to find the presumption of
18 reasonableness — really? What is the presumption of
19 reasonableness? I'm still trying to figure it out. I
20 think presumptions are supposed to be rebuttable.
21 I've never seen it rebutted. In fact, I've never
22 seen a court talk about rebutted the presumption of

1 reasonableness. And so, if you want to do what I
2 think you might want to do — which I don't think it
3 unreasonable, that is, sorry to use a pun — that is
4 disallow substantive appellate review from within
5 guidelines sentences. If that's the goal.
6 Certainly, that's functionally what's been happening
7 in those circuits that have adopted a presumption of
8 reasonableness. It never gets rebutted. It never
9 gets reversed. We never have a within guidelines
10 sentence. Considered too long, notwithstanding the
11 use of acquitted conduct, other enhancements that go
12 through the roof, never does a within guidelines
13 sentence get reversed as unreasonable in those
14 presumption of reasonableness circuits, or even in
15 other circuits. Or even in other circuits, much at
16 all, say for, say for *Dorvee*, but if the goal is to
17 make those essentially bulletproof — to create a
18 guideline safe harbor, as long as the guidelines are
19 calculated fine, just go to Congress and say that —
20 remove appellate review from within guideline
21 sentences. I don't think that's a good idea. I
22 think that's a very bad idea. But I think it's a

1 worse idea to try to get there by codifying a non-
2 existent phantom presumption of reasonableness if
3 that's the goal. We can talk about whether that's
4 the goal. If that's not the goal, if the goal is
5 simply to toughen up reasonableness review, which I
6 think is exactly the right goal. It should be done
7 in light of a concern of severity. And it should
8 involve you saying repeatedly, here are the
9 guidelines that we worry can have a tendency to get
10 too severe. So not only don't presume them
11 reasonable. Maybe presume them unreasonable, maybe
12 presume them unreasonable. After all, you encourage
13 downward departures on some factors. That's a sign
14 that you think they're not reasonable — when those
15 factors are present. Yet, the existing juris
16 prudence both pre-*Booker* and post-*Booker*, you can't
17 review a failure to depart. That's a mistake.
18 Because it's probably the case that African Americans
19 and/or others without the best defense attorneys, or
20 the most money, and time, and energy spent, are not
21 getting the benefit of mercy, and that should be
22 what's reviewed. Not just because their frogs that I

1 think deserve some respect, but because it's that
2 process of getting appellate judges to double check
3 sentences that are most important in a system that is
4 as severe as this one is.
5 CHAIR SARIS: Thank you. Judge Hinojosa
6 and then — Oh, you want to go first?
7 VICE CHAIR JACKSON: I just wanted to ask,
8 I guess, both Professor Tonry and Professor Berman.
9 At least Professor Berman, as I understood your first
10 argument about severity, that the problem is severity
11 but that we should keep the current advisory
12 guideline system because we can't get lower
13 sentences, or dealing with the problem severity to
14 work politically. And the example given is the crack
15 situation. And I'm wondering, why doesn't the lesson
16 from the crack situation turn out to be that we
17 actually have to do this as a wholesale reassessment
18 of the guidelines along the lines of what Professor
19 Bowman was talking about, rather than a case by case.
20 I take from crack, that the looking at each guideline
21 and trying to get severity readjustments on a
22 guideline-by-guideline basis, is going to lead to the

1 kinds of political headwinds that will make it
2 difficult to reduce severity. As opposed having
3 something, you know, more along the lines of what
4 Professor Bowman discussed. And I just wanted to
5 know your opinions about that. Why keep the advisory
6 system, if severity is really the problem?
7 MR. TONRY: I'll go up and then — We just
8 hit an Alphonse and Gaston.
9 (Laughter.)
10 MR. TONRY: You people are much better
11 situated then I am to think about the real politic of
12 doing such a thing. In a world in which the sky
13 seems to be falling post-*Booker*, you can imagine the
14 reactions of people who's sky would be falling if the
15 sentencing guidelines were completely overhauled as
16 an engineering matter, is a challenge. But, the
17 major problem, I think, with the federal sentencing
18 guidelines now, is the Commission — I worked with them
19 as a consultant during the drafting phase. The
20 Commission never considered using the much simpler
21 and much more successful models of sentencing
22 guidelines that American states were then using

1 successfully to reduce disparities. Including where
2 you don't have 43 levels of offenses, but you have
3 eight or nine; in which you don't have a relevant
4 conduct standards in which their list of aggravating
5 and mitigating circumstances that are non-exclusive,
6 but where the Commission has tried to give some
7 guidance to judges; and, where there is a fairly
8 thorough appellate review standard. The early — In
9 Minnesota, and Washington, and Oregon, it was all
10 substantial and compelling. They were trying to keep
11 most sentences within the guideline range or down,
12 requiring —
13 CHAIR SARIS: What's the standard in most
14 states?
15 MR. TONRY: Substantial and compelling.
16 You have to have a substantial and compelling reason
17 to — But the U.S. Sentencing Commission in its wisdom,
18 elected not to do that, but it considered two
19 options. One of which was a very quantitative crime
20 control model that they abandoned. And the other,
21 which was this 43 grid — A 43 level grid. If you can
22 reinvent the world, and go back and have a much

1 simpler facially understandable, facially persuasive.
2 I mentioned in my testimony — In my written testimony,
3 people knew about the problem of what was called the
4 sentencing machine then. That if you give judges a
5 bunch of ingredients and tell them, put them in one
6 end and then you will see what comes out the other
7 end, and that's justice, they won't be very
8 comfortable with that — and they weren't. So,
9 absolutely if you people think that the — Either in
10 terms of realistic policy possibility — what a
11 horrible phrase — If you think there's some policy
12 attraction to be gained by proposing major overhauls,
13 then go for it. Even if what you think is that you
14 would be doing — In doing it you will starting a new
15 conversation, in which you might now see any progress
16 in the next two years, or four years. But by putting
17 the ideas in play, we might move to a point where a
18 complete overhaul that gets us out this bizarre
19 position of people like me saying, "Well, leave this
20 crazy thing pretty much as it is, but if you want to
21 do anything, try to figure out a way to prevent
22 extremely severe outlier punishments that might be

1 the result of the idiosyncrasies of particular judge
2 who imposed them." I'd say, go for it, and give it a
3 shot.
4 So, if you think it's a politically
5 possible thing for you to do, then my blessing.
6 MR. BERMAN: And my fear, and maybe you
7 guys again can tell me I'm wrong, that it's severity
8 in the hands of Congress, and to some extent the
9 Justice Department, but mostly in the hands of
10 Congress, is like spending money on benefits. Right,
11 so it's a super-committee problem. Alright, why
12 can't the super-committee just get together and
13 figure out where to have the cuts and where to have
14 the tax increases, and we can get this all worked
15 out. We just need to have everybody in a room and
16 make the Faustian bargain and compromise, and it will
17 all work out and it won't be Faustian at all. The
18 answer, I think, at the end of the day why that
19 breaks down, is that everybody wants the benefit and
20 none of the costs. And in the context of sentencing,
21 the last 25 years have shown us that in Congress'
22 view, the benefits are, I'm tough. And, they don't

1 deal with cost, Justice Department is telling them
2 over, and over, and over again, look at the cost —
3 look at the cost, we're spending our money poorly and
4 still we see no reason to believe that Congress is
5 getting together in an effective way. Even when
6 there's that deal put together to bring severity
7 down. Now again, if you guys can engineer it, I
8 would not only be behind it, but the first one to
9 say, this is the thing to do. And, to the original
10 Commission's credit — and this is sort of where I'd
11 start — How about recommending, rather then using the
12 2011 guidelines as advice, you just come out and use
13 the 1987 ones. What would happen then, it'd be very
14 interesting. Right, a bunch of really smart people
15 got together, and said, these are what we think the
16 sentences should be. And my guess would — and I'm
17 sure Amy Baron-Evans' head's spinning around three
18 times right, if you could process what this would
19 really mean. But how fascinating would it be, if we
20 looked at what the sentencing table would look like
21 right now, if just processed every case through the
22 much smaller, much leaner, much less inquested, '87

1 advice. Right, and it's all advice now, right. Gosh
2 knows, if I could run the world — more accurately, if
3 somebody could pay me to litigate every case, that's
4 what I'd do. Right, I don't think *Booker* says, you
5 have to consider the latest guidelines. In fact,
6 there's a big debate over whether *ex post facto* is
7 considered in the guidelines. So I would calculate
8 the 87 range every year, and say, here's some more
9 guidelines to consider judge. And by the way, when
10 we first put this bargain together, this is what we
11 thought was a sensible range. Now it's a 100-to-1 in
12 it for crack, so I don't know if I'd want to do it
13 there, but what a fascinating experiment. Right, or
14 put it different, why don't you guys do that, so you
15 can tell a story very effectively to Congress — look
16 what you guys have done. And it may have all made
17 good sense.
18 Last important point about this one, in
19 terms of dealing with severity, especially to the
20 extent to which doing outliers, do data plots, don't
21 do averages. Computers are good enough, you don't
22 have to use judge identifiers. Although, I would be

1 all in favor of using judge identifiers. Use
2 district identifiers, whatever it takes. Plot all
3 them on a big chart that we can go in and we can
4 click through. The technology is there, and if it's
5 not, I'll throw in 20 bucks to figure out a way to do
6 it. Because seeing everything munched together,
7 doesn't tell you nearly as much as if we had a data
8 plot — at least of every district, if not of every
9 sentence — and that will allow you to see what are
10 outliers, and a lot of judges themselves to
11 understand when and how they’re out of whack for
12 3553(a)(6) purposes.
13 CHAIR SARIS: Judge Hinojosa, and then
14 Judge Carr.
15 COMMISSIONER HINOJOSA: Well, first of
16 all, I guess I have to say, it must be great to be a
17 law professor.
18 MR. BERMAN: Yes, yes it is!
19 COMMISSIONER HINOJOSA: So you can go back
20 and say, to use the 1987 guidelines —
21 (Laughter.)
22 COMMISSIONER HINOJOSA: A couple of

1 comments to Professor Berman first. The 18-to-1 is
2 not contrary to what anything the Commission has said
3 recently. And since the year 2000 and the last time
4 we had a report, because we said no more than 20-to-
5 1. It is the Barber fix, it's the part that people
6 have raised concerns about, no one has any crawl with
7 the 15 percent. And with regards to the suggestion
8 that we have no appellate review within guideline
9 sentences, that's already in 3742. Other than
10 highlighting that and sending it to the Supreme
11 Court, I don't know what else we can do, but that's
12 already in there.
13 And then the next question is, and this
14 gets talked a lot about in the courtroom, the
15 parsimony provision. Usually the only part that is
16 discussed is, not greater then necessary, not the
17 sufficient part. But what's interesting, everybody
18 just quotes that without — the statute says, "the
19 court shall impose a sentence sufficient, but not
20 greater then necessary to comply with the purposes
21 set forth in paragraph two of this subsection." It
22 says only paragraph two. Paragraph two has four

1 provisions. Three of them are basically public
2 protection: the need of the sentence imposed first
3 to reflect the seriousness of the offense to prompt
4 respect for the law and to provide just punishment
5 for the offense; the second to afford adequate
6 deterrents to promote conduct; the third to protect
7 the public from further crimes of the defendant; and
8 the fourth, to provide the defendant with needed
9 education or vocational training, medical care, or
10 other correctional treatment in the most effective
11 manner. And so, I know this parsimony provision
12 gets talked about a lot, but we ignore the fact that
13 it's limited to the second paragraph, which is mostly
14 public protection. So therefore it brings up a whole
15 issue of the frog, and we obviously have to be
16 concerned about the frog, but what about the other
17 frogs within that stream that are being hurt by that
18 particular frog. How much attention do we pay to
19 them ribbitting?
20 MR. BERMAN: Ribbitting, is that what you
21 said?
22 (Laughter.)

