UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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Wednesday, May 27, 2009

The United States Sentencing Commission met at the University of Stanford Law School, Stanford, California, at 9:00 a.m., Ricardo H. Hinojosa, Acting Chair, presiding.

MEMBERS PRESENT:

RICARDO H. HINOJOSA, Acting Chair
WILLIAM K. SESSIONS III, Vice Chair
WILLIAM B. CARR, JR., Vice Chair
BERYL A. HOWELL
DABNEY L. FRIEDRICH
JONATHAN J. WROBLEWSKI

ALSO PRESENT:

JUDITH W. SCHOEN, Staff Director
GLENN R. SCHMITT, Director, Office of Research and Data
LOUIS REEDT, Acting Deputy Director, Office of Research and Data

T A B L E O F C O N T E N T S

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

(8:53 a.m.)

ACTING CHAIR HINOJOSA: Good morning. It's my honor on behalf of the United States Sentencing Commission to welcome you to this public hearing which is the second of a series of public hearings the Sentencing Commission is having across the country with regards to federal sentencing policy. The first one that we had was in Atlanta this past February, and this is our second one.

We want to especially thank the Stanford Law School for making this venue available. And we especially want to thank Dean Larry Kramer, as well as Ms. Kara Dansky, who is the Executive Director of the Stanford Criminal Justice Center, for their help and the time that they have devoted to this particular effort. And we certainly thank them for their hospitality and welcome everyone from the Stanford Law School community who may be present.

On behalf of the Commission also a very special thank you to all of you who have taken the time to be here and share your thoughts with regards to the federal sentencing system. We realize that each one of you has a very busy schedule and that you're giving some of the time that you normally devote to your practice and to your work and to the different endeavors that you all pursue on a daily basis to be here and share your thoughts, and it is very much appreciated.

As everyone knows, 2009 is the twenty-fifth anniversary of the passage of the Sentencing Reform Act of 1984. It seems like a long time ago, but for some of us who were on the bench, it seemed like only yesterday. And I will say that for those of us who were on the bench at the time, it was a long time coming because, as you well know, the Sentencing Reform Act was discussed and debated in Congress for many, many years, for

several years at least. And I will say that it was nice to see the passage of the bill as a bipartisan bill. And after much discussion and debate it was obviously passed by Congress and signed by the President.

And for those of us who were around under the prior system, it was something that came about as a result of the feeling of many that there were problems with regards to the sentencing system as it existed at that particular point.

One of the things that we all know that the Sentencing Reform Act established was the bipartisan United States Sentencing Commission which, of course, is a seven-member commission and then two ex officio members, one representative of the attorney general, and then the chair of the Parole Commission serving as ex officio members.

And the principal purposes of the Commission, of course, were to establish policies and principles in the federal

criminal justice system with regards to sentencing that would assure the statutory purposes of the Sentencing Reform Act. Of course the guidelines themselves have been in effect now for over 20 years, the very first set going into effect on November 1st of 1987.

In those 20-some years the Commission has continued to promulgate guidelines and amendments throughout the process on a yearly basis with regards to things that need to be changed, also with regards to reactions to changes in the system, whether they be Supreme Court cases or changes in the criminal legislation by Congress with regards to creation of new criminal violations and changes to criminal statutes.

So the Commission has continued to strive to satisfy statutory requirements with regards to changes that it makes and that it responds to with regards to the system. I will say that some of the changes also come about as a result of input, obviously very

important input, from the federal judiciary itself through the sentencing practices that they conduct and the information that the Commission receives.

I will indicate that when the Commission changes guidelines or promulgates guidelines, it certainly acts within the conformity of its statutory responsibilities which include considering the Title 18 U.S. Code Section 3553(a) factors with regards to the promulgation of guidelines and/or amendments to guidelines.

And it is true that a lot has changed since November 1st of 1987. For example, the number of federal defendants being sentenced in federal court has doubled since 1987. It continues to be about 80 percent of the federal sentencing occurs with regards to four types of crimes: Drugs, immigration, firearms, and fraud.

There has been some change with regards to the makeup of the docket itself.

Drugs have gone lower on a yearly basis and immigration has risen on a yearly basis certainly in the last several years. There has been a change in the makeup of the defendants in federal court.

In fiscal year 2008, 40.5 percent of the defendants that were sentenced in the federal system with regards to the information that was sent to the Commission, which would be felony cases and certain types of misdemeanor cases, were noncitizens of the United States. Forty-two percent were Hispanic.

It's also interesting to note that in the first quarter of fiscal year 2009 the Hispanic percentage has risen to 45.4 percent and the noncitizens has risen to about 44 percent. Also in fiscal year 2009, the first quarter, is the first time that immigration cases have gone to a higher percentage than the drug cases. So there is a change in the type of docket that is appearing in the

federal courts.

There are some changes that have not occurred. Men continue to be the vast majority of the defendants. The age makeup has not changed during this period of time. More than half of the federal defendants are between the ages of 21 and 35.

The sentencing courts, a lot of questions are asked after *Booker* what are courts doing. And I will see that, as *Booker* made it quite clear, the sentencing courts continue to use the federal sentencing guidelines as the initial benchmark. They have to be determined and they have to be started with, with regards to every federal sentencing. And that is certainly what the Supreme Court has said and that's certainly what the judges have continued to do.

I will also indicate that it appears that the vast majority of cases continue to be sentenced within the federal sentencing guidelines either within the

guidelines themselves or as government-sponsored departures.

We talk a lot about the Commission's work with regards to the sentencing guidelines. I will also say that there are some very other important functions of the Commission, including data collection, research projects, training, information that is put out by the Commission, and those form an important basis of what we do.

With regards to that, I will say that we appreciate the fact, as I have already said, that so many of you have taken the time to come and share your thoughts, because the basis and the reason for these hearings is to hear from people that we normally might not hear from on a one-to-one basis with regards to your thoughts and suggestions with regards to the Federal sentencing process and where we are and where we should be.

I am going to continue this by introducing the other members of this

Commission. And I have to say that it has been a pleasure for me to work with the Commissioners and to see how hard they take from their schedules to do the work of the Commission. And it really does act in a bipartisan fashion. And we're very fortunate that we all work together and have continued with the work of what Commissions have done in the past.

To my left is Vice Chair William Sessions who has served as Vice Chair of the Commission since 1999 and has served as a United States district judge for the District of Vermont since 1995, and he is presently the chief judge of that District. There are two judges in that district, and so he is the chief judge of the other chiefs -- of the other judge.

VICE CHAIR SESSIONS: It's a big job, but somebody's...

(Laughter.)

ACTING CHAIR HINOJOSA: And I would

say it's probably a fun job.

To my right is Vice Chair William Carr, who is the most recent addition to the Commission. He has been a member of the Commission since 2008. He served as an Assistant United States Attorney in the Eastern District of Pennsylvania from 1981 until his retirement in 2004, although he doesn't look old enough to have retired. In 1987 he was designated as the Justice Department contact person for the U.S. Attorney's Office's sentencing guideline training.

To my right also is Commissioner Beryl Howell who has been a member of the Commission since 2004. She was the Executive Managing Director and General Counsel of the Washington, D.C. Office of Stroz Friedberg. Prior to that she was General Counsel for the Senate Committee on the Judiciary, working for Senator Leahy, both in his hat as the chairman as well as the ranking member when he was a

ranking member of the full committee. And she also has served as an Assistant U.S. Attorney and Deputy Chief of the Narcotics Section of the U.S. Attorney's Office in the Eastern District of New York.

And to my left is Commissioner Dabney Friedrich who has been a member of the Commission since the year 2006. She has previously served as Associate Counsel at the White House, counsel to Chairman Orrin Hatch on the Senate Committee on the Judiciary, and she has also been an Assistant U.S. Attorney, having worked both in San Diego in the Southern District of California as well as in the Eastern District of Virginia.

And to my left is also Commissioner Jonathan Wroblewski who is the ex officio member representing the Attorney General. He serves as Director of the Office of Policy and Legislation in the Criminal Division of the Department. And, in addition to that, he is a graduate of the Stanford Law School. So he

can tell us where to go.

Two members of the Commission are not present today:

Vice Chair Ruben Castillo, who is a judge, U.S. district judge in Chicago, Illinois. He is in the midst of a trial; as well as the brand-new ex officio member Isaac Fulwood, who was just named late last week as Chair of the United States Parole Commission, and he is the ex officio member.

At this point I would like to ask if any of the other members of the Commission would like to say anything.

Yes.

COMMISSIONER WROBLEWSKI: Mr. Chairman, if I might. It's a special honor and privilege and joy for me to be here today. As you said, I'm a graduate of this law school. Twenty-five years ago this month I was completing the first year of study here at this school. And I remember vividly a class that was part of that study that was taught by

Professor Miguel Mendez in criminal law. And in that class --

ACTING CHAIR HINOJOSA: From Texas?

MR. WROBLEWSKI: From South Texas.

And we studied in that class cases like *In re Winship* and *Patterson versus New York* and other cases where the Supreme Court tried to figure out what elements need to be proven beyond a reasonable doubt to a jury before a particular range of sentence could be meted out to a defendant. And, as you said, at that same time the Senate Judiciary Committee was putting the final touches on the Sentencing Reform Act some 2500 miles from here.

And here we are 25 years later. And we're here looking at cases *Apprendi versus New Jersey* and *Blakely versus Washington*, *Booker versus United States* where the Supreme Court again was struggling to figure out what elements need to be proven to a jury beyond a reasonable doubt to trigger a

particular range of sentencing. And here we are as a Commission struggling to find -- to create a sentencing system that reduces unwarranted disparities and brings about justice and fairness in every sentence.

For some I guess this might be frustration. But I think I take my lead from our new President who talks about the virtue of struggling to form a more perfect union. And I think that's really what we're all here today for. And, again, it's an honor for me to be here. I'm looking forward to the next couple of days. And I, too, want to thank both the law school and also all of the witnesses who have traveled from near and far to be here and to share their views.

And, again, thank you, Mr. Chairman.

ACTING CHAIR HINOJOSA: Judge Sessions.

VICE CHAIR SESSIONS: Well, let me begin just thanking you with the comments that

you made and the fact that we're here. But before I actually expand upon that I will have to say that I went outside and I looked at the picture of Chief Justice Rehnquist, and Justice O'Connor, the graduates of Stanford Law School. And I didn't see Jonathan Wroblewski's picture there. Perhaps as a Commission we should move that your picture actually be placed next to those folks.

I think it's really special that -- not only that we're here today, but that we're going around the country. I would like to talk about its purpose. We're here to review the guidelines, the guideline system, but we're also here to review the sentencing structure of the country, because the guidelines are, in fact, just one part of the sentencing system.

And it seems to me that this is the perfect opportunity for us to sit back and to listen, to listen to people who participate at the heart of the system, who are the main

contributors to the guidelines -- in fact, judges are the main contributors, as well as other persons who have a stakehold in the process -- and for us to sit back and open up the door so that we can listen freely with the idea of what is right and what is wrong, and what can we do and what can we recommend, et cetera, and just open up a dialogue around the country.

This is a part of a series of these kinds of hearings. And I, for one, find them to be incredibly exciting. The first one we went to in Atlanta, and the comments were just very interesting and thought-provoking. And I hope that we continue this dialogue among all of the participants in the criminal justice system with the idea of honestly reflecting upon the sentencing structure of the country, not just the guidelines, but the sentencing structure of the country so that if there are changes to be made, you know, we can be a participant in that system, a participant --

and I say "participant," not necessarily a leader -- a participant among all of the other groups to try to develop a system which is fair and just.