1 COMMISSIONER HINOJOSA: It becomes a
2 difficult process, and it's nice to be a district
3 judge, just like it is a professor. But, you know
4 this is, I think, a serious question with regards to
5 how people like to talk about 3553(a) factors, like
6 there's no limit to them, and we can just do whatever
7 we want. But there are some serious limits and parts
8 of this statute, that just get ignored.
9 MS. BEALE: That's right, and certainly if
10 you looked at *Pepper* and *Gall* in light of that, the
11 rehabilitative actions that those individuals had
12 taken, which shows there's less of danger to the
13 public — right? And no need to run them through the
14 system to somehow treat their addiction or otherwise.
15 And the young man that Judge McKee referred to who he
16 thought —
17 COMMISSIONER HINOJOSA: He was out of the
18 ordinary, just like under —
19 MS. BEALE: But really, an unusual person
20 who might —
21 COMMISSIONER HINOJOSA: Just like in the
22 mandatory system that person would be out of the

1 ordinary.
2 MS. BEALE: Right, right, right, right,
3 right.
4 COMMISSIONER HINOJOSA: You don't usually
5 have somebody that had that kind of issue, and that
6 kind of violation of the law, that for three years
7 was taking care of the next door neighbor and being
8 honest, and had her come in.
9 MS. BEALE: Right, and so that may tell
10 you something about public danger and what it would
11 be like if that person were reintroduced into the
12 community, and so forth, and their amenability to
13 various treatment protocols and so forth.
14 So, I think, it's not inconsistent to
15 think that we'd be looking at those factors and that
16 individual characteristics and characteristics that
17 might not otherwise be take into account. Including,
18 I thought Professor Berman's idea about thinking
19 about the effectiveness of the advocacy, in terms of
20 presenting information that might be needed by the
21 court, is another important point. And, references
22 to prosecutorial practices that may or may not

1 highlight, or may remove certain people from the
2 group — the cohort that the court is seeing, and the
3 statistics may not show that.
4 So, I mean, all of this is consistent with
5 your point.
6 COMMISSIONER HINOJOSA: The point I guess
7 I'm trying to make is, it's never that clear cut.
8 There's the good part of taking care of the neighbor
9 and then they'll be all sorts of other things within
10 this report, and in the facts that are brought out,
11 that make it very difficult and then you have to
12 follow the a(2), and it's sufficient, but not greater
13 than necessary — and I'm just trying to say, it's not
14 just greater than necessary, it has to be sufficient
15 also.
16 MS. BEALE: I take your point.
17 MR. BERMAN: Well, and I like on the
18 "Goldilocks" provision, right, that's somebody else
19 termed it that way. It's got to be just right. But
20 that's where again, you go through the guidelines and
21 it's hard to see where any of the guidelines
22 articulate an evidentiary basis, or an evidence-

1 based basis, for saying, we've concluded that a 20-
2 something point enhancement, when the law says,
3 calculate it to be 27 million. It's now only
4 sufficient if you drive the sentence up to 25 years.
5 Right, and it's especially notable. And this is my
6 concern about turning the guideline range into a safe
7 harbor, you'll have a case — it's only my mind of
8 late, Rubashkin, where the prosecutors have come in
9 and they've said, we think 25 years are enough, and
10 the judge imposes a 27-year within-guideline sentence
11 that gets affirmed under the presumption of
12 reasonableness. The prosecutors themselves, who I
13 think are concerned about public safety and all of
14 the 3553(a) factors, came into court and said, we
15 think 25 years is enough, and the judge went above
16 that. Now the judge may believe that the prosecutors
17 are being too lenient, but I don't think that
18 generally is a problem. And absent either something
19 in the record that suggests the prosecutors didn't
20 think that didn't protect the public, or something in
21 the guidelines that say we can't trust him, that
22 makes me think that we rarely have to worry about the

1 Goldilocks are too short. But we often have to worry
2 about the Goldilocks of too long.
3 CHAIR SARIS: So, did you — and then —
4 MR. CARR: I just want to say briefly to
5 Professor Berman, while defendants who are wealthy
6 have certain advantages, I just want to say that in
7 the district in which I practice, the best defense
8 attorneys in the town were the public defenders.
9 (Applause.)
10 MR. BERMAN: And if they had the resources
11 they needed to get the kind of expert reports
12 necessary to do the kind of work they'd like to do,
13 in the perfect world, I'm sure they would get much
14 lower sentences —
15 COMMISSIONER HINOJOSA: And they do them
16 better then anybody else, I have to say that.
17 Sometimes they get written by someone.
18 CHAIR SARIS: Judge Howell.
19 COMMISSIONER HOWELL: I have to live up to
20 my promise — after Professor Beale. And, may I just
21 start by saying, that I actually agree with your
22 initial statement that proponents of change bear the

1 burden.

2 I think it is certainly one of the reasons

3 the Commission is holding this hearing and preparing

4 a, you know, a subsequent book or report since our

5 last one, which was five years ago. So, you know, we

6 accept that burden. But I think that you wanted to

7 talk about the timing of whether this is the right

8 time — not putting aside our book or report, and our

9 analysis of all the statistics as we see it, with

10 sufficient foundations so that others can critic it —

11 as I'm confident they will.

12 That's part of the dynamic conversation

13 that is — makes us a fruitful and very interesting

14 position to serve in. And a — But so, what is that

15 you wanted to add to the timing discussion from our

16 last panel?

17 MS. BEALE: Sure. So, there was a

18 argument that the lower crime rates make this an

19 especially auspicious moment for legislative change.

20 And I wanted to suggest that that's not necessarily a

21 good indicator of public support for these or

22 political support for those factors. So, more than

1 two-thirds of people in the most recent public
2 opinion polls said that crime is rising. There's
3 more crime this year then there was last year. And
4 they've consistently said that throughout the entire
5 period of decline in crime rates.
6 Where do most people say they get their
7 information about crime? They actually don't think
8 crime is up right around them, they think it's up
9 more generally, and they say that comes from the
10 media — news media. Studies of news media show — I
11 don't want to shock anyone, but it turns out it's not
12 like a mirror, where it's just showing a reflection
13 of reality, it's market driven so that choice of how
14 much violent crime to show correlates to viewer
15 tastes in a particular locality for a violent
16 entertainment programming. And one way local
17 channels, for example, one thing they can control,
18 they have network programming, but they can control
19 their local news broadcasts. That's their money
20 maker. And so they try to adjust programming to get
21 more viewers. And so you're all familiar with the
22 phrase, "if bleeds, it leads." So, most people get

1 their information about how much crime there is from
2 the news and they think there's more.
3 The second factor that effects public
4 opinion is big lurid cases. That Petit rape-murders in
5 Connecticut, for example, had a huge effect on public
6 opinion there. Legislation was passed immediately
7 after. You can all think of choices, examples of
8 that.
9 And the third factor of course, is the
10 general political situation, and the question whether
11 there's a hotly contested partisan election. Whether
12 people are trying to get an advantage, looking for a
13 wedge issue, particularly in light of the public
14 belief that crime is still up. The media treatment
15 of it, any big case that's occurred, and I'm sure
16 that you can think of examples of political
17 situations where different parties or candidates — or
18 whatever — took this on and used it effectively. So,
19 I would ask whether you think we're in a politically
20 contentious period. And I know what I think the
21 answer to that is. I'm not expecting Congress to be
22 holding hands and singing Kumbuya anytime soon. So,

1 I don't see it as a situation, in terms of the
2 broader context, that would effect political behavior
3 or, frankly, public opinion, as especially
4 auspicious.
5 VICE CHAIR JACKSON: Can I follow up on
6 that?
7 CHAIR SARIS: Yes.
8 VICE CHAIR JACKSON: Well, while that may
9 be so — and you testified that, you know, fundamental
10 redesign is something that you haven't yet been
11 convinced is warranted.
12 MS. BEALE: Well, could I disagree with
13 that?
14 VICE CHAIR JACKSON: Okay.
15 MS. BEALE: Just in slightly. So, I said,
16 I think it would be great to have the ideal system,
17 but I don't think we can get it now. Right? So, I
18 don't think this is the political moment where I
19 would imagine that that could come through Congress,
20 and I'm quite concerned that if you start a process
21 where you throw open the possibility of political
22 design, that what you get will be worse then what you

1 have now, or all of your energy will be diverted to
2 something rather than what somebody was calling the
3 more — the more modest changes that would really
4 improve the way the system is actually functioning.
5 So, I'm pretty risk-adverse myself, as an individual
6 I buy lots of extra insurance, and all sorts of
7 things. So, it may reflect that mindset.
8 VICE CHAIR JACKSON: The only question
9 that I have is, if fundamental redesign was something
10 that one could conceive of as potentially being
11 beneficial in the long term. It's not going to
12 happen overnight. Right? And one would hope that it
13 wouldn't because you wouldn't want to do some kind of
14 fundamental restructuring in the heat of the moment.
15 So, when that window of opportunity comes where
16 public opinion is for and Congress is for you, we
17 might not be in a position to redesign the system in
18 that whatever narrow window it is.
19 So, I think that the concerns that you
20 expressed have to be balance against the risk
21 averseness has to be balanced against this notion
22 that we may want to get the ball rolling, in some

1 sense, because it's going to take a while to get to a
2 system that everybody could possibly be in a position
3 to get behind when that window opens. And so, the
4 concern that I've had with people who see that
5 changes could be beneficial, perhaps even see that
6 severity is much too high and we really need to make
7 some kind of drastic change, but yet, want to cling
8 to the current system in the interim is that it
9 prevents the beginning of the kind of thinking and,
10 you know, coalescing around the possibility that it's
11 going to take a while to do. You know, people don't
12 want to start the dialog because they're afraid that
13 if we open the door to the possibility, that
14 something worse will happen. So, I don't know —
15 CHAIR SARIS: Yes, then we need to move
16 on. So, you want to have the final word here?
17 MR. TONRY: I just want to say one last —
18 90 seconds. You have a precedent that when the
19 original Commission was formed they created two
20 design groups. One of which was supposed develop
21 guidelines based on research on deterrents and
22 incapacitation, and the other one what was called

1 "just deserts theory." They abandoned the first and
2 bought into the second, and that's where you get the
3 structure. You could, it seems to me, as a response
4 to *Booker* and the subsequent cases say, in trying to
5 think responsibly about the future, why don't we go
6 ahead and put together a couple of future
7 architecture design projects. One of which is, let's
8 make the current system as good as we can possibly
9 make it, let's tweak and tweak and tweak. And the
10 other is, suppose we are starting over under the
11 statute, what will we do? Seems like an overwhelming
12 just, but the reality is that in the states that the
13 sentencing have done it relatively successfully —
14 North Carolina, Minnesota, Washington for while,
15 Oregon — that actual job was an 18 month job with
16 part-time commissions. I mean, the real — the real
17 work not the politics, but the design architectural
18 policy work, is not a huge, huge job and it's not a
19 rocket science job. So if you'd allocated some
20 resources — Alright, let's try Option A for the
21 future, Option B for the future, and to see what they
22 look like, maybe in 24 months or 36 months you'd

1 actually have something you wouldn't necessarily
2 promote to the Congress, but the time came when you
3 wanted to do something like that, by golly you'd be
4 way ahead.
5 MR. BERMAN: I just want to make a tiny
6 point that both compliments the public defenders and
7 highlights why my concern about the way in which
8 defense representation may explain disparity, is
9 based on my own experience of being brought in as an
10 expert in a variety of these child porn downloading
11 cases. My sense is, the Federal Public Defenders
12 know the currency of these cases, they get in a plea,
13 they get the case done, it's not a below guideline
14 sentence — they've managed to work out whether to seek
15 plea or something else, so if the enhancements don't
16 apply, then a lot of retained attorneys make really
17 bad plea deals, relatively speaking, have a very high
18 guideline range, and then they're working their tails
19 off to try to argue for a variance. In fact, *Grober*
20 was in the Third Circuit, is exactly that story. It
21 was badly mishandled at the pre-plea stage when a
22 plea was offered according to the record to be below

1 five years, which was the way below guidelines
2 sentence that was imposed. But because it was poorly
3 handled at that stage and a variety of other factors,
4 it ended up being an open plea. The guideline range
5 was 20 years, the judge took all the record and went
6 down to five, which was still longer than if it had
7 been handled, I think, by a federal public defender
8 who knew the currency, but it wouldn't have been
9 coded as this massive departure. It would have just
10 been coded as another within guidelines sentence.
11 Because defense advocacy makes a huge difference in
12 the way in which the case even gets to the judge, let
13 alone how it ended up being a variance or departure,
14 or within guideline sentence.
15 CHAIR SARIS: Thank you very much, I'll be
16 thinking about frogs jumping all night. Thank you.
17 We're actually moving pretty fast, but I
18 think we need to keep going, we're just not going to
19 make it so —
20 (Recess.)
21 CHAIR SARIS: Alright, so our next
22 perspective, the community perspective, by two people

1 who've made a lot of difference to the Commission.
2 Mary Price is the Vice President and General Counsel
3 of the Families Against Mandatory Minimums.
4 Previously she was associated with the law firm of
5 Feldesman, Tucker, Leifer, Fidell, and Bank, LLP,
6 where she handled appeals of court martials and
7 conducted administrative advocacy on behalf of U.S.
8 service members. And Mark Mauer has been the
9 executive director of the Sentencing Project since
10 2005, having joined the Sentencing Project in 1987.
11 He's also an adjunct faculty member at G.W. — George
12 Washington University. Previously, he served as the
13 national justice communications coordinator at
14 American Friends Service Committee. Welcome — I
15 should say welcome back.
16 MS. PRICE: Thank you.
17 MR. MAUER: Thank you.
18 MS. PRICE: Shall I start then?
19 CHAIR SARIS: Yeah.
20 MS. PRICE: Okay, thank you.
21 Thanks Judge Saris and Commissioners for
22 inviting me to testify on behalf of FAMM on the

1 community perspective's panel.

2 CHAIR SARIS: You know what I think, and I

3 say this witnesses, but I think —

4 MS. PRICE: I was trying to move the

5 chair, the chair doesn't move.

6 CHAIR SARIS: Just this is moveable.

7 MS. PRICE: I'm sorry, is that better.

8 CHAIR SARIS: All you back there can hear

9 better? Alright, go ahead.

10 MS. PRICE: Alright, I was just saying

11 thank you, if that you missed that.

12 We have come before the Commission for

13 probably the last 20 years, often as witnesses at

14 this table to testify at hearings like this, to urge

15 you do what you can to cure the severity — they're a

16 product of the guideline system.

17 What we do — what you do rather matters a

18 great deal to the people who matter to us, so we

19 really appreciate this opportunity. You asked us on

20 this panel to compare the two options that were being

21 discussed — or the two sets of options that are being

22 discussed today.

1 The first is anchored in what we think is
2 your unprecedented request to Congress to stage what
3 we think amounts to a legislative intervention. The
4 other set of options would restore what you
5 characterize as mandatory guidelines. And I have to
6 say, the request to compare the options assumes that
7 there's some need for them, and I don't share that
8 assumption with you. To our way of thinking, both
9 options will inflect harm on, rather than improve the
10 administration of justice. Both would endanger what
11 we see as the healthiest dynamic that the guideline
12 system has ever experienced since its inception —
13 which is the unfolding dialogue between the judiciary
14 speaking through its sentencing opinions on the one
15 hand of the Commission, and the Commission responding
16 by evaluating the judicial feedback that it's
17 receiving and determining if and how it might do a
18 better job of guiding that conversation. It would be
19 the equivalent, if you — we start telling the judges
20 through making the guidelines more mandatory, or
21 mandatory, that it's one participant in the
22 conversation; we don't like what we're hearing and we

1 don't want to hear any more.

2 So, we see three problems with the

3 proposal that went before Congress. First of all, we

4 felt that there was incomplete evidence of the

5 reasons for the variances and the reasons for the

6 disparity — what are the sources of disparity and the

7 reasons for variance? Number two, we think that to

8 the extent that we can identify the disparities, we

9 haven't done a good job of identifying which ones are

10 warranted and which are unwarranted. And number

11 three, we think we would ask you to slow down a

12 little. Take your fences one at a time, and look at

13 the authority that's inherent in the rules that you

14 have and the statutes that you have to take a look at

15 guidelines that are too severe, or otherwise broken,

16 and fix those first.

17 The Commission announced its priorities,

18 and in its priorities this year they're going to

19 conduct a comprehensive report on *Booker*. I think

20 you've been intending to do that for a while. The

21 Department of Justice has asked for that review, I

22 think, in 2010. And what the Department said in this

1 letter is — asked the Commission to explore new ways
2 of analyzing federal sentencing data in order to
3 understand federal sentencing outcomes better,
4 identify any unwarranted sentencing disparities, and
5 determine whether the purposes of sentencing are
6 being met. But in October, without waiting for the
7 completed *Booker*, the Commission went to Congress
8 with its request to alter the rules of sentencing
9 based on your concerns about disparities and
10 variances.
11 We feel that the information provided in
12 the congressional testimony leaves us with a lot of
13 questions about evidence supporting the need for a
14 fix of that sort. The testimony to Congress, number
15 one, we thought evidence a rather a lack of curiosity
16 on the Commission's part about the causes of
17 variances and sources of disparity. The testimony
18 presented Congress with a lot raw data that showed an
19 increase in the number of variances, surely. And it
20 also demonstrated, according to the Commission,
21 troubling trends in sentencing, including growing
22 disparities among districts and circuits. That's

1 your language. The Commission didn't, with a couple
2 of tantalizing exceptions, analyze the possible
3 causes of the disparity. So, we can't tell from your
4 data who causes the disparities and the variances,
5 and if they are judicially causes or otherwise, are
6 they warranted or are they not warranted?
7 When the submission to Congress offered
8 some analysis, for example, providing some very
9 useful information that lower sentences are due not
10 only to judicial variances, but also to "a reduction
11 in the overall severity of the aggregate offenses in
12 federal case loads, i.e., due to an increasing
13 portion of the federal case load involving
14 immigration cases, which have lower sentences." That
15 insight didn't find a home in the overall narrative
16 to Congress. The Commission did not draw any
17 conclusions from that bit of information, which left
18 us to ask how does it affect the Commission's view of
19 the problem to know that some variances are the
20 direct result of a changing federal case load in
21 different prosecutorial practices. Similarly, the
22 Commission reported to Congress that the guidelines

1 rule that invites the greatest number of departures,
2 is the criminal history guideline, but that appears
3 to be at the end of inquiry. Can't the Commission
4 help stakeholders better understand why judges
5 believe the criminal history guideline so frequently
6 fails to account for — appropriately rather — for the
7 defendant's actual prior criminality? Is there
8 something about the criminal history guideline that
9 is askew?
10 In the same section the Commission told
11 Congress that variances are most frequently triggered
12 by the nature and circumstances of the offense, but
13 we're left to wonder, what does that mean? And how
14 does that fit into the case that's being built for
15 legislative fix? Now, happily the *Booker* report is
16 still forthcoming, I think you're still working it,
17 so there's still time, I think, to get a handle — at
18 least for those of us — to get a handle on what it is
19 you're presenting. So we urge the Commission in
20 preparing the *Booker* report — study, to take a hard
21 look behind the numbers and help us understand what
22 they can teach us, besides the fact that judges are

1 varying from the guidelines and they're disparities
2 in the system. The Commission can take a page from
3 the American Bar Association when it testified before
4 Congress — Jim Felman went behind the numbers and
5 factored out sentences under two guidelines. One
6 that produced lower sentences, one for illegal
7 reentry and one for crack cocaine. And when he
8 isolated those two guidelines sentence numbers, the
9 illegal reentry cases — being lower because the
10 government's policy of prosecuting less serious
11 cases, and crack cocaine offenders getting lower
12 sentences because of actions by the Commission. In
13 Congress, what he found, and what the ABA, is that
14 average sentences for all other major categories of
15 offenses are either unchanged or slightly higher.
16 And, you know, some of them are quite a lot higher,
17 the ones that you/we talked about yesterday in terms
18 of child pornography offenses, and high loss fraud
19 cases. And I know that you are taking a look at
20 those.
21 Better accounting for the role of
22 prosecutors and variances and disparities, will help

1 lawmakers also have more information about whether
2 things need to be changed right now. Alterations to
3 the guidelines system that put more power in the
4 hands of prosecutors by tying those of judges, strike
5 us as both counterproductive, and at this moment, at
6 least, counterintuitive. As you know prosecutors
7 play a large role in sentencing outcomes, that vary
8 from district to district, by selecting which cases
9 to prosecute and which charges to bring. They also
10 effect outcomes by recommending sentencing that vary
11 from the guidelines, or by not objecting below-
12 guideline sentences. And they exert a strong
13 gravitational pull, as you can imagine, on
14 sentencing, and you know that. But much of can't —
15 excuse me — Much of the impact — -
16 CHAIR SARIS: It's a long day.
17 MS. PRICE: Much of their — -something —
18 impact, I think, cannot be assessed, because it takes
19 behind closed doors. So, what happens is that the
20 acquiescence and below guidelines sentences varied in
21 sentencing transcripts. And it comes out looking
22 like the judge caused disparity, and we see variances

1 and we go, oh dear. So, it's normally the judge that
2 who draws, and also the prosecutor, that you draw,
3 and I think that that's something that the Commission
4 can help us learn more about. And I'm sure the
5 government would be, you know, amenable to helping to
6 figure that out as well. This is information that we
7 have.
8 One example, the Commission's statistic
9 demonstrate that we talked about earlier, in 2010 the
10 government asked courts to impose below-guidelines
11 sentences in over 60 percent of cases they prosecuted
12 in the Southern District of California, but in only
13 3.7 percent of the cases in the District of South
14 Dakota. It's a big difference, 56 — almost 57
15 percent. It would be very useful to know, at least
16 get an understanding of what makes the case loads and
17 practices in the Southern California — in Southern
18 California — South Carolina — South Dakota, rather, so
19 very different.
20 And as you know, until very recently, the
21 Attorney General decided in which districts
22 prosecutors could ask judges to impose below

1 guidelines in sentencing in certain immigration
2 cases. So the Department's early disposition policy
3 produced built-in sentencing disparity among
4 similarly situated defendants. So it's no surprise
5 that some courts combated this disparity among
6 similarly situated defendants by varying from the
7 guidelines in those districts that the Attorney
8 General had not elected to permit the early
9 disposition program in. We think that the Commission
10 would do a great service to emulate an approach that
11 never takes the numbers at face values, as it
12 prepares to release its upcoming book or report.
13 The final sort of concern that we have, is
14 that the Commission's appeal to Congress to fix the
15 guidelines, to some extent, without first using the
16 tools and authorities that you have at your hand to
17 improve troublesome sentencing rules. Congress
18 obviously built in the means to revisit and perfect
19 sentencing guidelines and use that authority a great
20 deal. It strikes us that seeking a change of
21 discretion without trying to fix problematic
22 guidelines suggest that the guidelines are

1 infallible. It's kind of like saying that past
2 Commissions — to carry on the religious analogy from
3 earlier, we're speaking *ex cathedra*, of course they
4 weren't. Were that true, then variances for the
5 guidelines would be — should be — better controlled.
6 But the guidelines aren't perfect, and not because
7 they're now advisory, they are deeply flawed because
8 they are, have been, riffed with sentences that are
9 unduly long and severe, overly retributive, not
10 proportionate and based on little or no empirical
11 evidence of their inherent validity.
12 So we think that the better course is to
13 consider fixing guidelines rather then trying to stop
14 judges from doing what they can do to ameliorate
15 unjust sentences. Taken in that light, looking at
16 what judges are doing, judicial variances are a
17 barometer and not a problem.
18 I see that I'm out of time —
19 CHAIR SARIS: You are — Don't worry, we're
20 have a lot of Q & A's so they'll be time for more — Is
21 there one last point that you want to make?
22 MS. PRICE: Sure. We have others have

1 come before the — We know that the guidelines aren't
2 perfect, obviously, I mean, you seen us come before
3 you for years complaining of about guidelines that we
4 think aren't perfect, so I don't want you to think
5 that we think the system is perfect. We've asked you
6 for years to delink or to minimum rejigger the
7 relationship that's between the drug guidelines and
8 the mandatory minimums. We and others have asked the
9 Commission over and over again to change the relevant
10 conduct rules that require judges to use acquitted
11 conduct in their sentencing equation. We've argued
12 for a better guideline safety valve, retooled
13 criminal history, taken a look at the fraud
14 guidelines, taken a look at the child pornography
15 guidelines, the career offender guidelines, and we do
16 so because they result in what we consider to be
17 disproportionate and unduly harsh sentences. But
18 absent meaningful feedback from judges in the past,
19 and given the difficult departure standard that
20 judges used to have to operate under, and given
21 pressure from Congress and the administration, nearly
22 all of the 737 guideline amendments promulgated

1 through 2009, increased the severity of sentences or
2 hindered judicial discretion. This Commission and
3 the Commission before this have begun the process of
4 beginning to address guidelines. And I think my
5 written testimony didn't give the credit that you're
6 due for having done that, and we really appreciate it
7 that. And we want that to continue. It doesn't have
8 to continue to be the fact that the guideline ranges
9 always have to go up. We urge you to take steps now
10 to improve problematic guidelines, especially those
11 that judges highlight by repeatedly varying from
12 them, or that we highlight by continuing to complain
13 about them.
14 In conclusion, we encourage you to dig
15 down; refuse to the take the data at face value;
16 embrace the feedback that you're getting; take stock
17 of guidelines that are causing variances; account for
18 the role of other actors and other rules in this
19 system that might be driving disparity; and, above
20 all, don't do anything that's going to slow down or
21 close down the ability to hear what the courts think
22 about the rules that you write.