ACTING CHAIR HINOJOSA: Thanks.

Commissioner Howell.

COMMISSIONER HOWELL: Yes. And I want to welcome all of our witnesses who are here waiting for us to finish talking. And I'm just going to be brief and to echo some of the things that both our Chairman and Judge Sessions have said.

This is, I think, an incredibly exciting time to be dealing with sentencing policy. All three branches of government are engaged very actively in looking at how our sentencing system, at least at the federal level, is working. We are getting new developments in Supreme Court jurisprudence dealing with sentencing that are revealing some of the fault lines in our guideline system.

Our Chairman has spent the past three weeks testifying at both sides of the Hill on sentencing policy, so Congress is very engaged. The Department of Justice has a task force that's looking at -- taking a comprehensive look at federal sentencing policy.

And I think it is our hope on the Commission that the hearings that we're holding around the country will help inform these debates that are going on in all three branches of government. And I think, as Judge Sessions said, we're approaching these hearings with an open mind. We don't know exactly what we're going to do with all the important criticisms of the guidelines that we're hearing, as well as what the guidelines are doing right, and I think that's also very important because, as I said, you know everybody's looking at sentencing -- policymakers are looking at sentencing policy right now. And these hearings, I think, could

help inform those debates at the federal level.

And I think the Sentencing Commission has a very important role to be the fair, nonpartisan -- because we're bipartisan -- listeners from all the different stakeholders in the process. So I just want to express my appreciation for everybody who is participating in that whole process. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Commissioner Howell.

I will then introduce our first panel which is a "View from the Appellate Bench." And I will not introduce them in the order in which they will be speaking since, Judge Tallman, Judge Kozinski informed me that you were going first. He has that prerogative, and he's the Chief, so I guess that's the way it's going to be.

We have the Honorable Alex Kozinski who has been a judge on the U.S. Court of

Appeals for the Ninth Circuit since 1985. And he has been chief judge of that circuit since 2007. The Ninth Circuit, I have to say, other than the Fifth Circuit, has the most federal sentencing in the entire country. Before serving on the Ninth Circuit he was the chief judge of the U.S. Court of Federal Claims from 1982 to 1985. He did clerk for two judges, Judge Anthony Kennedy, when he was on the Ninth Circuit, and then Chief Justice Warren Burger on the Supreme Court. And he received his degrees, both undergraduate and law school, from the University of California Los Angeles.

And we're also very fortunate to also have the Honorable Richard Tallman who has served as a circuit judge on the Ninth Circuit since the year 2000. He did clerk for a real judge on the U.S. District Court in the Western District of Washington, for Judge Sharp. And thereafter he served as an attorney in the Criminal Division of the U.S.

Department of Justice and subsequently as an Assistant U.S. Attorney in the Western District of Washington. He received his degrees from the University of Santa Clara and his law degree from Northwestern.

And, Judge Tallman, the Chief has informed me that you're going first.

JUDGE TALLMAN: Thank you, Mr. Chairman, other distinguished members of the Commission. My name is Richard C. Tallman, and I am a United States circuit judge on the U.S. Court of Appeals for the Ninth Circuit. I also serve as Chair of the Advisory Committee on the Federal Rules of Criminal Procedure for the Judicial Conference of the United States. Before becoming a judge, as the Chair has indicated, I practiced both as a federal prosecutor and as a white-collar criminal defense attorney.

I am pleased to appear before you to discuss a few issues we currently face that arise from the major changes in sentencing law

over the last 25 years.

The first issue I would like to discuss arises from the changes in the case law that the drafters of the guidelines did not foresee. The guidelines were drafted to be a comprehensive set of binding rules. The *United States versus Booker*, as we all know, invalidated the provisions that make them mandatory. The series of cases that have followed *Booker* have addressed how to apply the now advisory guidelines.

I will take one small example. For instance, in *Irizarry versus the United States*, the Supreme Court held post-*Booker* a judge is not required to give both parties advance notice before imposing a sentence that departs from the guidelines. One question that now arises is whether the *Irizarry* decision applies to variances as well as departures.

Many scholars, judges, and practitioners doubt that the departure

variance distinction is still a meaningful one. *Irizarry*, however, treated the two as distinct. However, the Supreme Court relied on the language of Federal Rule of Criminal Procedure 32(h), which only includes the word "departure." I understand a "departure" to be a change to the final sentencing range determined by factors set forth within the guidelines themselves. It was frequently said to apply to criminal conduct outside the heartland contemplated by the Sentencing Commission when it drafted the guidelines for a typical offense.

A "variance," by contrast, occurs when a court goes above or below the otherwise-properly calculated final sentencing range, based on the application of the statutory factors found in Title 18, United States Code, Section 3553(a). The Criminal Rules Committee is now considering changes to Rule 32(h) that would require notice before making any change from the suggested guideline

sentence, regardless of whether the change would have been categorized as a departure or as a variance under the former mandatory guidelines. However, the committee recently decided to defer final action on this proposal until the courts have had more time to address the issue.

The second issue we are currently confronting is how much disclosure parties are entitled to have during the preparation of presentence reports which, as you all know, are relied upon heavily by district judges in formulating an appropriate sentence. Probation officers process an extraordinary amount of information in creating the final presentence report that is submitted to the court. The district court typically relies on the end product in fashioning the sentence.

Under a discretionary sentencing regime, the inclusion or exclusion of certain information may well influence the sentencing judge to go above or below the advisory

guideline range. Both parties want more influence -- or at least more notice -- before information is memorialized in the final report. Providing more notice and more access, however, would create significant challenges.

First, it would result in even greater burden on our probation officers to disclose and memorialize every bit of information that comes into their possession during the investigation and preparation of the presentence report. These probation officers sift through huge amounts of information, much of which turns out to be either irrelevant background information or insignificant in driving the final sentence that is imposed. Disclosing all of this information or even providing access to it would multiply their burden.

Second, creating and enforcing workable rules for who gets access, what notice must be provided, and when would

require active and continued oversight by the sentencing court. District judges could well be placed in the position of overseeing a second round of discovery. In addition to the administrative burden this would impose, it would place the judge in the odd position of reviewing the information and determining its significance before he or she receives the final presentence report. The report would no longer arrive as a clean document from a neutral third party because the judge would have played umpire during its creation.

The shift to discretionary sentencing has added a new dimension to the ongoing debate about the crack/powder cocaine sentencing disparity. For years, [] we saw Eighth Amendment and Equal Protection challenges to the 100-to-one ratio mandated by the guidelines. In *Kimbrough versus the United States* and *Spears versus the United States*, the Supreme Court explicitly permitted judges the discretion to reduce that

disparity. Now a judge may impose a sentence lower than the suggested guideline range, either because he finds it unnecessary in a particular case or because he generally disagrees with the crack/powder disparity.

Now, instead of seeing challenges to the mandatory ratio, at the appellate level [we're] seeing more challenges to a district court's exercise of discretion on that subject or complaints that the district court did not know it could exercise discretion.

We also see many cases indicating ongoing confusion over the Supreme Court's holding in *Kimbrough*. For instance, we hear arguments that a judge should have departed even below the statutory minimum. Statutory minimums, unlike guideline-range minimums, remain mandatory. And *Kimbrough* provides no relief in such cases.

We are also beginning to see many inmates seeking to reduce their sentences under the Commission's Amendment 706 to the

sentencing guidelines, which decrease[s] the base offense levels for crack cocaine offenses. The amendment applies retroactively, but the challenge is determining whether application is appropriate.

Another interesting question is whether a sentence-modification proceeding under 18 U.S.C. Section 3582(c)(2) is an appeal pursuant to Section 3742, a collateral attack, or something else entirely. Prosecutors are taking innovative action in this arena, as well. The U.S. Attorney's Office for the Central District of California recently announced a new policy permitting AUSAs to agree to downward variances in crack cocaine stipulations. This would presumably make crack sentences equal to the more lenient sentences imposed for the same amount of powder cocaine. We will see how that policy plays out in practice and how it affects the claims raised before the appellate courts.

The last sentencing issue I would like to address appears in several contexts. In *Taylor versus the United States*, the Supreme Court set forth the categorical analysis for evaluating prior offenses. The approach is employed in cases involving the Armed Career Criminal Act, in immigration cases, and the sentencing guidelines themselves. The question in each context should be the same: Does the state offense reach conduct beyond the generic federal definition.

Now the Ninth Circuit takes a highly academic approach to the question, asking whether it is hypothetically possible that a state court could convict someone for conduct that would not fit within the generic definition of the crime. This often requires a healthy dose of legal conjecture, nevermind the difficulty of determining what the generic definition is in some cases.

We often get results that, while

technically correct under *Taylor*, seem utterly absurd in a sentencing system based on principles of recognizing real conduct. By contrast, the Fifth Circuit employs a common-sense approach. I personally believe that the Fifth Circuit's approach is more faithful to congressional intent in enumerating certain crimes of violence worthy of enhanced punishment when sentencing recidivists. My hope is that the Supreme Court will revisit *Taylor* to give us additional guidance in carrying out congressional policy toward repeat offenders.

Perhaps the Commission might contemplate clarifying the guidelines or seeking action from Congress to clarify and address recidivism enhancements. In the last year or so I have personally sat on panels involving cases alleging that our application of *Taylor* is too rigid, that it is too loose, and that the enhancement analysis should operate differently in certain contexts.

Multiply my own experience by the 50 judges on our court alone and you get some idea of how pervasive and frequently litigated these *Taylor* issues are.

I would like to conclude with one observation. For many years after the guidelines were adopted we heard tireless complaints that sentencing was too rigid. It was argued that no formula could capture the subtle questions of guilt, repentance, and recidivism that a judge must weigh in crafting a just sentence. The result was *Booker* and its progeny. And we now have more discretionary power invested with the district courts.

Now we're seeing a new wave of complaints. Defendants who look the same on paper are receiving inconsistent sentences. It is said that judges fail to consider a particular factor the defense thinks is important, or judges are accused of inadequately considering factors that the

prosecutor thinks significant. In short, some say judges now have too much discretion. I predict with some confidence that this continuing swing of the sentencing pendulum will keep us all in business a while longer.

Mr. Chairman, I look forward to your questions.

ACTING CHAIR HINOJOSA: Thank you, Judge Tallman. And I appreciate your mentioning the Fifth Circuit. I believe their first case where they came up with the common-sense approach was quoting a district judge who was doing a sentencing who said: Common sense tell you it was such-and such, and I think that was my case.

JUDGE TALLMAN: And he recently had one where we said common sense is out in the Ninth Circuit.

COMMISSIONER WROBLEWSKI: And you were affirmed?

ACTING CHAIR HINOJOSA: Yes, I was affirmed. And that's how the common-sense

approach started. It is a very difficult process with regards to the categorical approach to the prior -- way of looking at a prior sentence.

Judge Kozinski. There's nobody else that you can say is going to go next, so it's your turn.

JUDGE KOZINSKI: I'm afraid so. I'm certainly glad Judge Tallman came and had this very philosophical statement. My view is a subject on a little bit more stream of consciousness.

But, first of all, I want to welcome you to the Ninth Circuit. It's good to have you here. Of course, you didn't have much choice. We're not only the northernmost circuit and the westernmost circuit, but we are also the easternmost circuit since we are on the other side of the international date line. And the southernmost --

ACTING CHAIR HINOJOSA: Where the American day begins.