1 Thanks a lot.

2 CHAIR SARIS: Thank you. Mr. Mauer.

3 MR. MAUER: Okay. Well, thank you for

4 inviting me here, and I do appreciate the number of

5 opportunities that I've had to come before you, and

6 always the level of discussion that we do have here.

7 I do want to focus my comments today on the whole

8 question of racial disparity. And I'm sorry I wasn't

9 able to be here this morning, I understand there's a

10 fair amount of discussion, so what I'd like to try to

11 do is to summarize fairly quickly what my take is on

12 what we know and what we don't know about the

13 disparity. And probably more importantly, what are

14 the implications of what we know or what we should be

15 thinking about doing to the extent that we perceive

16 there may be racial disparity and is it warranted or

17 unwarranted.

18 First, you know, I thank the Commission

19 for looking at the issue of racial disparity, it

20 seems to me that it would be irresponsible not to be

21 asking these questions. The Commission has had a

22 long history of looking at racial disparity and

1 mandatory sentencing, crack cocaine, and many others,
2 and that should be the first agenda item on the
3 table. And so, while there's been debate in part
4 about research and things like that, these are the
5 questions we need to be addressing. It seems to me
6 that, I think the Commission's study, the Penn State
7 study have been sort of unfairly, unwisely at
8 competing studies, when I think in many ways, they're
9 much more portrayed as complimentary studies. Both
10 asking important questions, looking at somewhat
11 different outcomes of sentencing; working with, you
12 know, not always perfect data, but better data than
13 we have in most of these states' studies being done.
14 And so, they tell us something about different parts
15 of the system or different ways decisions are made,
16 and they're both beneficial in that senses. And I
17 think we should try to learn as much as we can from
18 both of them. I think it's fair to say that the
19 Commission's conclusion was that there was disparity
20 for black males receiving longer sentences. The Penn
21 State study focused more so on the in-out decision,
22 and identified disparity more so coming at that

1 point. These are all important questions, and we
2 should be concerned, and we should try to understand
3 what it means. So the question is, to the extent we
4 think there is some disparity at different stages of
5 the system, what do we know about where that might
6 come from. There's some people that would like to
7 jump on federal judges and say that it's bad federal
8 judges, and all that sort of thing. I'm not one of
9 those people. And there's some people that would
10 say, well, prosecutors are responsible for this, and
11 I don't know that that's the case either. It seems
12 to me that what we do know about racial disparity in
13 particular through a series of many years looking at,
14 not just federal courts, but state courts, is that
15 the sentencing outcomes on the day of sentencing in
16 court, reflect a range of decisions that are made
17 prior to Defendant A and Defendant B ending up in
18 court one day. And to just look at Defendant B, and
19 make a determination about whether there's disparity
20 and warranted or unwarranted, is getting halfway
21 there, but only halfway there. So, we need to know
22 more about what those processes look like.

1 I think we also need to examine sentencing
2 policy, broadly speaking. I think we've learned a
3 lot in recent years about policies that we could
4 fairly describe as race neutral on the surface, but
5 often may have unintended and often fairly
6 predictable racial effects too, and how do we avoid
7 doing that sort thing in the future. In terms of the
8 process by which two defendants are likely to end up
9 in court on the day of sentencing, yes we've learned,
10 I think in part from the Michigan study, it's been
11 referred to about the role of prosecutorial charging
12 decisions, and the odds that a defendant will be
13 charged with a mandatory penalty, I think the key
14 question there is probably — for these purposes today-
15 -why would this more of an issue in the post-*Booker*
16 period? I think the Michigan researchers' answer to
17 that is that given that federal judges now have more
18 discretion on the guidelines, but not the mandatory
19 penalties, that the mandatory penalties become even
20 more significant than outcomes, and they may have
21 been previously. And so, any unwarranted disparity
22 in the charging decision will have potentially

1 greater effects.
2 The other recent study by academic Spohn
3 and Brennan, I think shed some light on this issue of
4 what are prosecutors doing, how are their decisions
5 influencing some of these outcomes where they look at
6 downward departures for substantial assistance, and
7 find that there's disparity that works against Black
8 and Hispanic males. What I find most intriguing
9 about their conclusion is, you know, what are the
10 reasons for why they think this comes about, and as
11 the authors study say, they believe prosecutors are
12 doing this too as they, "fashion more appropriate
13 sentences for sympathetic and salvageable offenders."
14 Now, it seems to me there's nothing wrong with that.
15 As Judge McKee was talking about the case there, that
16 was a salvageable offender in his eyes or so, and we
17 shouldn't discourage federal prosecutors from trying
18 to help people who are capable of being helped and we
19 can produce better outcomes. The challenge becomes
20 if salvageable offenders, sympathetic offenders, to
21 what extent, racial dynamics may play into that, it
22 could be because of racial perceptions of the

1 prosecutors. It could be because of socioeconomic
2 differences that make some people more salvageable
3 under current terms. So, what do we do about that?
4 It seems to me the solution is not to sentence white
5 males to longer prison terms — that would be one way
6 to remedy some of these disparities. I don't think
7 anybody would suggest that's a good way to go. It
8 seems to me what we have learn, and what I would
9 suggest we may want — where we should be going, is
10 first of all, there's no quick fix to addressing
11 racial disparities in federal or state sentencing, or
12 any other system. These decisions are very
13 complicated and so, they're not amenable to any quick
14 fix. This doesn't mean that we shouldn't try to
15 develop remedies, or try to understand it more, so I
16 would encourage the Commission as well as other
17 academics, to continue to do ongoing research into
18 racial disparities among other outcomes and try to
19 identify as much as we can where this may come from.
20 So we can learn more from that, and from that develop
21 some responses to deal with that.
22 But also look at race neutral policies

1 with the aim, I think, of trying to level the playing
2 field. If prosecutors or judges are identifying
3 sympathetic defendants, how do we make a greater
4 array of defendants more sympathetic in the eyes of
5 prosecutors and judges in a way that doesn't
6 compromise public safety? So, in terms of leveling
7 that playing field, I think one significant
8 impediment, if we think of it that way, is this whole
9 issue of criminal history. And this is a very
10 complicated issue, it seems to me. The fact is, the
11 average African American male defendant coming to
12 court is likely to have a more significant history
13 then the average white male defendant. And some
14 people would say this because of a racist criminal
15 justice system. Some would say this is greater
16 involvement in crime, and decisions make by
17 individuals. But the fact is, we are going to see
18 different criminal history scores on average that
19 correlate with race to a certain extent. So, it
20 raises questions about to what — How significant
21 should the criminal history score be in thinking
22 about what sentencing should look like? To the

1 extent that criminal history tells us something about
2 public safety concerns. Of course, that needs to be
3 taken very seriously, but what are the sum of the
4 other implications? One, the Commission, of course,
5 has been talking about expansion of the safety valve
6 in looking at criminal history scores there. So
7 clearly it seems that there's room for consideration
8 of extending the range of criminal histories that
9 might be consistent, again, with promoting public
10 safety, but might incorporate a greater range of
11 defendants who might qualify for that. I think
12 there's questions that we need to look at in any
13 sentencing system about the degree to which criminal
14 history scores are used to aggravate to enhance
15 sentences. You know, in recent years this has become
16 an even more significant question I think, when we
17 have extremes such as "three strikes you're out"
18 policies in states like California. Where not only
19 do you get enhanced penalty, but you get enhanced
20 penalty that was unimaginable for many cases a
21 generation ago or so. And, again, to the extent this
22 may correlate with race, is troubling and I think

1 demonstrates that some of the tough on crime race
2 neutral policies have these very predictable effects.
3 Finally, I think to the extent that some
4 of these disparities we see to be identifying —
5 certainly the Penn State study, is focusing more on
6 the in-out decision, how do we create a greater array
7 of options for sentencing judges, and is there a way
8 to make a greater proportion of defendants suitable
9 candidates for consideration of non-prison sentences?
10 In part, I think we have something to learn from
11 state courts, which I think have been doing a greater
12 variety of alternatives for longer then the federal
13 courts. State and federal populations are not
14 entirely comparable by any means, but none the less,
15 we can learn from the state courts. To the extent
16 that issues such as employment or education make
17 defendants seem worthwhile keeping in the community,
18 how do we expand some of those options, services, and
19 the like, so that we can have the level of
20 supervision and services that make these non-prison
21 terms more appropriate for some other types of
22 defendants? And finally, I think, as the speakers on

1 the previous panel talked about the whole issue of
2 sentencing severity across the board. I think it's
3 not just a question of where we stand on child
4 pornography or crack cocaine offenses, but what is
5 the degree of severity, broadly speaking, what are we
6 accomplishing or trying to accomplish for public
7 safety for the other goals of sentencing? And to
8 just evaluate that in terms of sentence lengths,
9 severity, and potential racial dynamics there.
10 So, thank you very much.
11 CHAIR SARIS: Thank you, very much
12 VICE CHAIR JACKSON: I have a question.
13 CHAIR SARIS: Commissioner.
14 CHAIR SARIS: Ms. Price, I understood your
15 testimony to have something of an underlying implicit
16 assumption that the path of legislative proposals and
17 the path of revising or reforming the guidelines as
18 necessary, are mutually exclusive in a way. And
19 maybe I misunderstood that, but it seemed as though —
20 you know, the suggestion was that because the
21 Commission has made these sorts of legislative
22 proposals with regard shoring up the current system

1 from the Commission's perspective, that somehow the
2 Commission is not going to, or not interested in,
3 revising the guidelines. And I just wanted ask if
4 I'm misreading that?
5 MS. PRICE: No, not at all. I mean, I
6 think that they're not mutually exclusive, and I do
7 recognize the steps that you have taken and are
8 taking to take a look at guidelines.
9 What I am concerned about is, when you
10 went to Congress and said, there are troubling
11 disparities and increasing variances from the
12 guidelines, there's an assumption there that we can't
13 do more to make this system work better, and we need
14 your help to do it. And I think that is premature, I
15 think there is more to be done to understand the
16 nature and causes of disparity. And I don't feel
17 like — I mean, I read the testimony fairly carefully a
18 few times, and I was there, as you know. I don't
19 feel like we've quite got it yet. You know, I think
20 that for years people have been coming before the
21 Commission to try to explain those very things, why
22 there are variances, inner-district disparities,

1 racial disparities — to some extent. And but to go to
2 Congress cold and say, this problem is so severe that
3 now we need your help. I found it remarkable, I have
4 to say, and several people have said here earlier,
5 you know, it does — you started the ball rolling, but
6 you know, I think might have rolled it in the wrong
7 direction to some extent. And I think that we —
8 The kinds of questions I'm asking about,
9 to look behind the data that you presented. Because
10 you presented a lot of raw data to Congress, but
11 there wasn't a lot of analysis. So it doesn't help
12 any of us understand, sort of, what's really going on
13 here. And I would really love to hear that, and I'd
14 love to have those kinds of questions in panels like
15 these. Because I think there are insights that you
16 all obviously have, that the department has, and that
17 practitioners and advocates have, that we can begin
18 to tousle.
19 VICE CHAIR JACKSON: And just a minor
20 factual point, Congress actually asked the Commission
21 to come and talk about what was going on in the
22 system. So, just from the standpoint of haptics it

1 wasn't as though the Commission, you know —

2 MS. PRICE: Of course.

3 VICE CHAIR JACKSON: — of its own volition

4 going to Congress and, you know, asking for this kind

5 of intervention.