JUDGE KOZINSKI: That's right.

-- and the southernmost circuit because the southern part of Hawaii actually issues farther down than Puerto Rico or the Virgin Islands, so we have you surrounded. You really didn't have no choice but to come to here.

Being a large circuit we also get, as was pointed out, more than our share of -- more sentencing appeals than any other court. So I have seen my share in the years since the guidelines were done. But I must say over the years I've had sort of a love-hate relationship with the guidelines -- so I should maybe say hate-love relationship to the guideline. It's now swinging in the other direction.

Many years ago in a now long-forgotten case by the name of *Gubiensio-Ortiz versus Kanahele*, I wrote on behalf of a panel of the Ninth Circuit that the guidelines were unconstitutional, it took the Supreme Court

another 20 years to recognize that conclusion, but they finally came around.

But in the meantime -- I do remember. Judge Hinojosa and I, and maybe some of these -- I don't know who actually have sentenced people prior to the guidelines, and I remember those days fondly. I thought it was a great weight of responsibility. And I must say I, along with many other district judges, resented the imposition of the guidelines, which I saw as a constraint on the power of trial judges, of district judges who are on the cutting edge and actually are able to see the case or are able to see the full texture of the case before them, this was just tying their hands in a way that would lead sometimes to an unjust result.

I mean if the guidelines would have put no restraints on judges then they would have increased the result anyway. So in those cases where the judge was forced to sentence a defendant in a way that went against his own

better judgment, I thought led to an injustice.

But I came around to a view that the guidelines were actually a pretty good thing. And ten years ago in the Federal Sentencing Report of the issue of -- the September-October 1999 issue, almost exactly ten years ago, where I wrote a piece actually extolling the virtues of the guidelines. The piece is called "Carthage Must be Destroyed," but I wasn't talking about the guidelines. I was talking about *Koon versus the United States*. That was the case where the Supreme Court unshackled district judges to a great degree and allowed for departures. And where I come around to the view in the intervening years that actually the guidelines were a good thing, so long as they were mandatory, so long as they were really constant.

But judges, because of the tendency, I concluded when you are a judge is to be a little too close to the case, you see

a little too much of the suffering of the parties, the defendant, sometimes others as well in the case, and you can't always tell what's going on from another perspective. And I came around to thinking that it's a good thing to have that kind of a constraint on judges so they are not swept away by the particularly compelling facts of a case.

And that led me to another important value in our legal system and that is not simply sort of individual justice which is a value, but there's also the value of equality, the idea that, you know, "I may be suffering, I may be punished, I may be off to prison, but at least I know what the guy in the next courtroom, down the hall, who happened to have a different judge or, you know, is in Vermont or somewhere in Texas, they will get more of the same sentence." The fact that they appear before a different judge in a different part of the country will not make them better or worse off. We're all in

this together. It's a very important value in a society in having not simply individual justice but simply having equality.

Koon sort of, as I said in my article, threw a monkey wrench into that machinery because it greatly freed the sentencing judges to depart. And in "Carthage Must be Destroyed" I pointed out to the Sentencing Commission that *Koon* interpretation of the statute and the Commission having a great deal of discretion in shaping the guidelines, and I thought it was a good possibility, one doesn't lightly take on the Supreme Court and try to overrule a Supreme Court case, but I thought this one was worth trying. It was worth trying to take back some of the flexibility in the system and go back to a another system.

Well, of course we know what's happened in the meantime. The guidelines are now entirely discretionary in an opinion that, I must say, I've read a number of times, I

still don't get it, but it is in the *U.S. Reports* so it must be true. So we all live by it. But the reality is that what this has done is to, I believe, and this is something that the Commission probably has a wider view on, that the guidelines no longer constrain any judges who do not want to be constrained.

You know, I, as Judge Tallman, I sit on district court on a regular basis. And I do it because, I must say, I have learned a great deal every time I sit as a district judge or, as Judge Hinojosa says, as a real judge. And I always learn something new and important about juries, about cases, about defendants, about victims, a great deal.

And my guess, I guess based on my own experience in talking to other district judges, is that most judges do want to do what other judges are doing. You're there in court, you're there by yourself. You really have no one to consult. At least in the court of appeals you've got two colleagues. You may

disagree violently, but at least you can talk with them and have contrasting views.

When you are a district judge and particularly in a sentence it is the loneliest job in the world. I think -- there's a district judge present, I don't think I'm saying anything new. And it is good to know what other judges are doing across the country. It is good to have a constraint. And most judges want to fall within the mainstream. They can want to take -- but to the extent that was the case, we didn't need the sentencing guidelines at all. We could have studies about what -- what other judges are doing. There are statistics. We can have research in, you know, analyzing cases and letting -- giving judges information.

But the question really is is the problem with the sentencing guidelines were designed to deal with and that is the outlier judges. And I'm not convinced that there were that many outlier judges there to begin with

in 1986 or '85, when the guidelines were being considered. But there were a few. And those are the ones to -- everybody pointed when they said, "Look, you know, here are the outlier judges and these are the judges that are creating the disparity and the disparity is unfair and call into question our justice system."

The reality is at this point there's nothing that I have figured out on appeal that we can really do to constrain the outlier judges. And as they learn their power more with the passage of time, the outlier judges will become more frequent outliers. Most judges will still sentence within the guidelines, the sentencing guidelines range within the main, because that's what they were going to do. But I don't believe that it will provide any constraint on judges who want to find a way to sentence high or low.

We went through a period where we kept reversing and sending cases back and

considering, because the judges didn't say the catch was quite -- you know, obtain the formula quite the right way and didn't say, "Yes, I've considered all the sentencing factors, yes, I did. I know I could sentence higher, I know I could sentence lower." They didn't say the magic words. And you send it back and then they say the magic words.

And now a few judges made that mistake anymore. We get very few cases where judges really mess up on procedure. They're pretty good about it. If they stumble, one of the government lawyers will point this out in open court and they will have a chance to correct it.

So what we wind up -- I had a case myself that was remanded to me four times on a six-year sentence that I gave. And finally the last time I wrote an order saying: Look, I know I can sentence high, I know I can sentence low, I think this defendant deserves six years. I know nothing -- quite sure of

the fact that's what he deserves. And if the court of appeals will prefer to give him a different sentence, they should just remand to a different judge because this is what I'm going to give him. Well, you have time, the sentence time expired, so that was the end of that case.

But we have struggled in our circuit to try to find substantive constraints on sentences and it's a very -- it's a highly difficult standard to apply and maybe the Sentencing Commission can give us some help with that. Because what we have now is a situation that the judge looks at the presentence report, says all the right things, takes into account, okay, he says everything into account all of the factors, and then comes up with a sentence of, say, probation or less or more rarely somewhere much higher than the sentencing range. And we are struggling with trying to figure out where that becomes substantively, substantively unreasonable.

And we have disagreements in our court with this. We've had it in bank [inaudible], we've had the [inaudible] bank, we've had -- you know, we've struggled with it a great deal. But the reality is it's very hard to come up with a formula for when a sentence will be substantively, substantively unreasonable. Any sort of attempt to try to deduct a good formula, that's exactly the kind of thing we're not supposed to do on the book, and just provide some hard constraints, because at that point those things become mandatory and they become constitutional.

So what we have here now is a situation where according to the statistics of the Sentencing Commission extracted by some on our staff we have just about 1200 total criminal appeals in FY 2008, of those 56.6 were sentence-only appeals and 202 have sentencing conviction, so almost three quarter -- just about three quarters of our appeals involve sentencing issues. More than half

involve sentencing issues. It doesn't amount to anything.

The reality is these briefs are filed. Perhaps a defendant, usually the defendant is the one who appeals, has his hope that something will happen, but the reality is that nothing much happens. The sentence imposed by the district court is the sentence that winds up being imposed.

So *Booker* has made things worse. Not only has it significantly increased the ability of the discretion of district judges and significantly decreased the ability of courts of appeals to provide any kind of substantive review of the sentence, but -- we used to have a class of cases, and I believe that this was never done by the Supreme Court [but] I believe every circuit came on the same way, what they held was that -- what we had held was if the sentence fell within the guidelines range, within the range, that we had no jurisdiction to the review it. So

there are a whole bunch of cases that were never brought or could be dismissed on that basis.

Of course that mode has no ability anymore, so there is no mandatory guidelines range, and we've now held that that line of cases no longer exists. So while hearing -- while looking at more cases with fewer tools to do anything about it. And so I -- this makes me go back to my original view and I say why are we doing this. Is this as good as we can.

And let me just finish by just reading a paragraph from my article of September of 2002 where it explained the problem of *Koon* and the problem of disparate sentences and why giv[ing] this additional discretion of district courts really took away the most important aspect of the guideline[s]. And I said that -- this was supposed to be an article written to the incoming commissioners at the time, the 1999 commissions.

I said: the incoming commissioners might want to consider whether the frequency with which departures are now being granted by district courts is consistent with the basic premise of consistency in uniformity, which is supposed to be the backbone of the sentencing guidelines. Or, to put it another way, if we're going to have a -- want sentencing disparities anyway, what's the point of keeping the sentencing guidelines and the sentencing range.

I leave you with that question. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge.

Open for questions. Commissioner Howell.

COMMISSIONER HOWELL: Thank you very much. Those are very interesting comments, and I have a number of different questions. First, to go to your point, Judge Kozinski, about substantive versus procedural

review. I think in the *Booker* case, the Supreme Court basically supplanted the de novo appellate review with a reasonableness review. The Supreme Court acknowledged that they did not think that that would produce the uniformity in sentencing that the Sentencing Reform Act [intended]. But I think the Supreme Court has said that -- you know, a remedial majority opinion -- that the reasonableness review would still tend to iron sentencing differences.

Do you think that the reasonableness review is working the way the Supreme Court thought it would in terms of ironing out differences given what you've acknowledged to be the struggle even within the Ninth Circuit alone as to what that means?

JUDGE KOZINSKI: What they gave in *Booker* they took back in *Gall*. I mean look at that case. The district judge gave the guy straight probation after he -- they took -- you know, he was perfectly nice guy. You

know, the kind of guy I'd want for my son-in-law if I had a daughter.

(Laughter.)

JUDGE KOZINSKI: He turned it around and the district judge, they gave a straight probation sentence. And I looked at that case and I say -- and the Eighth Circuit in a struggle to try to find the meaning of the case said: No, that's too much of a departure. If you did do drug dealing it doesn't matter how much you recant, you've got to spend some time in the poky, which again I'm not expressing any personal view about whether it's good or how heavy a drug run to be, your sentences aren't enough, I'm just talking about your generic crime. And it seems to be drug dealing, which is one of the four categories of most common crimes and perhaps *the* most common crime or the most frequently sentenced in the federal system, and an extremely dangerous -- I mean drug dealing is really, big serious stuff.

And if a court of appeals cannot say to a district judge, "You can give straight probation for drug dealing," it doesn't matter what the facts are, if you -- courts obviously can't do that, I don't know what court of appeals can't do about it for review.