6 COMMISSIONER FRIEDRICH: I just had one

7 other point.

8 MS. PRICE: If I could respond to that,

9 though, and I appreciate that, I do. I think that

10 the next step that was taken was the one that we

11 found remarkable. So if I misstated — I know you were

12 invited, and I could have said that better. But, I

13 don't know that you were invited to present a request

14 for legislation, and that was the thing that I found-

15 -we found sort of troubling, so.

16 COMMISSIONER FRIEDRICH: Just following up

17 on what Ms. Jackson said. Certainly, I think you'll

18 find when we issue our *Booker* report, which you can

19 assume we're doing ongoing research as we're making

20 these recommendations. And this isn't on a blank

21 slate, we will give quite a bit of detail, but I

22 think you're overstating it to think that the

1 Department of Justice is ever going to open its files
2 to us to drill down, and understand why they charge
3 cases the way they do. I mean, it's going to be
4 impossible to get that kind of information.
5 Certainly, we can report on the extent that the
6 department advertises policies in certain districts,
7 and we will do that, but we simply can't get behind
8 the prosecutor's decision in every case. And so, on
9 the one hand to say, well, we can't do that,
10 therefore, we can't make statements with regards to
11 judicial variances and departures. I mean, that is
12 what we're tasked to do. So we would all love to be
13 able to give the department more guidance and
14 direction on how they should be more uniform in their
15 processes. But we've got to be more realistic,
16 that's not something we as commissioners can do,
17 constitutionally. So, at the same time, we do, we've
18 been tasked with looking at the judicial branch. And
19 so, to the extent that we can in our report, we will
20 drill down by district; we will drill down by
21 offense; we will look at, to the extent we can
22 identify prosecutorial policies, we will, but there's

1 only so much we can do in that regard.

2 MS. PRICE: Right. Well for example — and

3 I appreciate that. But for example, just presenting

4 raw variance data — A defender came in a few years ago

5 to the regional hearings, Alex — I'll mispronounce his

6 name, I think — Bunin, and talked about the variance

7 rates in the districts in the four regions that you

8 were considering at that point. I think the first,

9 second, third and fourth. This was in New York. And

10 he talked about the variance rates based on the fact

11 that a number of the districts he was discussing did

12 not have the fast track departure available to them.

13 The early disposition departure available to them.

14 And in those cases judges were not necessarily

15 varying in giving all of these illegal immigrants a

16 huge break, they were looking at disparities inner-

17 district disparities were caused by a sentencing

18 rule — excuse me — that were caused by a sentencing

19 rule, and saying, we need to combat a disparity here,

20 but it looks like — if you just look at the raw

21 numbers — it looks as though there are these great

22 judicial variance rates. And that's what I find

1 missing from some of the — just the raw numbers that I
2 was seeing.
3 COMMISSIONER FRIEDRICH: Well, I think you
4 can assume that there will discussions in the *Booker*
5 report about fast track policies, and of course,
6 that's all changed now moving forward with the new
7 policy announced by the department.
8 MS. PRICE: That's great.
9 COMMISSIONER FRIEDRICH: You know, our
10 ability to look behind the government's decisions, is
11 even more limited then it used to be when the
12 government's operating according to the Holder
13 Memorandum. And it's not simply — we can't assume
14 that these decisions are based on evidence any more.
15 I mean, if prosecutors are exercising their
16 discretion as individuals — There's certain disparity
17 there. We acknowledge, we agree, we wish it could be
18 better, but we cannot as the Commission, do that
19 work —
20 MS. PRICE: But then talking —
21 COMMISSIONER FRIEDRICH: — it would have
22 to be the department.

1 MS. PRICE: I'm sorry. But then talking
2 about haptics, talking about that again, when you
3 present the problem as one of variances that are
4 disturbing, and disparities that are disturbing, and
5 then the next thing that one does is say that we need
6 to sort of, fix the guidelines by making some rules
7 that may perhaps make more difficult for judges to
8 vary. Why you're not pointing the finger at judges,
9 the implication is, of course, then that those
10 variances are all judicially cost, and without
11 warrant. And I, you know, I think we agree, I think-
12 -
13 COMMISSIONER FRIEDRICH: Well, I think to
14 be fair, I think the Commission's position has been,
15 there are outlier sentences, and I think all of us in
16 this room can agree that there are outlier sentences.
17 VICE CHAIR JACKSON: And I think the other
18 sort of piece of the proposals, to some degree, was
19 the suggestion that Congress needed to be clear about
20 the standard of review. That Congress needed to be
21 clear about the role of guidelines at sentencing. At
22 some of the, you know, confusion that's happening

1 right now, is based on the lack of — you know — this
2 inconsistency that we identify, perhaps, between the
3 994 directives and what exists in 3553(a). And those
4 things, I think, would still be proposals
5 notwithstanding some, you know, other suggestions
6 about where the disparity is coming from in the way
7 that you suggest.
8 I mean, so I mean, I — I — I completely sort
9 of understand, at a certain level, the surprise that
10 people may have had about the Commission recommending
11 certain things to Congress. And, to the extent that
12 the recommendations as made did not lay out all of
13 the factors in the way that you discussed, and
14 perhaps didn't come to the conclusions that you may
15 have come to, that's a legitimate debate. But, you
16 know, again, I just say that Congress asked us to
17 explain what was going on, and we planned to do that
18 further and with substantial detail dealing with some
19 of the issues that you're talking about in written
20 form in this report that we're putting together.
21 MS. PRICE: Great, I look forward to it.
22 CHAIR SARIS: Mr. Wroblewski.

1 COMMISSIONER WROBLEWSKI: Thank you, and
2 thank you both for coming. Can I ask a political
3 science question, if I might?
4 COMMISSIONER HINOJOSA: That's government
5 in some schools.
6 COMMISSIONER WROBLEWSKI: So, feeding off
7 the last panel. The way I read — whether it's
8 testimony from the president of Families Against
9 Mandatory Minimums over the last ten years; whether
10 it's testimony from Eric Sterling over the last ten or
11 15 years; whether it's Bill Stuntz's book on the
12 criminal justice system; whether it's reports from
13 the Sentencing Project; whether it's information from
14 Professor Tonry, or Professor Berman — to me, the
15 burden of proof has long ago been met for the need
16 for reform of the federal sentencing and correction
17 system. And by the way, I'll throw into that, Mr.
18 Axelrod's testimony this morning. Despite the fact
19 that it didn't have a particular proposal.
20 About six or seven years ago there was a
21 group called the Sentencing Project, which included
22 people as diverse — Justice Alito and Tom Perez, who

1 is now head of the —

2 MR. MAUER: Constitution Project I think

3 you're talking about?

4 COMMISSIONER WROBLEWSKI: — the

5 Constitution Project, I apologize. But you know

6 that — You know the group that I'm talking about? It

7 had a very diverse group. It was led again, from Ed

8 Meese, to Phil Heymann, and on and on, and they were

9 beginning to come together with principles to reform

10 the federal sentencing and correction system.

11 Between that moment and today, that project fell

12 apart, but at the same time — and your groups work

13 with states, and that's why I'm particularly asking

14 you, and I think you can be helpful in this political

15 science question. That effort fell apart, dealing

16 with the federal sentencing and correction system,

17 and at the same time, states as diverse as Louisiana,

18 Mississippi, New York, Vermont, Texas, and many, many

19 others have found a way to reform sentencing and

20 corrections. They've recognized problems and have

21 been able to reform. Tell us why that hasn't happed

22 in the federal system, and is there some mechanism

1 that we can break through what I see as sort of, just
2 a stalemate, and at the beginnings — or the
3 continuation since 2005, of greater polarization — and
4 I very much commend to you, two documents that are on
5 the Commission's website, one is a letter that the
6 Commission received from Congressman Lamar Smith,
7 who's the chairman of the Judiciary Committee of the
8 House of Representatives of the Congress of the
9 United States of America, and several other members
10 of Congress, as well as the Department of Justice's
11 testimony about child pornography sentencing
12 guidelines. So, why are we moving, actually, getting
13 more polarized and making reform more and more
14 difficult, while at the states reforms has happened?
15 MS. PRICE: He's done the most recent
16 writing on the states.
17 MR. MAUER: I can start off. First of
18 all, I wouldn't paint quite as bleak a picture as you
19 paint about federal sentencing. And you're very much
20 aware as everyone else, you know, two of the major
21 accomplishments certainly, crack cocaine is a
22 bipartisan reform, you know, the work of nearly 20

1 years by a very broad array of people. Some people
2 were disappointed it didn't go far enough,
3 nonetheless, it was a very significant victory and it
4 was bipartisan. We have, you know, developments,
5 reentry movements, Second Chance Act, and you know,
6 to me the amount of money is relatively modest, but
7 in some ways what's more significant is the political
8 coalition that came together in the House. You know,
9 you had democrats like Bobby Scott and Danny Davis,
10 John Conyers, and in the Senate it was Senator
11 Brownback who was the leader. I mean, you couldn't
12 ask for more broad range in coalition than that.
13 So, while I think there's a sort of common
14 assumption right now that the work in the states is
15 being driven by the fiscal crisis, I wouldn't
16 discount that, but I think both the federal level and
17 the state level we've had — you know — well over a
18 decade of progress in how we address these issues.
19 Basically, you know, greater interest in evidence-
20 based corrections, looking at what works, greater
21 compassion for children of prisoners, and things like
22 that. You know, the whole reentry movement is fairly

1 remarkable in 10 or 15 years every correction system
2 in the country says they care about reentry. Some do
3 it better then others, and all that, but the climate
4 has changed — Justice reinvestment very similarly. I
5 think to the extent that states are moving more
6 quickly now, some of it is driven by the fiscal
7 crisis. They've got to balance their budget this
8 year, and they — It's not a question of ideology, it
9 is how they're going to pay for things and
10 corrections has been eating up lots more money. But
11 it builds on a base of growing concern about
12 developing a greater array of incarceration and the
13 like thereto. I think at the federal level, members
14 of Congress are one bigger step removed from day to
15 day, both politics, crime issues, and money, then at
16 the state level. You know, the money is — while it's
17 troubling in some respects, it's fairly trivial
18 compared to what the money looks like for state
19 prisons or so. So that's, I don't think, ever going
20 to be the driving force, and it makes it easier for
21 people to just deliver political sound bites rather
22 then grappling with some of the issues of so. The

1 states that have done good things, it's been policy
2 change, it's been bipartisan in many cases, and I
3 think there's a certain momentum that's developed
4 now. The more states get on board, the more
5 bipartisan it is, the easier it is for the next state
6 down the line to take on some of these changes too.
7 MS. PRICE: I would absolutely agree with
8 that, and I think — I mean, we've had this
9 conversation a lot, you and I, and I think that part
10 of it is exactly what Mark describes, that Congress
11 is more removed from the budget crisis and from sort
12 of day to day in some sense, that the states have not
13 been able to removed from. Once having started down
14 that path, those states are seeing that making some
15 of these changes, including lower sentences and
16 getting rid of some mandatory minimums, for example,
17 doesn't hurt public safety, and nobody gets kicked
18 out of office for doing it. So there's politics that
19 I don't have a good enough handle on, that I think
20 plays into this. But I think that our failure as an
21 advocacy community, is that we haven't been able to
22 explain — or to unexplain, or disconnect, sort of, the

1 public safety and sentencing dynamic that, you know —
2 Public safety — Sentencing is often spoken about in
3 terms of keeping people safe, and I don't think that
4 we've done a good enough job of being able to explain
5 what public safety really is, what really does
6 contribute public safety. That it's much more nuance
7 and much more interesting and complicated than that.
8 I thought that your testimony — Or the department's
9 testimony today leading off with the kind of
10 pressures that the department is seeing in the system
11 due to prisoner overcrowding, and it's reference to
12 public safety, is an important contribution to this.
13 But we certainly feel like we've got to a better job
14 of talking about this in the context of public safety
15 and not just fairness. Although fairness matters
16 most to us, or in the context of disparities or
17 anything else. I mean, what's going to keep us as a
18 people more safe and convince lawmakers that we're
19 going down the wrong path at locking up people for
20 ever increasing periods of time, ratcheting up
21 guidelines, and building in more mandatory minimums,
22 isn't doing anything to keep us safer. And I know

1 that people try and make the connection between the
2 falling crime rate and rising sentences, but it's a
3 facile comparison, it isn't what's happening. And I
4 think there's been a lot of, you know, better
5 research on that, but we got to find a better way of
6 talking about it.
7 CHAIR SARIS: Thank you very much.
8 MR. MAUER: Thank you.
9 MS. PRICE: Thank you.
10 CHAIR SARIS: Maybe five minutes, pop up
11 the switch and then we'll get going.
12 (Recess.)
13 CHAIR SARIS: Welcome. You have the
14 position — We've been here for two days listening to
15 all sorts of interesting testimony, and I am sure
16 that yours will be —
17 COMMISSIONER HINOJOSA: Last.
18 CHAIR SARIS: — last.
19 (Laughter.)
20 CHAIR SARIS: So, I would like to — as some
21 of you as well, as I mentioned last time, we see you
22 a lot. I always appreciate your testimony, and at

1 least one, for me anyways, is new, so I'm looking
2 forward to hearing from you as well.
3 So, we start off with — this is about
4 comparing the options, practitioner's perspectives.
5 David DeBold is a partner at the firm of Gibson Dunn
6 in Washington, DC, and chair of the Commission's
7 Practitioners Advisory Group (PAG). Prior to joining
8 Gibson Dunn in 2003, Mr. DeBold was an assistant
9 United States attorney in Detroit, Michigan, and was
10 also on detail to the Commission. Lisa Monet Wayne-
11 -
12 MS. WAYNE: Yes.
13 CHAIR SARIS: — is an attorney in private
14 practice, and president of the National Association
15 of Criminal Defense Lawyers (NACDL). Prior to
16 entering private practice in 1999, Ms. Wayne was a
17 Colorado State public defender for 13 years. And
18 last, James Felman, is a partner in the firm of
19 Kynes, Markman and Felman, P.A., in Tampa, Florida,
20 and co-chair of the Committee on Sentencing of the
21 American Bar Association. He also serves as member
22 of the Governing Counsel of the ABA Criminal Justice

1 Section, and previously co-chaired the Sentencing
2 Commission's Practitioners Advisory Group.
3 So, Mr. DeBold.
4 MR. DEBOLD: Thank you, Chair Saris and
5 members of the Commission. On behalf of the
6 Practitioners Advisory Group, we once again
7 appreciate the opportunity to offer our views from
8 the field on the issues that are before the
9 Commission today. I guess to really boil down what I
10 want to say in my oral statement, is that we really
11 are much in agreement with what you heard from Judge
12 Lynch earlier today. Which is that we believe that
13 the advisory system, although not perfect, is working
14 reasonably well. We think that the benefits to the
15 proposal statutory modification to the advisory
16 system would not be great, and that any possible
17 benefits would probably not be enough to justify the
18 risks — including litigation over the
19 constitutionality of the some of the proposed
20 changes, should they really modify the way courts are
21 operating currently.
22 We all know, but some may not really spend

1 much time considering why it is that not only
2 imperfection, but significant imperfection, is
3 inevitable when it comes to sentencing. I kind of
4 call this the "are we there yet" question. We know
5 that we're always going to have imperfection, the
6 question is, have we reached the point where we've
7 kind of gotten the imperfections out of the system,
8 is there more that can be done, and where can that be
9 most readily effected? In other words, how much of
10 this, that we do have in way of imperfection, is
11 unavoidable? I guess one way to look at how far it
12 is from a real system to a perfect system, would be
13 to imagine what a perfect system would be. If you
14 could imagine a perfect judge with knowledge, full
15 ability to take into account all the relevant
16 purposes of sentencing and sentencing factors, who
17 had enough time to impose some 80,000 sentences in a
18 single year, and in the course of doing that could
19 arrange each of those 80,000 defendants from the
20 least culpable to the most culpable, with all the
21 other factors that go into the purposes of
22 punishment, arranged in between. And then imagine

1 that those cases instead of being sentences by that
2 perfect judge are now doled out randomly to the
3 number of federal judges that we have around the
4 country. And imagine that each of those judges would
5 come to the exact same decision as the hypothetical
6 perfect judge. We all know that we are far from
7 having a system, or being able to create a system,
8 that could come up with that kind of result.
9 And the reasons why we can't get there are
10 important to consider. Number one, the purposes of
11 sentencing that are found in the sentencing statute
12 are in tension with one another in a number of cases.
13 They include such things are promoting respect for
14 the law, just punishment, deterrents, and providing
15 training and correctional treatment. Which in an
16 individual case could, each of those individually,
17 could push a judge in different directions. And then
18 the rest of 3553(a), you have the question of how do
19 you measure those various factors. How do you get
20 proportional weight? How do you mix them among each
21 other, in order to take into account all the relevant
22 characteristics of the offense, the offender, and so

1 on. And the question is, how do you as commissioners
2 include some of these factors in the first place?
3 Some like what we heard from Judge McKee, factors
4 that he described in that one example, but I don't
5 think there's any way to write into the guidelines,
6 and certainly no way to quantify, and there are a
7 number of factors like that in any given case. So,
8 the fact is, that sometimes when you try to address
9 one problem with sentencing system — and certainly
10 there are problems with every system — the risk is
11 that you're going to worsen another problem that
12 already exists as well. For example, trying to
13 increase uniformity, which would include things like
14 reducing complexity, as we heard some of the panelist
15 talk about earlier. The taking into account fewer
16 factors when you're calculating the guidelines. That
17 can often paper over meaningful differences between
18 different defendants, that would warrant different
19 treatment, and so you have the unjustified
20 uniformity, which is the flip side of unwarranted
21 disparity — and indeed a version of unwarranted
22 disparity.

1 So, it's with all this in mind that our
2 group comes here to say that we are satisfied. And I
3 use the word satisfied advisedly, with the current
4 advisory system. It is not perfect, but we believe
5 it leaves enough play in the joints for judges to
6 judge, and to meet out justice in individual cases.
7 If anything, in a number of cases, with a number of
8 judges, the guidelines still get more weight than the
9 other statutory factors. And in no small part,
10 because they are the only factors that have both the
11 appearance, and in many cases, the reality of
12 objectivity, plus measurability. There's a way for a
13 judge to calculate a number as opposed to the other
14 factors, which don't come with numbers attached to
15 them.
16 So, we reject the assumption that having
17 some 17 percent of the sentences outside the
18 guidelines without some affirmative government
19 sponsorship, is proof of an unwarranted disparity.
20 There's an awful lot to unpack when it comes to
21 disparity in different ways in which people are
22 sentenced. We reject the notion, as you heard

1 earlier today, that judges get to where they get in
2 their individual sentencing decisions because they
3 "can do whatever they want." We don't believe that's
4 what's happening in the courts around the country.
5 There may be judges out there who don't approach
6 their decisions in sentencing with great seriousness
7 and a lot of angst, but I have yet to meet one. This
8 is very serious business, it's very difficult
9 business, and it requires a human factor that no
10 system of guidelines is going to completely be able
11 to capture.
12 But to be sure, good intentions on the
13 part of judges are not going to be enough. And I
14 fully agree that one of the most concerning kinds of
15 disparity, as Commissioner Wroblewski mentioned earlier
16 today, is the kind that it matters which judge the
17 defendant ends in front of. When two judges with the
18 exact same case in front of them come out to very
19 different outcomes that is a very big concern. And
20 that in my view, my personal view, is one of the
21 biggest goals of a guidelines sentencing system, is
22 to try to get rid of that kind of disparity. But

1 it's very hard to tease out when that is happening.
2 Because we don't have multiple judges sentencing the
3 same people in the same case. Even in the example
4 that, I think, was offered earlier in the *Pepper*
5 case, you had two judges, one of them thinking that a
6 downward departure of variance was permitted for
7 post-offense rehabilitation, post-sentencing
8 rehabilitation — the second judge did not have that
9 same luxury in light of the intervening court of
10 appeals decision. So, it's very hard to say how much
11 of this disparity is because two judges looking at
12 the same case, come to a different result.
13 We are not satisfied that the data have
14 shown either, a) the extent to which the variance
15 rates that occurred district by district, is the
16 result of that type of disparity, as opposed to other
17 inbuilt disparities that may result from charging
18 decisions, case selections, or a whole number of
19 other factors; or, b) that trying to get rid of
20 what's left, the real cases where you do have two
21 different judges who would give a different sentence
22 after looking at the same facts and circumstances,

1 whether we really do want to get rid of that, and
2 whether trying to do that will actually create more
3 harm then good. It's what I call, you know, leaving
4 the human factor involved in the sentencing decision.
5 And it is inevitably going to result in some level of
6 disparity. We just don't know how much we're getting
7 and we don't have the data right now, I think, to
8 really determine how much that is happening.
9 As long as we are going to let judges, and
10 not robots, handle criminal sentencing, just like
11 they handle criminal trials, just like they handle
12 civil cases, you're going to have a situation where
13 practitioners say, you know, I've got to try all — I
14 have a case coming to trial, and one of the first
15 questions they're going to get is, who's your judge?
16 It's just a natural thing that different judges
17 behave differently, and you're not going to able to
18 get that out of the system, no matter how hard you
19 try — and nor should you try to get that out of the
20 system, to a complete degree.
21 We heard testimony earlier today about how
22 we don't have really any meaningful data on how much

1 of these disparities between districts, in terms of
2 the variance rates, is a result of differences and
3 how U.S. Attorneys' offices operate. And a number of
4 these could be legitimate differences in terms of
5 charging practices, where their priorities are — a
6 number of them could be not legitimate in terms of
7 how different offices try to deal with the guidelines
8 system, and dealing with agreements on fact
9 bargaining and the like. I think that the Commission
10 should press the Department of Justice for more data
11 in that area, and also should be a partner with the
12 Department in trying to determine how much that
13 accounts for a lot of what we're seeing in
14 differences from one to district to another.
15 As an AUSA, a former AUSA, for 17 years, I
16 know that it's not as if each U.S. Attorney's office
17 is, you know, independently owned and operated, but
18 there are a lot of differences between different
19 offices. I was really amazed as I went through my
20 years as an AUSA, talking to people at conferences
21 about very different practices in plea bargaining
22 approaches, sentencing approaches, charging

1 approaches, and obviously there are differences
2 within offices as well.
3 If you cannot get these kind of data, I
4 think that it would be wrong to assume, that had you
5 had those data, it would explain away — it would deal-
6 -you know — it would tell you that there's no problem
7 within terms of the charging decisions or that it
8 couldn't fully explain where the disparity is when
9 you have differences in rates or variances from one
10 district to another. There's no question, though,
11 that there's room for further work, and there's room
12 for improvements that can be made in the system. But
13 we believe that the case is not been made for
14 legislation, that as my prepared testimony explains,
15 would result in actions that work across the board to
16 modify the advisory system. We still believe that
17 there's a lot to be done, but we think that the focus
18 of the attention should be on approving specific
19 guidelines that deal with specific offenses, and
20 specific offender characteristics, before coming to
21 the conclusion that we need across the board changes-
22 -even to our advisory system.

1 Thank you.

2 CHAIR SARIS: Thank you. Ms. Wayne.

3 MS. WAYNE: Thank you Judge Saris and
4 distinguished members of the Commission. I'm a trial
5 lawyer and I recognize when brevity may be most
6 persuasive, so I'm going to get this down. And you
7 all have our written remarks. And I want to focus in
8 on what I've heard today from some of the other
9 panelists.

10 I am president of the NACDL, which is an
11 organization of over 10,000 members. As you all
12 know, that membership is federal defenders, state
13 defenders, private lawyers, law professors — those of
14 us who are in the business of being defenders. I am
15 a practicing criminal defense attorney in Denver,
16 Colorado, and I bring to the table a little bit of a
17 different perspective, in that I was a state public
18 defender for 13 years. I'm now in private practice
19 and I mainly practice in federal court. I also come
20 from a state that is considered punitive and harsh, in
21 its own sentencing in the state. And so, my
22 transition to the federal court, and the federal

1 system, I had a very difference perspective. I
2 started pre-*Booker*, and now I've been practicing
3 there for almost 13 years, so I've seen the change in
4 the federal system. I also am in the situation of
5 having represented indigent defendants, mostly people
6 of color for 13 years, I now find myself in the
7 position of representing people who are wealthy —
8 mainly white defendants in federal court.
9 And so, from that perspective, I can
10 address the racial disparity because I know what it
11 means and I have firsthand knowledge, and I think
12 those of us in private practice see it frequently.
13 It's not something that's a myth, it's not something
14 that we just talk about, but it is a reality in our
15 federal court system. Like the judge spoke about in
16 terms of the federal defender system, I am the kind
17 of private lawyer that recognizes the expertise of my
18 federal defender bar. Frankly, smart private lawyers
19 call our federal defenders at the get-go and say,
20 "Ray Moore, I need you, tell me what I should do."
21 And a lot of us understand that, and we have complete
22 deference for the Federal Defender Association across

1 the country.