So I agree with you, with the implication you questioned. And if you look at the remedial opinion in *Booker* you would be able to extract that, but *Gall* throws everything in the back --

COMMISSIONER HOWELL: Well, --

JUDGE KOZINSKI: -- throw the baby out with the bath water, so --

COMMISSIONER HOWELL: I think perhaps substantive reasonableness at the appellate level is basically just to pay, you know, some acknowledgement to the issue of transparency in sentencing and whether there is sufficient reasons given and explanations so that people looking at the sentence

understand the reason it was given. That may be all a substantive, reasonableness review turns out to be, which was one of the goals of the Sentencing Reform Act as well, to provide transparency as to what was going and the thought processes of the sentencing court. But --

JUDGE KOZINSKI: But then it's a misnomer. It's a misnomer. That is not substantive review, saying you've got to show your hand, show what you're doing is procedural review, and that's perfectly fine. I don't have any problem with that. And we can certainly -- are very good and look to that for making sure that procedures are followed. That we can do. But after *Gall*, I mean I just feel like I think has a somewhat different view --

VICE CHAIR SESSIONS: Well, I'm not sure --

JUDGE KOZINSKI: You're constrained by Ninth Circuit law.

VICE CHAIR SESSIONS: By Ninth Circuit law, yeah.

JUDGE KOZINSKI: Maybe in the past I've said, but putting that aside.

VICE CHAIR SESSIONS: Well, you know, our en banc opinion that followed *Booker* was *Carty* and *Zavala*, and in that case we told district judges that in this circuit it's a two-step process. The first thing you must do is that you must correctly compute the actual guideline, the final guideline offense level and the Criminal History category, and we will review that for procedural correctness. That's step one.

Step two, which your question addresses, is we then look at the sentence that's ultimately announced and determine whether it is substantively reasonable. And I have to agree with the Chief, I think that so long as the judge articulates some reason supporting the sentence imposed, it's very difficult for the appellate court to declare

it as substantively unreasonable.

After all, Congress has specified the maximum statutory penalty for almost all criminal statutes. And as long as the district court sentences somewhere between probation and the statutory maximum and the judge explains why she imposed that sentence, I think it's very difficult for the court of appeals to declare it substantively unreasonable.

COMMISSIONER HOWELL: Let me just talk a little bit about, Judge Tallman, about your discussion of departures versus variances. In *Irizarry*, as you mentioned, the court certainly drew a distinction between departures and variances and, you know, said that Rule 32(h) only applies to departures, requiring notice for departures and not for variances. There have been some courts that have said that departures are now obsolete and some of our statistics actually sort of indicate they're not obsolete, they're

certainly less used by courts when they're departing -- when they're sentencing below a guidelines offense level and even our recent statistics show that courts are relying upon manual departures for below-guideline sentences not sponsored by the government. In about three percent of the downward -- the below-guideline sentence and in about 12 percent of the cases they're relying on 3553(a) variances.

Do you think that's a problem? Do you think the Commission should be concerned about that decreasing reliance on manual departures for reasons set forth in the Guidelines Manual versus variances? And if you think we should be concerned about it, do you have any recommendations to us about what we should -- we could or shouldn't do about it?

JUDGE TALLMAN: I think that it is an inevitable consequence from the switch from mandatory to advisory guidelines. And the

Supreme Court was pretty clear in *Booker*, it said what it meant, and the follow-on cases have pretty clearly announced that we are giving more discretion to sentencing courts. And that means that in departures or variances, rather, under 3553(a), if the district court decides that one of the statutory factors applies and should be given greater weight than what the guidelines advises and the judge announces that that is the basis for a lower sentence imposed, I think that's what *Booker* is all about.

ACTING CHAIR HINOJOSA: Do you think there's any value with the fact that one of the seven factors, which is (a)(5), is a consideration of the policy statements? Should I as a district judge then look at Chapter 5 when I'm trying to decide, and I decide that the range is not appropriate, shouldn't I then also have to look at Chapter 5 to determine within the Guideline Manual do I have grounds for a departure because that's

one of the seven factors that I'm supposed to consider, the policy statements, which includes departures?

And I realize that's another step, but shouldn't I have to also consider that before I then decide that, when I look at all the 3553(a) factors, I find this not acceptable or what I think is the appropriate sentence?

JUDGE TALLMAN: In a perfect world the answer is yes. From an appellate judge's standpoint, because we have language and Supreme Court opinions that tell us that the district courts do not have to articulate each step in the thought process in order to formulate a sentence that is ultimately reasonable under the current regime, I don't think that there is any requirement that the district court specifically say on the record, "I have also considered the policy statements of the Commission in formulating the sentence."

I guess good sentencing judges, if they're keeping an eye on the record for appeal will have a little checklist in front of them. And they'll go down and tick off each of those factors and specifically say, 'I have considered the policy statement.' But from an appellate judge's standpoint, I don't think we can reverse a district judge because he forgot to say, 'Oh, by the way, I also looked at the policy statement before I decided.'

JUDGE KOZINSKI: Especially if he says, 'And I have considered all the factors.'

JUDGE TALLMAN: Yes, that's good enough.

JUDGE KOZINSKI: I mean he talks about a couple of them and said, "I have considered the rest of them."

VICE CHAIR SESSIONS: This is a very significant issue to us, really. And I will say that I've been told by a district court judge, "Well, let's see, if I decide to

depart, that the appellate court then will review adequate grounds for departures, including extraordinary family circumstances, et cetera." You can go through a whole list of what are traditional departure grounds. "But if I just disregard that and I go to an adjustment, a variance, then it's just a question of reasonableness."

And what I find interesting in your comments, Judge Tallman, is that when you talked about the Ninth Circuit case, you actually talked about a two-step process, not a three-step process. First step, guideline range, and then second reasonableness. And you left out the question as to whether or not the judge went through that middle process of looking at grounds for departure.

And I wonder, and I'm going to ask for a broad-based question, and you talk about the inevitability of changes as a result of a now-mandatory system, is this whole concept of departures going to become antiquated under

the current development in the process?

Do you see that at the court of appeals level, where you just basically don't have to even deal with extraordinary family circumstances or the various other grounds that the courts used to use for departures?

JUDGE TALLMAN: When *Booker* was first announced I predicted, now in hindsight incorrectly, that we were done with having to worry about appeals that would challenge [whether] the defendant had a significant role in the offense as a leader, manager, or organizer, that all we would now be looking at was is this a reasonable sentence that the district court has adequately articulated grounds to support.

Then our en banc court decided *Carty* and *Zavala* and said: No, that there is still a real role here for the sentencing guidelines. You have to start somewhere. And that somewhere is step one, compute the sentencing guidelines and then go from there,

as I indicated earlier with regard to the factors, the Commission statements, and so on.

VICE CHAIR SESSIONS: So do you skip over the departures, do you skip over the traditional grounds for departure that was used by the courts and go right to variances?

JUDGE TALLMAN: I think so. I mean it depends on how much weight you want to give to the guideline in calculating them, but ultimately when you then apply the 3553(a) factors you're in essence doing the same thing, because those factors are so broadly written. You know, you must consider in essence the inter rerum effect of the sentencing you're imposing on this defendant in order to deter others from engaging in the same kind of conduct. You have to consider the protection of the community. And those are very broad considerations in justifying whatever sentence the court wants to impose.

VICE CHAIR CARR: Judge Kozinski, I want to address three things you said. One,

the judges are not really constrained now, which I think is one [reason] that they articulate some reason for why they're doing what they're doing and the right way is right. The other two are that most judges want to do what other judges are doing and that there were not many outliers out there.

That was not my experience in the first seven years that I was prosecuting cases pre guidelines. I think that each judge wanted to reach the right result as they saw it. I didn't see that much concern back then for what other judges were doing.

And I started in a courthouse in which among about 20 district judges there were four who would routinely give probation for the same cases in which four others would routinely give six to eight years in jail, and the other dozen were all over the place and it could depend on different kinds of cases. I considered my courthouse to be an exhibit for why we ended up with the sentencing

guidelines.

If you're right that perhaps now judges are more interested in doing what other judges are doing and perhaps that would be because, if it is the case, we have had a guideline system for a while, it could suggest two things, one of which I think you mentioned, which is that our data and research, which shows what other judges are doing, gives a sentencing judge an opportunity to compare him or herself to what other judges have been doing.

The other is, aside from our data and research, our guidelines and whether our guidelines let judges say, "You know, this is not only what other judges are doing, maybe we should be doing this because the Sentencing Commission does have some particular expertise and does go about its business making its decisions in the right way about what guidelines should be." In your view, going forward, is it likely that we're just going to

be useful to district court judges in providing them information about what other judges are doing, or do you think there is a way in which we can have or increase the credibility of our own work for judges to care about not only what other judges are doing but what our guidelines are suggesting?

JUDGE KOZINSKI: Well, first of all, it's sort of hard to argue with personal experience. You know, my understanding is that part of the guidelines -- in the circuit it was taken, and I think in some other large courts, they used to have sessions where they would meet once a week and discuss cases as a group. And where each judge would give the sentence he thought was right, there was often a consensus reached as to keep thing, to keep -- avoid the kind of things that were to your experience.

I thought those -- in the districts where those kind of procedures were implemented, they worked pretty well within

the district. Of course it didn't tell you what was going on in other districts, which is much more difficult.

You know, I think the most important thing the Commission can do is to provide information to judges. But I think the Commission also has a great deal of delegated authority from Congress and I think it is possible, and I -- I don't offer any legal opinions on this and I won't guarantee that I won't strike it down if you try it, so -- but I think there is authority, there's a great deal of authority that's delegated by virtue of the fact that you are a regulatory commission with members that go on from -- on a bipartisan basis, from a wide range of people involved in the process, prosecutors, judges, so on.

So there's a great deal of both moral and legal authority. And it would be very helpful if the Commission could explore ways of, you know, thought about the process

of what we do on appeal and thought of ways that we can exercise some authority to constrain district judge, if that's -- because that's how it's going to work.

People aren't going to come to the Commission. The few cases that are going to go to the U.S. Supreme Court, if they're -- as fast, which is a goal, whether -- where the rubber hits the road is what happens to a sentence on appeal. I mean three judges get together.

And right now we are -- it is like swimming in molasses. There is really not -- you know, sure, we can check and make sure that all the i's have been dotted and all the t's have been crossed, but we have no substantive protocols. And that is something I think the Commission can provide or at least can try to provide: Substantive protocols for things that -- where we can exercise, you know, with a light hand nevertheless some constraint on the sentences that are imposed.

I think that if the Commission is going to be more a reposit of information, you have to explore, you should explore the possibility of providing within the guidelines themselves these substantive protocols that we can stand on in making judgments about the substantive appropriateness of --

COMMISSIONER WROBLEWSKI: Judge, can you follow up -- can I follow up with you on that? I was going to --

ACTING CHAIR HINOJOSA: Oh, go ahead. I'm sorry.

COMMISSIONER WROBLEWSKI: I know that, Commissioner Friedrich, you also have -- I guess my question is -- first a comment. I don't know that the guidelines can address themselves to the appellate courts, but doesn't this require the appellate courts themselves, as some dissents within the appellate courts have said, "This sentence is just not appropriate," and that an appellate court would say that and then take it on up to

whether the Supreme Court really meant anything about substantive review, in the case where there have been some dissents where an appellate court judge said, "Look at this, this is not a reasonable sentence," and has decided the record as to why that judge may feel -- appellate judge feels this is not an appropriate sentence; and then, therefore, that takes it to the Supreme Court that then decides, "Well, we did mean something by a substantive review" or "We didn't"; and then that leaves it open to the congressional decision as far as whether there is any appellate review.

I personally would rush to appellate review. I will not take a guilty plea where there is a giving-up of the right to appellate review on the part of the defendant. If that's part of the plea bargain, I just don't take those pleas.