2 However, what you don't see in the

3 sentencing guidelines is what happens pre-indictment.

4 Federal defenders don't know about that, because

5 federal defenders get appointed after someone has

6 been indicted. That is where, I think, you see a lot

7 of the racial disparity. What happens on the front

8 end really dictates what kind of guidelines will be

9 used, and what kind of sentencing the prosecutors may

10 want to use in terms of plea bargaining. It's a

11 really important, I think, part of what goes into

12 this calculation in terms of the sentencing

13 guidelines.

14 At the outset, I want to echo the

15 testimony of my colleagues, the expertise of the

16 defenders, the ABA, the brilliant and provocative

17 scholars that you've heard from. As I've sat here

18 throughout the day, I keep taking notes, and

19 thinking, I'm going put that in my next sentencing

20 memorandum — and know that that's going to be

21 persuasive. But in terms of our federal sentencing

22 system and the guidelines, as everybody has said,

1 it's not perfect. But the shift to advisory
2 guidelines has further advanced the goals of the
3 Sentencing Reform Act and resulted in a more just
4 administration of our federal sentencing system.
5 What does that really mean? I think it
6 means to those of us the trenches who are actually
7 seeing the defendants, the human beings, who are
8 doing the time. What that means is that the advisory
9 guidelines allows us to humanize these defendants.
10 Instead of having to go in front of a judge with the
11 same historical drug conspiracy, the same crack
12 offender, or whoever it might be in front of the
13 judge, that the judges had to see every day, ten times
14 a day, or whatever it may be, the advisory guidelines
15 the ability to vary, allows us to make the argument
16 that these defendants are different from each other.
17 It allows us to put a human face on hundreds of
18 defendants that come through the system. The
19 mandatory guidelines did not allow us to do that. I
20 think what happens often is that we talk about the
21 guidelines in a esoteric kind of scholarly way. At
22 the end of the day though, we're affecting people's

1 lives. And the only ability that the defense has to
2 be able to paint a compassionate and persuasive
3 picture or scenario of the defendant to distinguish
4 them from the other hundreds of defendants that are
5 in the system, is by the ability to paint outside the
6 factors of what the mandatory guidelines allowed us
7 to do. That's an important part that needs to be
8 considered when you're talking about human lives. In
9 the years following *Booker*, some have called for a
10 return to the system of mandatory, or at least, more
11 binding guidelines. These calls are not coming
12 though from judges, they're not coming from
13 prosecutors, they're not coming from defense
14 attorneys, and they're not coming from the community
15 of organizations that are involved in the criminal
16 justice system. Rather the calls are coming from the
17 Commission itself, seeking to impose stricter
18 adherence to its dictates, and a variety of political
19 actors who are attempting to appear tough on crime,
20 by calling for inflexible and harsher sentencing
21 practices.
22 The proposals under consideration today

1 all evidence these motives. Each proposal would move
2 us away from an advisory system and back towards the
3 ineffective and unconstitutional mandatory system.
4 *Booker* finally returned moral legitimacy to
5 sentencing through actual judging, and as the PAG, or
6 my colleague on my right's testimony so powerfully
7 states, to meaningful advocacy. All of the proposals
8 would undo this progress, and for these reasons NACDL
9 strongly opposes any attempt to enact what's been
10 called, the so-called *Booker* fix.
11 It warrants repeating that no sentencing
12 system is perfect, and we've heard that time and time
13 again. And I understand from the Commission's
14 point, I think there's been some inference of, well,
15 if it's not perfect, why are you so afraid of fixing
16 it the way that we've proposed? As my colleague
17 before me, Mary Price, stated, we have to give this
18 time, we have to give this the ability of time to
19 really look at this with the components that are
20 worthy of review, that should be fixed, but it
21 doesn't mean that we go in and we throw it up against
22 the wall and we say, here's how we're going to do,

1 we're going to go back to a mandatory system. The
2 current evolving system undoubtedly achieves a better
3 balance between flexibility and the rigidity that the
4 pre-*Booker* guidelines had. Eighty-one percent of
5 sentences under the advisory system are guideline
6 conforming sentences. That tells you something. That
7 tells you that we have not — this has not become what I
8 guess we could call in Colorado, the Wild West. The
9 proposal of the former Commission chair, Judge Sessions,
10 would exacerbate disparities and strain resources.
11 Curtailing judicial discretion through the imposition
12 of stricter mandatory sentences, will create
13 additional disparities by failing to account for
14 individual offender characteristics. And by setting
15 in place even more extreme sentencing cliffs, under
16 his proposal, nearly all judicial discretion will be
17 relocated primarily to prosecutors through their
18 charging decisions, and their plea offers. This
19 moves disparities underground by hiding them away in
20 plea negotiations and will undoubtedly result in
21 increased — not decreased — disparities and uptick in
22 judicially unreviewable horse trading by the parties.

1 This eviscerates one of the most important functions
2 of the federal guideline systems, the ability of
3 judges to prove feedback to the Commission in order
4 to advance the guidelines constructively.
5 With that said — I mean, for these reasons
6 and many more that you've heard throughout the day,
7 NACDL opposes the proposal set forth by Judge
8 Sessions and the Commission.
9 MR. FELMAN: I move to adjourn.
10 (Laughter.)
11 CHAIR SARIS: Oh well.
12 MR. FELMAN: No questions.
13 (Laughter.)
14 MR. FELMAN: As the twenty-second witness
15 of the day, I would say that —
16 CHAIR SARIS: Don't even talk about
17 yesterday.
18 MR. FELMAN: Yeah, this is just today.
19 You know, I can't imagine that I'm going to say
20 anything new, but you all know me well enough to know
21 that I'm going to try.
22 I'm here, partially, on behalf of the

1 American Bar Association, and also partially in my
2 individual capacity. I'm going to cover four points.
3 The first two are in my ABA capacity, and the second
4 two are in individual capacity. The first two relate
5 to the issue of severity and that no case has been
6 made for jettison the advisory guidelines, and in my
7 individual capacity, I'm going to urge you not to
8 adopt my initial proposal for how to fix the system,
9 and also talk a little bit about the Commission's
10 proposals.
11 I really — You know — Doug Berman has the
12 line, the problem is not disparity, but severity, and
13 I think I just would be remiss if we didn't put that
14 into perspective for this Commission. The data, I've
15 said it before, but I think it bears repeating,
16 because it is one thing that I think has not yet been
17 said, and that is just some of the startling
18 statistics. That roughly one-quarter of all people
19 imprisoned in the entire world, are imprisoned here
20 in the United States. That according to a recent
21 American Law Institute memo, the incarceration
22 explosion over the last 40 years, in this country,

1 is, "unmatched by any other society in any historical
2 era." I think that's a remarkable statement. No
3 society in history has done what we are doing now. A
4 recent *New Yorker* article noted that there are now
5 more people under correctional supervision in
6 America, then were in the Gulag Archipelago under
7 Stalin at its height, and there are more black men
8 under correctional supervision then were slaves in
9 1850.
10 So, to talk about the fact that the
11 unauthorized, or nongovernment sponsored, rate of
12 variances has changed since *Booker* from 12.7 percent
13 to 17.2 percent, a 4.5 percent change, is — I am just
14 struck that that type of relatively insignificant
15 change, when you consider that the change in federal
16 sentence length has been an increase of 300 percent,
17 since the guidelines were put into effect. That the
18 percentage of probation — straight probation, was
19 between 35 and 40 percent, when the guidelines went
20 into effect. It's now down to a little over seven
21 percent. Those are statistics that ought to motivate
22 this Commission to serious action. But to say that a

1 four and a half percent increase in the rate of
2 nongovernment sponsored variances is an emergency,
3 that it calls for a full overhaul of the system, as I
4 put in my testimony, it just feels little more like
5 we're rearranging the deck chairs on the Titanic, as
6 opposed to really addressing the serious issues that
7 confront our country in terms of sentencing policy.
8 So, of course — you know — to say that we need to do
9 something about severity doesn't help you answer, how
10 do you that? And I understand that. And, I'm going
11 to try to address that to some degree in comparing
12 the different options.
13 But we think that there has been no case
14 made for scrapping the advisory system. And I agree
15 with what my law professor, and mentor, and friend,
16 Sara Beale said earlier — which is that I think
17 everybody agrees on — that you have to — those who
18 would have us change, have a burden proof there. And
19 after coming to these hearings for the last 18 or 20
20 years, one thing that I have come to do, is to learn
21 what I'm not hearing. What I did not hear today was
22 any support for any change by the Department of

1 Justice. No prosecutor has come before this
2 Commission to say, we think the Commission's
3 proposals are great, we love them, or we think that
4 you're — that Judge Sessions', or whatever you want to
5 call it — my earlier proposal — that's a great one, or
6 here's what we want. That's really extraordinary.
7 The Department of Justice is not asking for a change.
8 No judge came before this Commission, the
9 Judicial Conference came before this Commission and
10 said, we think things are just fine, we are not
11 asking for any of your proposals, we are not asking
12 for the Judge Sessions proposal. It's what I'm not
13 hearing. Of course, we knew the Defenders would come
14 and say, hey don't do anything. But there was no
15 entity that came here and asked for change. We heard
16 individuals in their individual capacity suggest that
17 change was necessary. So, to me, one the resounding
18 take-away from this hearing is what I did not hear.
19 And probably for good reason, and that is because
20 this change in the nongovernment sponsored variance
21 rate, has been truly modest. And in fact, it's not
22 only plateaued, it's reversed itself. And that's the

1 one thing that I think also — I mean, I would love to
2 have been in the room when you all — when Judge
3 Sessions was so kind to reveal some of y'all's inner-
4 workings and y'all were taking bets — or least he was
5 taking bets. Well, I bet he lost the bet. I mean,
6 you know, it went from 12 percent up to 18.7 percent.
7 I bet the bet was it's going to go to 20, it's going
8 to go to 22, it's going to go to 25 — it went down.
9 Now, maybe —
10 COMMISSIONER HINOJOSA: I wouldn't put too
11 much on your bet.
12 MR. FELMAN: Well, I know — It might have
13 been my bet. I mean, I'm not saying that I can't
14 foresee the future any better. But I think when the
15 Commission and the Congress fixed the crack powder
16 issue, that's a part of what's happened here, and I
17 think that if you do some of the things that I know
18 you're looking at in the child porn area — you know,
19 where there's been like a 1,700 percent increase in
20 severity in sentencing. You want to talk about
21 unprecedented human existence, it's unprecedented.
22 So, no wonder the judges are looking at this and

1 saying, what is it about this that the initial
2 Congress got this penalty structure so wrong that we
3 needed to raise the penalties by 1,700 percent? So,
4 I think if you can fix that — I see that you have put
5 out some proposals for comment that might address
6 some of the problems with the high loss economic
7 crime cases.
8 I know that you all are focused on that.
9 I applaud that you all are actually putting the
10 judicial feedback loop into process. So, I think
11 that the — You are correct to be looking at the degree
12 of nongovernment sponsored variances, you ought to
13 look at that really closely. But it went up and now
14 it's coming back down. And it may come back down
15 further. And you know that I'm going to harp on the
16 point that you also have to look at the extent of the
17 variance, and they're relatively modest. Now, what I
18 can't tell from the data is, how many of these just
19 real crazy outlier sentences there are. And that's
20 something that I agree that's important, and I can't
21 see that. I just look at your — you know, your total
22 number. So sure, if it turns out that — you know-90

1 percent of the variances are two months, and then
2 you've got judges out there that are varying from 30
3 years to probation, I take it back. But what I think
4 is happening for the most part with rare exceptions,
5 is that we're talking about fairly modest
6 adjustments. Because that's what I see, I think you
7 have judges that are not frivolous people that are
8 recognizing, hey, this is just a little bit different
9 then the typical case that I see, and I'm not going
10 to go off the reservation here, but I'm going to take
11 it into account. I'm going to give a modest break
12 for that. So the idea that it's a variance — first of
13 all, it may be just exactly what we want them to do.
14 And secondly, or a concern about it needs to be
15 constrained by the extent of it.
16 And, so that, I think, leads me then into
17 my personal comments about, don't do what I told you
18 to do before. In 2004, when *Blakely* came out, Frank
19 Bowman wrote a memo to the Sentencing Commission,
20 saying, you should have enact topless guidelines. I
21 remember sitting in my office getting this, I'm
22 thinking, who is Frank Bowman to write a memo to the

1 Sentencing Commission?
2 (Laughter.)
3 MR. FELMAN: Then I got on the phone with
4 Sara Beale and I started saying, Sara, what are the
5 options here? What is the constitutional structure
6 here? And it's pretty obvious, I don't think Sara
7 and I are any smarter than anybody else. It's
8 obvious, okay, if you have to have jury driven
9 findings — obviously, you've got to put something to a
10 jury, and then that's going to result in some ranges.
11 So I thought, if Frank Bowman can write a memo to the
12 Sentencing Commission, I can write a memo to the
13 Sentencing Commission. So, that's what I did, and
14 then I turned it into some testimony, and it's in the
15 hearings and whatnot. And I laid it all out, but it
16 doesn't meant that I think now that it's a great
17 idea. I think that it's the obvious constitutionally
18 valid alternative, but it does not mean that it's a
19 good idea. And I think that Frank, and I wish he was
20 here to hear it, and he won't be shocked, because I
21 told him I was going to tell him he was wrong. But I
22 think Frank was absolutely dead wrong today when he

1 said that our chief complaint about the old — when he
2 was listing — and I think he was talking about me half
3 the time with my flip-flop, as the defense bar — But
4 one of our chief complaints about the old guideline
5 system, was not just the complexity, it was the
6 rigidity of it. It was the fact that judges couldn't
7 get out from under it, and so there was so many times
8 where there would be a mitigating circumstance, that
9 just wasn't yet enough for a departure. So it was
10 the rigidity, and I was a part of that Constitution
11 Project group, and we came to consensus. While all
12 the members, including Justice Alito, was part of our
13 group before he was a justice, and the undue rigidity
14 of the guideline system was a point of consensus
15 across the board. So that's what this brings back,
16 to what benefit — when I mentioned this in the House
17 testimony — But what you have to look at is when you
18 consider that if the average variance is only a
19 month, what is the cluster of sentencing outcomes
20 under the advisory regime? And I think everybody
21 has —
22 CHAIR SARIS: Did you mean a year?

1 MR. FELMAN: I'm sorry, yeah — It's late, I
2 meant a year. Well, it's actually 13 months. It's a
3 little more than a year.
4 But if you take the data and you say,
5 okay, well what is the scope of the actual sentencing
6 outcomes under the current system, and then you plug
7 it into the Felman/Constitution Project/Sessions
8 Proposal, whatever you want to do with it, everybody
9 agrees that you're going to have to limit the number
10 of facts that you put to the jury and it's going to
11 yield a wider range. So, I think — you guys are the
12 experts on the data, but what I think you're going to
13 find is that it's not going to be any tighter cluster
14 of results. It's going to look better, it's all
15 going to look like it's within range, but it's going
16 to be within the same cluster of outcomes. And so,
17 you'll do all that, but you'll sacrifice the
18 flexibility. You could have the same amount of
19 disparity, that some people might think are undue,
20 but instead you're going to now have the rigidity,
21 and transferring the power of the prosecutors. A lot
22 of the other things that have been pointed out about

1 what would be the defects of that system.
2 So, I can see that I'm out of time. I'll
3 just say — Look, I feel like I'm kind on the point of
4 despair here, I'm in a district where departures and
5 variances are pretty rare. But I also practice in
6 other districts where they're not. So, I can see
7 exactly what's happening. Don't tell me what I want.
8 I think I'm okay under this system. And I don't want
9 that other one, even though I helped come up with it
10 before, because I don't think at the end of the day
11 it's going to help me. At some point in time I will
12 try to give some comments on the Commission's
13 proposals.
14 CHAIR SARIS: Thank you. Do you want to
15 go?
16 VICE CHAIR JACKSON: Yeah. I just wanted
17 to ask. Is the rigidity problem that you talk about
18 with respect to the mandatory system, tied in any way
19 to the severity? I mean, I'm sort of thinking about
20 the comments that were made earlier, that if the
21 mandatory system had substantially lower penalties,
22 then the defense bar would be all for it. So, is it

1 not — It's not necessarily the mandatoryness that is
2 the problem — I'm asking — or is it the fact that the
3 penalties are just too high, and if we can bring them
4 down, we could live with a mandatory system? No?
5 MR. FELMAN: No.
6 VICE CHAIR JACKSON: No? You can't?
7 MR. FELMAN: No, no, no, you are
8 absolutely correct —
9 VICE CHAIR JACKSON: You can't.
10 MR. FELMAN: I got to fill in all the
11 numbers, and put them all in really low, and then I
12 think, this is great —
13 VICE CHAIR JACKSON: But you're
14 disagreeing?
15 MR. FELMAN: I just don't think — I don't
16 think it will happen. And Frank says he doesn't know
17 that it's going to happen — it's pie in the sky. I
18 mean, the idea that we're going to have a Congress be
19 sold or fooled on the idea — that we're across the
20 board lowering penalties? I don't think so. And I
21 just don't see it happening. If you guys can make
22 that happen. If you can come up with a system that

1 lowers the penalties across the board — go for it. I
2 mean, I still think you're going to have the one-way
3 ratchet. I mean, I don't see where the beast is
4 going to stop being fed. And just because there's
5 only ten levels — Boy, I don't see the people over
6 there saying, oh, you know what, even though there's
7 this storm of controversy about this new crime of the
8 day, we think the penalties are just fine — we're
9 going to leave them alone. No, that's not going to
10 happen. They're going to say, okay, now —
11 COMMISSIONER WROBLEWSKI: Have you been to
12 Texas or Mississippi in the last couple of years?
13 MR. FELMAN: I have not.
14 COMMISSIONER WROBLEWSKI: Because, it
15 actually happened.
16 MR. FELMAN: Well —
17 COMMISSIONER WROBLEWSKI: There's been
18 reform. The country is reforming. This system is
19 not reforming.
20 MR. FELMAN: I'm not seeing that mood on
21 the Hill, but anyway, I've probably answered your
22 question.

1 VICE CHAIR JACKSON: But you were
2 skeptical, Ms. Wayne?
3 MS. WAYNE: I don't think mandatories are
4 appropriate in the criminal justice system, it's not
5 a formula, it's not an equation. So, when you have
6 mandatories, you're talking about a subjective thing
7 that people have come up and said, we think these —
8 this set of, you know, factors should be this
9 particular sentence. And then again, you get away
10 from allowing the judge from have — use their
11 discretion, and it's not appropriate. It's not — We
12 shouldn't have mathematical formulas in the criminal
13 justice system when you're talking about human lives.
14 So, bring down the advisory guidelines, but still
15 allow it to be discretionary in terms of — with
16 judges.
17 CHAIR SARIS: Judge Hinojosa.
18 COMMISSIONER HINOJOSA: Well, this is
19 directed to Mr. Felman. And I know there's a lot
20 made about the number of people in the prison system
21 in the United States, and people mention the numbers,
22 but I don't think it's fair when we talk about the

1 federal system to mention those numbers. Because
2 when you look at the federal system, and the
3 population of the United States — Let's say it's about
4 200,000, and we're at 310 million, it is 0.0006
5 percent of the population of the United States that
6 is in custody in the federal system. The rest of
7 those numbers are all the states' systems which the
8 federal system has no control over. And I know we
9 make a big point of that, but it's unfair to say that
10 it is the federal sentencing system that has that
11 many people in custody. The other thing I have to do
12 say is, with regards to the probation before — And the
13 other thing we need to understand is, at the time of
14 the sentencing guidelines came into effect, and the
15 number of cases today, it's well over twice the
16 number of cases that are being brought into the
17 federal system, then were brought in 1987. And so
18 that explains any growth that there might be within
19 the federal system, but it's still just a small
20 percentage of the population.
21 The other thing about probation before the
22 guidelines, well that was also before mandatory

1 minimums in the drug trafficking cases, as well as,
2 the number of immigration cases. And those two make
3 about 55 to 60 percent of the docket in the federal
4 system. Immigration cases pretty much automatically
5 are taken out of the probation mix, and they're about
6 thirty-some percent of the case load, because people
7 are kept in custody. And so, they usually going to
8 get, at the very least, time served. With regards to
9 the drug trafficking cases, most of the times the
10 ones — the cases that are brought in federal court,
11 pretty much fall within the mandatory minimum system.
12 And so, it's not fair to talk about the guidelines
13 system as creating this drop in probation — at least I
14 don't think so. When you really — It's like
15 everything else that we've been invited to dig deep
16 down inside as to what's causing this — it's important
17 for us to realize this.
18 MR. FELMAN: Well —
19 COMMISSIONER WROBLEWSKI: And it's unfair,
20 really, don't you think, to talk about the number in
21 custody in the United States when we're talking about
22 the federal system here, as opposed to whatever is

1 going on in 51 jurisdictions, because we've got to
2 count Puerto Rico, and so, it's difficult to say that
3 somehow the federal system is contributing to this.
4 MR. FELMAN: Well, certainly everything
5 you say is correct, but I think states look to the
6 federal system for policy guidance. And the federal
7 system has contributed to —
8 COMMISSIONER WROBLEWSKI: I don't think
9 they do that —
10 MR. FELMAN: — average —
11 COMMISSIONER WROBLEWSKI: — in Texas.
12 MR. FELMAN: I think that they're looking
13 at what you do, and the average — the average, I'm not
14 talking about gross numbers — the average federal
15 sentence has tripled. Now, you're right, and I make
16 it clear in my testimony, that it's since the advent
17 of both the mandatory sentences and the guidelines —
18 that's absolutely correct. You can't tease them out,
19 and the probation numbers are certainly driven by
20 that, but we see the same thing in the cases where
21 there aren't mandatory minimums. I mean, I'm sure
22 that in my line of work in the fraud cases, if you

1 tease that out, the probation percentage, I'm sure,
2 has probably dropped even more significantly. And
3 it's in the face of 994(j), that directed the
4 Commission to assure probably for all but the most,
5 otherwise, serious offenses — or whatever, I think has
6 been not especially honored.
7 So, yeah, I think your point is well taken
8 in the sense that it's not exclusively the federal
9 system that is driving these numbers, and it's not
10 exclusively the guidelines that are driving these
11 numbers, but they're doing their part.
12 COMMISSIONER WROBLEWSKI: Well, I don't
13 think the numbers show that. But that's a
14 disagreement we'll have.
15 COMMISSIONER FRIEDRICH: Mr. Felman, if I
16 could follow-up on the probationary point that you're
17 making. I'm not going to remember the numbers today,
18 but a couple years ago we did an extensive
19 report on probation/supervised release, and
20 interestingly, judges aren't exercising their
21 discretion to impose probation and split sentences.
22 And when defendants are in Zone B, Zone C, Zone A — So

1 it was remarkable to see how infrequently judges
2 choose to impose probation when they have the
3 authority to do so.
4 MR. FELMAN: Yeah, I remember seeing that,
5 I was surprised to see that too. Of course, you know,
6 that doesn't necessarily mean that we shouldn't make
7 it an option, because I know there are other cases
8 where the judges might want to use it as an option,
9 but they can't. And so — But yeah, I remember — I
10 agree with you, I remember seeing that data and being
11 surprised by it.
12 CHAIR SARIS: Anything from anybody else?
13 (No response.)
14 CHAIR SARIS: Thank you very much.
15 But before we go, I did want to thank Ken
16 Cohen and Raquel Wilson, and who else — the whole
17 team — the whole team for putting together an amazing
18 day.
19 COMMISSIONER HINOJOSA: And thanks to the
20 chairperson for keeping us all on time.
21 (Adjourned 5:19 p.m.)
22