And so doesn't this require the appellate courts themselves to -- and I

realize that it puts you in a difficult situation from the standpoint of these cases keep getting filed and what standard do you use, but doesn't this require that action as opposed to --

JUDGE KOZINSKI: You follow -- following the *United States versus Whitehead*, was a case I was on the panel, I don't know whether it was particular of -- judges can hold opinion, and was held in en banc, Judge Gould filed saying, this is substantive, was a case of -- a case out of my court, and I'm sorry, I can talk about it, the case involved somebody was defrauded a million dollars worth of satellite dishes with the forged software, a fraud to steal DirecTV signals, and he got probation. And we affirmed over dissent by Judge Bybee And then there was an en banc hearing and there was by dissent by Judge Gould saying if you affirm this sentence, there is no such thing as substantive.

You know, I've read our sentence,

and I think it's pretty good. I've read Judge Bybee's dissent, and I thought it was right, too. And I read Judge Gould's dissent, and I thought it was right as well. I think they were all right. So that's the case to follow. I don't know whether the Justice Department will take the case up, and I hope it does because I think it will test to see whether the -- you know, I don't have any take in the outcome. I hope for clarification around. I hope the Supreme Court does take it and tell us what it really means for us to do.

But I do think the Sentencing Commission does have authority to deal with the issue. I think it views matters too narrowly to say you are just telling district judges what to do. It is an integrated process. What happens in the district court ultimately doesn't matter very much. I mean not to individual defendants -- very important. Don't get me wrong. But in terms of providing constraints and reform to the

law, it only matters if there is some way in which appellate courts can exercise real review. But right now there is.

We can check and make sure the district judge said all the right things. But, believe me, district judges are very good and they're very clever. They have good law clerks. And they do not now say things like, "Well, I decide to ignore three of the Sentencing Factors." They will say the right things.

ACTING CHAIR HINOJOSA: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Thank you.

Judge Kozinski, I'm intrigued by your suggestion that we should try to give courts of appeal, we the Commission, more guidance in terms of how to exercise their authority, but I tend to agree with Judge Hinojosa that -- and the *Whitehead* case is a good example. In that case the district court judge relied on factors that the Commission,

through the guidelines, had already taken into account, things such as acceptance of responsibility, reflections the defendant was remorseful -- that was one of the grounds the district court relied on. Another was that the defendant had a small child to take care of, and that was another factor that the Commission and which circumstance is addressed in the guidelines.

And there are other cases that illustrate the same point, which is even in cases in which the district court judges depart or vary from the guidelines based on factors that are already taken into account by the guidelines, the courts of appeals nonetheless, in light of the Supreme Court case law, view their hands as tied, based on the decision involved.

Another one is *Kimbrough*. A number of courts of appeals have said, "We can't reverse based on a district court judge's policy disagreement with the guidelines." So

I guess I'm skeptical that despite whatever policy decisions we make in the guidelines that are intended to guide the courts, that absent congressional or statutory reform, which Congress creates a constitutional and binding guideline system with a rigorous appellate review, that there is any way the Commission can give the courts of appeals the power that you suggest and would like. Because I just think in light of the Supreme Court decisions, there are so many courts of appeals judges who feel that a defendant can be sentenced from probation to the stat max as long as the judge doesn't commit procedural error and correctly calculates the guideline.

So I guess I'm just skeptical of what we could say in the guidelines that would then be given greater weight by the appellate judges.

COMMISSIONER WROBLEWSKI: And if I could join in with Commissioner Friedrich. You described earlier in your testimony, Judge

Kozinski, how the judges on the Ninth Circuit, you know, are staring at the chaos of the *Booker* decisions, and then *Gall* and *Kimbrough* and *Spears* and *Nelson*, and there's the Sixth Amendment constraint.

And the Ninth Circuit judges couldn't figure out how there could be some meaningful constraint on district judges. If the Commission were to take on the project that you're suggesting, we have to stare at those very same cases. And we have the same Sixth Amendment limitation that you all are facing.

And so is there a way consistent with the Sixth Amendment as interpreted in the series of cases by the Supreme Court that we could, as a commission, give appellate courts a way to provide that constraint? It's the constraint, that's the problem. Once there is the constraint, then you've run afoul of the Sixth Amendment. And so I'm just curious. What -- give us -- help us a little bit with

this.

JUDGE KOZINSKI: Well, we're not just talking about downward departures. We're also talking about and I think, in some ways, upward departures, more serious problems of what you have, at least for the individual. I faced a case, it was shortly after -- actually Paul Wallace, due to be sentenced the day *Booker* came out, and I postponed the sentence because *Booker* had just come out, and so.

And I was sorely tempted, though he had pled guilty to four counts of environmental, and I was sorely tempted to give him four consecutive five-year sentences, even though the guidelines range was something like -- I forget -- it was like 27, 40 months, something like that.

I said: Well, you know, I have discretion. This guy was I thought a really bad guy. You know, I don't want to go into the facts of the case too much, but I thought the guy -- and I said: Well, he poses two

counts. I said: You know, what if I decide that this is so bad, you know, that this -- you know, I don't just give him five years, I give him, I say four sentences to be served consecutively, for a total of 20 years. And I, for a variety of reasons, I just couldn't get myself to do that. I gave him -- I actually gave him a little bit on the high end of the guideline sentence.

But I would say something like saying if there are multiple sentences -- I mean just to give you an example. If a district judge decides to run them consecutively, that requires some extraordinary factor not -- that is not already considered by the guidelines. Can't be based on any factor that's not -- that's already been considered by the guideline.

That used to be a great tool, by the way, apart of *Booker*, to say the sentence is outside the range, the reasons the judge gave were all considered by the Commission, so

it's reversed. So it would seem to me whether the judge uses, as happened in *Whitehead*, I think it should happen in *Gall*, if I'm correct, where the judge relies on factors that the Sentencing Commission has already taken into account in drafting a sentence, I think that there could be a presumption. I'm just speaking to the moment here. I'm telling you what I do if I had this case. So I'm just speculating here.

But that might be one approach, is to say that things not already taken -- if it's not -- it's a fact that has already been considered by the guidelines, then that is the kind of factor that will -- that will not support an extreme departure from the sentencing guideline range. I think it's worth a try, but I don't think that -- if the Sentencing Commission can't solve the problem, Congress can't solve the problem either because the problem then winds up being unconstitutional.

So I think the Commission probably has as much power as Congress can give it. And if the Commission tries and fails, then we'll know when the Supreme Court disapproves that, then it can't be done and then Congress will have to think about whether or not we need jury trials for all these sentences. But I think it's worth a try to take one more stab at it based on the Commission's current power and try to provide some hard constraints, but particularly for those things that have already been considered factors, that have already been considered by the Commission.

ACTING CHAIR HINOJOSA: Our time is up. We thank you very, very much for being here. It's been most informative and we appreciate your taking your time to share your thoughts with us.

JUDGE TALLMAN: Thanks for having us. Thank you all for the work that you do, including putting all the rules together.

ACTING CHAIR HINOJOSA: Thank you

very much. Thank you all very much.

And we'll take a five-minute break.

(Recess taken from 10:13 a.m. to 10:24 a.m.)

ACTING CHAIR HINOJOSA: Next we will have a "View from the District Court Bench," and this morning we're very fortunate to have three individuals who have a great amount of knowledge on the subjects with which the Commission deals with.

We do have the Honorable Robert S. Lasnik who has been a district judge for the U.S. District Court, Western District of Washington, since 1998. And he has served as the chief judge since the year 2004. He was a prosecutor at one point in the King County prosecutor's office and actually became chief of staff for that office. He was also a superior court judge in the state court level before he became a federal judge. And he has his degrees from Brandeis and a University of Washington law degree and a Master's from

Northwestern. And he also is a very active member of the Budget Committee of the Judicial Conference of the United States.

We have the person who deserves the coming-furthest-from award, the Honorable Susan Oki Mollway who is a district judge in the U.S. District Court for the District of Hawaii. And she's been on the bench since 1998. Before being named a federal judge she was in private practice in Honolulu from 1981 to 1998 and was an adjunct professor at the University of Hawaii's School of Law. And she holds her degrees from the University of Hawaii and her law degree from Harvard.

And we also have the Honorable Charles Breyer who has served on the U.S. District Court for the Northern District of California since 1997. He did clerk for a U.S. district court judge, Judge Oliver Carter. He also worked for the Legal Aid Society of San Francisco and was an assistant and chief assistant district attorney in San

Francisco. And he has served as an assistant -- he did serve as an assistant special prosecutor for the Watergate Special Prosecution Force and was in private practice for almost 20 years. He holds his degrees from Harvard and his law degree from the University of California Berkeley.

And we thank you for your time. And we'll start with Judge Lasnik.

JUDGE LASNIK: Well, I was just thinking for a circuit that says they don't know how to deal with any sentences, I've been reversed three times on sentences in the last two years.

The first point I want to make is -- two of them are identity thefts where I thought the people who had their identities stolen were victims, even though the bank had restored their money within a certain reasonable period of time, but we end up arguing about are victims really victims. And any time the law looks foolish to people --

and the person who has had their identity stolen, regardless of whether the money is restored, feels victimized, especially some of the elderly people, under the circumstances of these sentences. And I commend the Commission for stepping up and dealing with that the way they did.

But we have created a situation where district court judges are aware of their vulnerability on appeal if they make honest calls in difficult situations and they call it wrong against the defendant, that's the vulnerability on appeal. If you call it right for the defendant, in other words, use the rule of lenity or some equivalent, you're not going to get reversed.

On both those sentences with the identity theft, I departed from the guideline range, anyhow. But, still, because I had calculated the guideline range wrong, it needed to come back for resentencing.

So I think you've created a

situation -- not you -- but the law has created a situation where scoring the guidelines becomes you err on the side of the defendant, and then you're still free to do what you want to do afterwards. And that is a little unpleasant because it leads district judges to be intellectually dishonest from time to time.

I also think that one of the things that we talked about at the beginning, it's so great to have you within the Ninth Circuit, I think it would be great for the credibility of the Sentencing Commission to have a judge from the Ninth Circuit on the Sentencing Commission, because I don't think there's ever been a judge from one of the biggest districts in terms of criminal cases, *the* biggest district in terms of geography.

And as with all sorts of diversity issues when you see one of your own whom you know and respect up there it makes a big difference. So I'm hopeful that we'll get a

district judge from the Ninth Circuit -- and there are some great ones at this table -- to be a representative.

COMMISSIONER WROBLEWSKI: So you look to your right, you look to your left, which way --

(Laughter.)

JUDGE LASNIK: Not myself, no. But I'll tell you I do have the personal experience of having been on this Washington State Sentencing Guidelines Commission for a number of years, including two years as chair of the Commission. And so let me say my heart goes out to you and my respect flows greatly to you, all of you. And I think you're actually doing a great job. I think that the guidelines are well thought out in a number of ways. They provide tremendous guidance to judges.

We have great information. The staff is always responsive and helpful. But because there has been this traditional

resistance to any kind of sentencing guidelines, you get blamed, especially the judges where their colleagues are almost rooting for them to fail so that the whole thing will come tumbling down. It's a particularly difficult role to play, and you have my great respect for what you do.

I would like to use my time to talk about a different topic than occupied the first hour and 20 minutes, or so. I want to talk about how we can make the guideline system better. And I think -- when I go to the glossary of The Sentencing Manual, I don't see any place in the index for alternatives to confinement. I don't see any place for treatment. I don't see any place for a first-time offender waiver or some sort of special treatment for first-time offenders. I don't see anything about drug courts or diversion.

And I really think the time is right, especially now, for the Commission to take a leadership role along with the change

in administration, the new Attorney General who is talking about fairness in sentencing, to say that we have to expand our utilization of alternatives to confinement.

And I think the Commission started this process with the conference, the document we produced. But at the present time alternatives are defined as basically probation, or some sort of intermittent confinement. And that is not keeping pace with what's really going on. You're going to hear later from U.S. Probation; you're going to hear later from public defenders, including my own fiery Federal Public Defender, Tom Hillier.

And I took a look at the testimony coming from the Federal Public Defenders, and I agree with all of their suggestions. I don't always agree with Tom Hillier about everything, but I do agree with him on this.

And I had two experiences this year that were very important to me. Seattle being

Seattle often becomes a focal point for national get-togethers. And both the federal defenders and the CJA group met in Seattle, and the U.S. probation officers and pretrial services officers -- within a month of each other. I was asked as chief judge to address both groups. And both groups are yearning for the Commission to open the door to alternatives to confinement.

The U.S. probation officers, especially, are thinking that -- they have learned so much about ways to stop recidivism. And that's a word that hasn't really appeared in our discussion so far today. We've talked about things like procedural fairness and substantive fairness, but really the goal of sentencing is not just uniformity, because uniformity, if it's all bad, is certainly not a good thing. Nor do I think we should be wedded to the fact that a judge in Seattle has to give exactly the same sentence as a judge in New Hampshire. Crime does vary from region

to region, from urban to rural. And it's perfectly okay to take account of some of those differences as long as we are open, honest, and transparent about what we're doing and why we're doing it.

My district, if you look at the numbers, is one where we have 30 -- within the guideline range, about 48 percent, so we're outside the guideline range most of the time, but 30 percent government-sponsored below the range, 20 percent nongovernment-sponsored below the range, one percent above the range.

So when a court, such as ours, is 20-to-1 on downward departures over upward departures, I think that's a message that the guidelines are not taking into account what the right sentences are for us, for the individuals who appear in front of us.

Now I'm not saying that -- we're the standard by which everyone else should be measured, but we have a district where our U.S. Attorney has a philosophy, our Federal

Public Defender and CJA panel have a philosophy, and the court has a philosophy. And no one -- it's not like what Commissioner Carr was talking about, where the sentences totally varied from place to place.

The seven of us, if you look at the statistics, the seven active district judges, and we have four senior judges who also sentence, the 11 of us are roughly in the same place with what we're doing. It's a different place, perhaps, than the Southern District of Texas, but it's a place where we say what we're doing, why we're doing it. It's all on the record. And I think that that is appropriate and a fair way to approach things.

But I think that we can -- we wouldn't have 20-percent downward departures if the guidelines presented options to take into consideration the use of alternative sentencing.

In the state court system we developed a drug court of sentencing

alternative, a special sexual offender sentencing alternative to encourage victims to participate in the process even when it involved a family member who they did not want to go to prison for a super long time. Those cases would not come into the system, at least in the state courts, if grandpa was going to have no other choice but to go to prison for eight to ten years. But if there is a possibility of grandpa getting a smaller jail term, up to six months, and some treatment option, we would get in those system and keep -- getting those cases into the system and keeping them there.

I also think that there is a role in the federal system for drug court as a diversion, not just for use on supervised release. It can be a sentencing alternative or it could even be a diversion in a traditional deferred prosecution sense.

But I think that it's time to look at what we know about evidence-based treatment

programs that work and don't work. It's certainly only fair to try to be wise with the limited resources that we have. On the state sentencing guidelines commission in Washington state I had with me on the commission as ex officio members, not just the Parole Board Chair, but I had the Director of the Office of Financial Management, who was there to make sure that the sentences were not beyond what the state could afford; the Director of the Department of Corrections, who talked about the impact of double bunking and triple bunking in prison overcrowding. I had prosecutors from Eastern Washington and Western Washington, rural and urban; defense attorneys; victims; and victim advocates. And it created a dynamic that is not possible on a limited Sentencing Commission such as you have.

But I do think part of the reason why it's so important for the Commission to go on the road and listen to what you're

listening to today is that there are a lot of viewpoints that are not necessarily being heard. And so I think it's great that you are doing this.

Now the other thing that I think that the Sentencing Commission and the sentencing guidelines get blamed unfairly for is, "Boy, we never had these huge incarceration rates, and we never had these problems before sentencing guidelines." And that's just -- trying to compare the 25 years before the Sentencing Reform Act to the 25 years afterwards in society is like comparing the crime problem in "Mayberry RFD" to what you see on "CSI." I mean the world has changed. And it was going to change regardless of sentencing guidelines.

The politicization of crime as an issue which led to mandatory minimum terms, tougher drug sentencing, tougher sex offender sentencing, et cetera, et cetera, would have been there anyhow. And I think we have a much

fairer system with a guideline approach where that is somewhat moderated than we would have had we retained the prior system and had mandatory minimum term one after another imposed by Congress because they were so unhappy or so unaware of what federal judges were really doing.

So the explosion of crack cocaine in the inner cities, the meth problems in rural areas, you've had a lot to deal with. And, as a closing point, again, I want to say I think you've done a great job under the circumstances. Now it's time to take that next step towards alternatives to confinement. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Lasnik.

Judge Mollway.

JUDGE MOLLWAY: Yes. I'd like to thank the Commissioners for letting me come and speak. I'm very grateful for this opportunity. And I did submit some written

comments, and I'll follow-up on those, but I actually wanted to start with something that is not in my written comments but that's a follow-up to a question that Commissioner Carr asked of Chief Judge Kozinski.

And the discussion started with the Commissioner asking whether the value of the Sentencing Commissioners' work to judges might be limited to data collection. And I don't think that that's all that we need. That's very helpful for us to get that data. But let me suggest that taking in evidence of what works and what doesn't work to meet sentencing goals would be a great function for the Commission.

And sometimes I'm concerned that some of the guidelines might need more only evidence to support them. In particular, I'm concerned that the child pornography guidelines might not have sufficient evidence to show that the particular guidelines will meet the sentencing goals.

And so to follow up on that I'll add also that I think the Commission has a voice that can be heard probably much more loudly than the voices of individual judges or lawyers. And that voice can be used for statutory changes also. And so I urge the Commission not to think that the only value that we, as judges, can get from you is reports on what other judges are doing; also I would not minimize that value which I think is very helpful to all of us.

But going back to what I thought I was going to come and talk about, for myself, you know, I came on the bench in 1998, and the guidelines were mandatory.

And when *Booker* came, a lot of judges urged that the rest of us not exercise the discretion we were given by *Booker* to its fullest extent for fear of political fallout, that Congress might react by imposing mandatory sentences all over the place where it had not yet done so.

And there was, of course, another voice to be heard, other judges saying the Supreme Court has given us this discretion; we should exercise it. And I think what has happened -- at least it happened with me -- was that when you're faced with a specific individual and all the details of that, that that individual and that crime present, those individual details are going to trump political considerations that are theoretical, what might happen if all the judges did this. At least that's what I feel has happened for me, that I'm always dealing with the individual case, although I'm aware, of course, that there may be fallout if everybody does this. I'm faced with a person and that person's individual circumstances, and that's going to trump the more, to me, hypothetical concerns. And so I don't know if that's how the other judges feel, but that's how I reacted.

I have a couple of requests of the

Commission. One is that the Commission adds its voice, its policy voice, to the -- again, I know it's done this already -- and we do see the crack cocaine/powder cocaine disparity, but that it do so again, and that it add its voice not only on the guideline level but also on the statutory level because, as I say, I think it's a powerful voice that the Commission can express.

I also am concerned that because we are charged by Section 3553(a) with creating a reasonable sentence, with creating a sentence sufficient to meet sentencing goals, but not more than necessary to meet those goals, that that requirement sometimes runs smack into conflict with mandatory sentences. And that becomes a problem for the judges who have to impose mandatory sentences but who sometimes feel that that is in direct conflict with the need to fashion a sentence under 3553(a) that's sufficient but not more than necessary to meet those goals.

Now what I've said so far I think probably tends to suggest that I think sometimes what we need is a more lenient approach in some of the guidelines, some of the statutes. But, you know, maybe once every five years I actually impose a sentence that goes above the guidelines. And so I'd like to talk about that, too.

For me the place where I usually will feel that is in a fraud case. And I tried to think about why that might be, and I think it's because fraud maybe comes in a greater variety of forms than some of the other crimes do. And it's so great that the guidelines cannot possibly take into account all of those factors.

Of course, for me a sentencing hearing is a dynamic experience, and it's not a sham where I go in and I argue what I'm going to sentence somebody to. Sometimes elocutions matter. And sometimes victims stand up and say things, and those matter.

So I understand that in calculating the guidelines for purposes of presenting a presentence investigation report, not everything can be taken into account. But I would suggest that some things can be taken into account that I don't know that the guidelines now consider.

The thing I'm specifically thinking of has to do with the impact on victims. And I can give you an example.

If you have a fraud case, the guideline calculation is often driven by the amount of money that was involved in the fraud and the number of victims. There may be other things, such as whether the person had a position of trust, whether some of the victims were vulnerable, and so forth, and there may have been a destruction of justice.

But there are lots of things that are not taken into account, and I wonder if the Commission might consider whether these should just be left as they are to being

considered at the hearing, or whether they might be folded into guideline calculations.

If you take, for example, the situation in which there are ten multimillionaires, each defrauded of a hundred thousand dollars, the impact of those victims will be different from the impact on a number of victims, each of whom has only a hundred thousand dollars, and gets defrauded out of that full hundred thousand dollars. There might be the same total financial loss and the same number of victims. And possibly none of the victims qualifies as a vulnerable victim, but the impact on their lives is much greater.

So people will say: I can no longer afford to do such-and-such in my life. They're not starving, but they had certain plans for this money which was in a savings account and they no longer can do those things. And that difference in the impact on the victims is now not, I think, something specifically taken care of in the guidelines.

In my written testimony I also asked for some clarification of 2B1.1 because I happen to have a very difficult case in which those guidelines -- that guideline was the subject extensive briefing and argument. I was lucky to have very good attorneys on both sides and a terrific probation officer. And all of them were flooding me with papers and I, you know, still sat down, and there was an issue about which guideline book applied.

So I sat down at my conference table surrounded by books and memos. And, you know, I would have liked to have had some of these issues addressed. And those are detailed in the written submissions I have. They basically talk about how you determine whether a particular offense, base offense level should be seven or six. And you wouldn't think that would be a big issue, but it definitely became a big issue in a recent case I had.

So some assistance on how to handle

the fraud guidelines would be greatly appreciated. And I think that's about all that I have. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Mollway.

JUDGE BREYER: Thank you, Chairman. It's an honor for me to appear before you today. I don't believe that I have any particular insights about the sentencing guidelines that are very different from those of my colleagues, at least this panel. In the earlier panel, there may be some differences, and I concede that.

(Laughter.)

JUDGE BREYER: Almost all of us are more pleased with the post-*Booker* sentencing process than the previous. And I think that all of us actually would agree that sentencing, which is the hardest part of our job, has become even more difficult but more rewarding because of the responsibility it imposes on judges to do justice.

One thing that I suggest for you to consider going forward as a Commission, required by law to administer what is a very complicated and an extremely important system, I thought I would briefly discuss the sentencing process and the role the Commission can continue to play which would be of great help to district judges.

First, let me give you a bit of an analogy. We district judges, all 846 of us, or some such number, find ourselves to be positioned a bit like those lobsters in the fish tank in a restaurant. We're perfectly happy to be there as long as we don't ask the question: Where do we go from here?

Each judge is individually capable of giving his or her sentence of a just sentence, but collectively if we don't recognize the implications of our own sentences in a nationwide context we may soon find out where we go from here. And it could easily be in the direction of less discretion,

less individualized sentencing, and, unfortunately, less justice.

We understand, of course, that we are to begin the sentencing process with a guideline calculation, because this range is the starting point, an initial benchmark from which a sentence is ultimately fashioned. This is true, however, only if the guidelines meaningfully impact the sentence.

Practically speaking, in a post-*Booker* world, since the guidelines are advisory and only one factor among the several to be considered, they, these sentencing guidelines may be swallowed up, ignored, or even indirectly mocked by a sentence imposed by judges.

The challenges facing the Commission today, I respectfully suggest, is how does one keep the sentencing guidelines relevant as they change from mandatory to advisory. Quite simply, will the sentencing guidelines continue to serve as a framework

for nationwide consistency.

I believe that the guidelines are just as relevant today as they were pre-*Booker*, but they may have been more difficult to ascertain and, as a consequence, we may now have less transparency in the sentencing process. Let me give you some examples.

Judges are to consider real conduct, not just charged conduct in setting the offense level. Depending on the negotiations between the prosecution and the defense, a process which the court is forbidden to participate, and the changing policies of individual United States Attorneys, the judge may never learn what the real conduct was.

Take, for example, a child pornography case. One prosecutor may decide, through his or her policies, that you count images a particular way. A second prosecutor may have a different view as to how you count images, yet the number of images has, of

course, a bearing on the sentencing guidelines.

In one district, the United States Attorney, as a matter of policy may file priors in narcotics cases at the outset, while in a different district may do so only if a defendant seeks pretrial release or, in our district, if a codefendant files a motion to suppress; or the prosecutor may fail to award a three-point reduction for acceptance of responsibility, even though the defendant agrees to plead guilty but not, in the prosecutor's judgment, soon enough.

It can be said, of course, that these practices may have occurred pre-*Booker* as well as today. But pre-*Booker*, these decisions made by prosecutors, and sometimes with the consent of the defense counsel, were determinative of the outcome and, thus, subject to judicial review.

Today, since they may not necessarily be determinative of a particular

result they all too often can be swept under the rug of indifference since courts are free to give little weight to them. Therein lies the danger. Our starting point for a guideline sentence becomes highly uncertain.

And to that uncertain platform judges now apply all the 3553(a) factors which, by their very nature, involve subjective findings. It is this exercise that is equally critical since it may involve variances from the guidelines. To that end it is important for judges to have enough information so they can explain how and to what extent these factors influence the sentence.

In that regard, the judges must rely on you, the Commission, to help train our probation officers so that the presentence reports contain details supporting each sentencing factor, thereby enabling the judge to address it at sentencing, refer to it the JNC and, of course, provide sufficient detail

for appellate review.

This process, while it requires additional efforts on the part of judges and probation officers, will assist, in my view, to restore transparency. For example, judges must consider disparities in sentences of codefendants under 3553(a) in order to determine if these disparities are warranted.

Without a judicial inquiry, including a probing examination of the circumstances, I doubt that a court can discharge this obligation. Thus, even with our newly-founded post-*Booker* discretion comes the responsibility to exercise it through a rigorous, energetic, and probing fact-finding process. As judges we cannot simply accept without question a party's representation that the difference between two sentences is warranted.

To do so creates a kind of shadow guideline system operating by agreement of counsel and frequently without the knowledge

of the court and without the viewing by the public. There will and perhaps should be variances from the guidelines in individual sentences, but these variances should be explained in detail so that it is the guideline that ought to be amended; there will be empirical evidence on a nationwide basis to support its changes.

Ignoring the guidelines by accepting practices that mischaracterize the underlying conduct will only impair our ability to form a nationwide system of sentencing and to correctly perceive where we are.

So finally I suggest that all of us can learn a little bit from these lobsters in the fish tank, that we must know exactly where we are today before we ask the question: Where do we go from here. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Breyer.

And it's open for questions.

Commissioner Howell.

COMMISSIONER HOWELL: I'll just start and pick up on one of the themes of your comments, Judge Lasnik.

And that is that the regional differences that we see should be of no concern to us. I think that's sort of the import of your comments in that. And I have to say, I find that jarring.

I think one of the goals of the Sentencing Reform Act was to have at, at least at the federal level, more uniformity in sentencing. And even the Supreme Court in *Booker* in the quote I read at the first panel, you know, seemed to acknowledge that there was a value to that goal.

Do the other judges also, you know, share -- share your views on whether or not we, as a commission, should be concerned about these differences --

JUDGE BREYER: You know, I give you all -- I did share your concern, but I know --

I read Judge Lasnik's -- or heard Judge Lasnik's comments a bit different.

I think that what Judge Lasnik -- if I may?

JUDGE LASNIK: Please.

(Laughter.)

JUDGE BREYER: It's grand.

-- reflected the reality that there will be a lot of differences given policies, which I tried to enumerate some of them in my remarks, by U.S. Attorneys whether they're filing a prior at the beginning, whether they're not filing a prior, how they're counting pornographic images, how they're not counting it.

So all of these things -- and that's just two. You could go get 10, 20, 30 -- all of these differences in policies may very well result in differences in guideline calculations. And what will seem to be the same or not, would not reflect really the differences. I think that of course in an

individualized sentence, the important thing is that the judge discuss, and put it out on the table and say at the sentencing, and write it in his or her opinion what were the factors, how were they viewed by that, because I think then you get exactly what the Sentencing Commission was going to do in 1984, which is to amend, to bring about changes to the sentencing guidelines which reflected the reality on the ground, which is what we are, of the sentencing process.

Now that has -- perhaps what was naive in that, in that view, was the ability of the Sentencing Commission and the judges to influence Congress to accept the changes that mirrored the reality of what was going on.

VICE CHAIR CARR: Let me tell you what I think Judge Lasnik was saying.

(Laughter.)

VICE CHAIR CARR: I was going to give that advice --

(Laughter.)

VICE CHAIR CARR: -- and apparently I've -- I thought you might be getting at the point that a million-dollar fraud in New York City and a million-dollar fraud in Montana might be the same thing. But, as we've discussed before, cattle rustling in New York City and cattle rustling in Montana may not be the same thing.

JUDGE LASNIK: Oh, just keep going. I'm learning a lot.

(Laughter.)

ACTING CHAIR HINOJOSA: I guess I'll go back to Commissioner Howell's question. I think what she was asking was: Did you mean, Judge Lasnik, that, for example, on the border of McAllen, Texas a 50-pound marijuana case is not that big a case because we have such hundreds of pounds and tons of pounds that are being seized. And so the question becomes: Did you mean that I should then have the opportunity to think, well, when I look at all these other defendants, this

isn't such a big amount of drugs as opposed to somebody in Iowa who sees a 50-pound case in a rare situation and thinks this is a big drug-trafficking case, that we should be able to take in those regional differences as far as outlooks and then say: Well, it's okay for Judge Hinojosa in McAllen, Texas to view it differently than a judge in Iowa, because he's already jaded by the amounts of drugs that he sees.

JUDGE LASNIK: Yes, yes, and partially yes.

When you're a state court judge and you're in an urban area and people break into somebody's garage and take a power tool, it has one impact on the community. In a rural area where people don't even lock their garages and doors and somebody starts doing that, it has a different impact on the community.

I'm not saying that the crime should vary tremendously, but there are

regional differences in how crime impacts communities and how it impacts victims that it's okay to take into consideration as long as you're open, honest, and doing what you should be doing.

I don't agree with Judge Kozinski that the defendant is worried that somebody in Pasadena is worried that somebody in Amherst, Massachusetts is getting the same exact punishment for the same exact crime. They are.

What they do is they talk to each other in the jail and they compare notes in there. And, you know, the greatest honor I had is a guy who wrote me a letter and said, "You have a very good reputation in the Federal Detention Center for being fair," not for being lenient, or being queasy, or a milquetoast, but for being fair. And that comes much more than how you handle the sentencing as dealing with human beings in front of you than it does processing, criminal

history, severity level, looking at different factors and coming up with a result.

The things that resonate with defendants are you treated them as a human being, you let their family members address you, you treated them with respect, you didn't necessarily go along with prosecutor who said he was -- you're -- that the person was a monster, or with something else that the person said was really not fair or really not true.

And then once you get through those things the actual sentence is less important than the process. And I think that's one thing that district judges will tell you what makes it so hard is, it's not just a matter of looking at the probation officer's report and saying: Well, that guideline range was correct, and so I'll just go here; or I'll go there. It's the process as much as it is the result.

VICE CHAIR SESSIONS: So can I just

add what I think you said?

JUDGE LASNIK: Yes.

VICE CHAIR SESSIONS: Actually I think you agreed with Judge Mollway when she said that a hundred-thousand-dollar loss to a poor person is different than a million-dollar loss because -- so those are human characteristics that a judge always considers. And what I think -- and I, you know, certainly agree. We talk about uniformity nationwide but, you know, I think that you could become obsessive on that particular issue and, in fact, there has to be some leeway within the sentencing structure so that there may be legitimate reasons why this particular sentence is different than that sentence despite the fact that you fall within the same guideline range.

But having said that -- and, obviously, the judges now have the power to do that with 3553(A). When you talked about the relevance of the guideline system, that's

where we are at this particular point. After all, you've got a guideline system that now has less than 60 percent within the guideline range. You have certainly many judges who feel that they don't even have to go through departure grounds; they can go right to 3553(a).

And, you know, so we are now listening to people talk about what we should do ultimately to make the guidelines continue to be relevant. You've said one thing: Alternatives to imprisonment. I'd love to hear your thoughts about, you know, low-level drug defendants.

Both of us were listening to the Attorney General speak about low-level drug defendants not going to prison. In fact, obviously he said it right to the Judiciary Conference, and both of us were there hearing the same thing.

You know, that's one particular option that may be helpful to make the

guidelines, you know, relevant. But, you know, on the broader perspective, just from, you know, your thought, because you all three are very thoughtful on these issues, what do you think we should do to make the guidelines relevant three or four years in the future?

JUDGE MOLLWAY: What you should do to make the guideline --

VICE CHAIR SESSIONS: To make guidelines relevant. To make them to continue to be relevant in a post-*Booker* world that allows a judge to go, as we've heard from the appellate judges, allows a judge to go right to 3553(a) and essentially be upheld.

JUDGE MOLLWAY: I think if I thought that the guideline I was applying or was told to apply was based on solid evidence, that the number of times when I would feel that I shouldn't sentence according to that particular guideline would go way down.

I frequently go below the guidelines in child pornography cases. And

I'm not confident that the guidelines were set based on actual empirical evidence that these particular guidelines link to a sentence that addresses these sentencing goals.

VICE CHAIR SESSIONS: The offense that you're --

JUDGE MOLLWAY: I think if they were evidence based, if I was confident they were evidence based, that that would be something that would definitely affect how I viewed applying the guidelines.

ACTING CHAIR HINOJOSA: Judge, does it make a difference to you if they were based on congressional statements and directives to the Commission and -- they being the ones that wrote 3553(a) and knowing what they meant when they wrote 3553(a) and what those factors meant. And if there is evidence that these are based on congressional statements and directives to the Commission as part of the statutes, where they have increased the penalties or set mandatory minimums on child

pornography, would that make a difference to you as to how you view the 3553(a) factors knowing that the Congress that wrote 3553(a), knowing that they wrote it and knowing what the law is, is sending these directives to the Commission, does that make a difference to you as to how you view the guidelines?

JUDGE MOLLWAY: I guess my answer is I view Congress as having political reasons for both the statutes that it passes and directives that it sends to you. But I look at the Commission as not some body, that is, that has its overwhelming impetus from politics. And so because I look at you differently, -- I understand, it's a factor I take into account, but if I don't think it's evidence based, then I have a hard time thinking that I should apply particular guidelines in those cases.

ACTING CHAIR HINOJOSA: Even though Congress may have written 3553(a) and you think they may have had political reasons for

having written them the way they did, that you would then decide that it's not important to listen to what they're saying with regards to other statements they may make?

JUDGE MOLLWAY: I'll never say it's not important not to pay attention to what Congress says. I mean we're bound by the statute, but Congress can put things into statutes that are going to be binding upon us. And when it doesn't, you folks have a charter yourself and I think the charter goes beyond just taking the political directives. I think it would be great if you could tell Congress that its political directive isn't supported by evidence. Even if you have to write a guideline in some way, I think using the Commission's voice to suggest that a particular directive isn't based on evidence would go a long way toward educating Congress. I mean they send you a different directive later.

COMMISSIONER HOWELL: What is the

evidence that you'd like to see? Because --

JUDGE MOLLWAY: I would like to --

COMMISSIONER HOWELL: -- I think that the Commission, you know, it's a debate that we have every time we write our commentary and explanation for our amendments, sort of how we're going to formulate that, and we all look at that very closely. You know, do we put in some of the data that -- empirical data, you know, the dataruns that we've done and analysis that we've done on data. Do we look at the recidivism analysis that we've done. Do we look at average sentence lengths. Do we look at departures.

I mean we do look at all that, but the question is do we put that all into our commentary, and sometimes we do and sometimes we don't. The question is what -- are you asking for -- when you say empirically based, are you looking for more of an -- is basically all you're saying is just more of an explanation in the guidelines?

JUDGE MOLLWAY: I don't --

COMMISSIONER HOWELL: Because we look at the data for every amendment, in conjunction with the directives we've been given by Congress expressly. And oftentimes Congress asks us first for a lot of data before they actually give us the directive and as they're considering legislation. So oftentimes Congress has a lot of the data already too and has made the policy decision that forms the basis for the directive to us.

So sometimes I think that when I hear people demanding or criticizing guidelines for not being empirically based when every amendment to the guidelines that we issue is based on some empirical analysis, whether essentially what you're asking for is just more of an explanation that is -- and so I'm curious what -- what exactly do you mean?

JUDGE MOLLWAY: I think having more of an explanation would help, but my comment was directed more at what -- I want not just

being told something, but I want the reality to be that there is empirical evidence that supports a guideline, not just --

COMMISSIONER HOWELL: Not empirical -- I'm sorry.

JUDGE MOLLWAY: -- being told something.

And so I don't know, for example, if you were to work out the possible sentences that might come out of different combinations of guidelines, let's just take child pornography, whether there's evidence that those particular sentences -- take a four-year sentence for, you know, someone who had file-share on a certain number of images, or something like that -- does that really cut down on recidivism. Can something different have the same effect. That's the kind of evidence I would like to see.

I don't know whether what body is better positioned to collect that kind of evidence and work it into a nationwide policy.

ACTING CHAIR HINOJOSA: I guess a follow-up question is, Judge Mollway, let's say it's a brand new statute, that has never been a violation of federal law, should the Commission then wait till it starts seeing cases within that statute before it promulgates a guideline on a brand new statute or what should the Commission do in that situation? Where there is no basis for prior cases and empirical studies and looking at average sentences and what courts have done in a similar situation because there hasn't been one?

JUDGE MOLLWAY: Well, I'm sure whatever guidance the Commission could give me would be greatly appreciated. If I'm the judge who has to give the first sentence on this new statute where there has never been anything done, you can bet I'll be grateful for any advice you give me.

But, you know, as they work their way through and as we get evidence, if that

could support any amendment --

ACTING CHAIR HINOJOSA: And I think Commissioner Howell's point is that, you know, this process that the Commission goes through is a long process. And for those of us who have to do it, you know, it's not unusual for me to continue a sentencing because something comes up at the sentencing. I know some judges may be cautious about that, but I have no problem whatsoever in the middle of a sentencing, somebody comes up, and I need more information, whether it's medical evidence about a family member or anything else like that, to say, okay, we'll continue it till I get it.

But you know the Commission has the luxury of we have gone through a whole process of an extended period of time of comment from defenders, prosecutors, the public; what we got from Congress; what we get from the judges; and that every guideline, Amendment, and/or new guideline that comes into effect

has gone through this extended process that has been put through a pretty serious test, and then obviously it goes to Congress and sits there for six months before they let it become part of the manual itself, and so it is a difficult situation to explain this to -- and perhaps we don't do as good a job as we should -- to explain what the process has been, because it isn't that we just sit around one day and decide, well, let's put this in the book.

JUDGE MOLLWAY: I didn't mean to suggest that --

ACTING CHAIR HINOJOSA: No, no. And I know you didn't --

JUDGE MOLLWAY: And I'm grateful for the detail you help me get --

ACTING CHAIR HINOJOSA: -- mean that, Judge. And we didn't take it that way. It's just that I think perhaps we don't do as good a job sometimes of explaining what the process is. And I, frankly, was not as aware

about it as when I became a judge.

And, you know, getting back to Judge Lasnik's point, I'm probably the first southwest border judge ever to serve on the Sentencing Commission and, frankly, never picked up the phone and called the Sentencing Commission when I probably should have. And so that's why it's great that you all are here because we're hearing from you. But it was an eye-opener for me as to what the process was.

JUDGE LASNIK: The other thing, Judge Hinojosa, picking up on what you said, you have maintained great credibility with Congress because you listened to what Congress says, you incorporate it into the guidelines.

It doesn't help us for you to say, well, we're going to be an independent Commission and just go a certain way, because you will lose your clout and your credibility.

So we understand that you have been successful in many important ways for the judiciary because of how you have handled a

very difficult role of being this independent Commission. So we understand that, and, you know, especially as a former chair of a state sentencing guidelines commission, if you lose credibility with your legislative authority and your political people, you're not going to be of any use to anyone. So the political doesn't mean evil, and it's important that you take account of some of those factors. And you've done a great job in that area.

ACTING CHAIR HINOJOSA: And I hope that we've done a good job also of listening to the judges, because, as we all know, the district judges are the ones who have actually to pass the sentencing, to do this actual difficult job itself.

COMMISSIONER HOWELL: It saves lobsters.

ACTING CHAIR HINOJOSA: And it's difficult, as you all explained, you know, a lot of times we know the defendant and family members, I'm in a building where it's public

elevators, so we sometimes ride up together. But, at the same time, you know, it's also difficult because the factors themselves talk about the public quite a bit, and they're usually not present. And so we have that difficult task of putting it together as to what's better for -- best for the defendant and the public also. And so what we hear from the judges is very helpful. And, you know, certainly what the executive has to say and the general public. And it's all put together over a long period of time here.

But you all have been very helpful and -- yes.

COMMISSIONER WROBLEWSKI: First, let me add my voice of thanks for you all being here.

I have a couple of follow-up questions on a few things. Judge Lasnik and Judge Mollway, you both testified about alternatives to incarceration. And I'd like you to expound a little bit on what you meant

because a few things come to mind.

First is with advisory guidelines and with the type of -- or lack of substantive reasonableness review that's going on right now, it seems to me that if a district judge has in front of him or her a defendant who that judge believes should not go to prison and should be given an alternative, at the moment under the current law that judge has the ability to do so.

So my first question is, is there -- is the problem you want the Commission to address one of defining the eligibility for alternatives or, as Judge Mollway talked about, is it the idea of gathering the evidence of what alternatives work and what alternatives don't, presenting that to the district judge within the current scheme of eligibility? And if it --

JUDGE LASNIK: I think it's both, frankly. And -- but I think we have a lot of evidence out there in the social science

community about what does and does not work, much more than we had back in 1984, when the Sentencing Reform Act was passed and we are still on sort of the tail end of nothing works. We have drug courts that started at the state court level and apparently there was a diversion during court that General Holder utilized when he was a judge that he's very positive about.

There's a lot of data on the Oregon program being utilized. There are workforce programs. There's MRT. There's a lot of things that are out there. But there -- this district does this, that district does that. Hawaii has this program. And I think the Commission can be a clearing house of what works, what doesn't work, and possibly influence funding to some extent because these programs, they do save money over incarceration, but they cost -- they cost money in the intensity of drug treatment, beds for mental health courts, or things like that.

And so I think the problem that I see with the Commission is the -- this is a situation where Congress had a preference for alternatives for certain kinds of offenders, but as a judge you don't really know what's out there other than straight probation or some sort of intermittent confinement.

And I think we have a lot better information, but it's scattered and it's not put in a useful manner for not just the judge but for the practitioners to present to --

COMMISSIONER WROBLEWSKI: Let me follow up again on that. Obviously the availability of treatment or of halfway houses or of certain alternatives is going to be in many ways very district specific and sometimes city specific. So the Eastern District of Virginia may have one availability of a program in Alexandria and may not have a similar program in Norfolk.

Do you think as a centralized agency sitting in Washington, are you asking

the Commission to sort of pick and choose and sort of try to make something a little more uniform across or are you just talking about the Commission advocating more with the appriators and allowing the kind of experimentation that you described to continue at least for some time?

JUDGE LASNIK: The latter point. Because obviously, again, if uniformity is your only goal, and you wait till everyone has a similar program, it'll never happen. But to have a pilot program that uses drug-court diversion in Seattle, for instance, with the concurrence of our new U.S. Attorney, backed by the Attorney General, and with the court and Probation and Pretrial Services being onboard, and study that and see does it work or not, might be a good thing to do, even though it will lead to some sentencing disparity because the people in the Western District of Washington have an option that's not open to them in the Eastern District of

Washington.

But I still think those things are important to encourage, from the Commission's perspective, to study with your superb staff, to educate and be training on, and to hopefully -- it's not going to happen overnight but work towards a system that put some real meaning into the phrase "alternatives to confinement."

JUDGE BREYER: But if there are ways to put within the guideline structure some alternatives for low-level drug defendants, as an example. I mean obviously that would encourage --

JUDGE LASNIK: It certainly would. And I'm mindful of the fact that 40 percent of the offenders are illegal aliens and it creates a great challenge, because you cannot do the same kind of programming with those individuals.

But even those individuals who go to prison, why not give them treatment, why

not give them education opportunities, why just warehouse them, or anything like that. So I agree with the point that you can't necessarily put those people in the same kind of community-based, free-to-roam treatment programs. But even there, with the ones who go to prison, there should be drug treatment, alcohol treatment, and work, education opportunities.

JUDGE BREYER: And you know where you see this, there is basically a national laboratory for this because we all find in cases of supervised-release violations, when they come in, you start to get an idea of what the particular problem is with respect to that particular defendant. And then you do try, at least I do and I think all my colleagues do, fashion the sentence with respect to the violation that addresses the particular problem of that defendant.

So I think that there is some empirical evidence out there about what seems

to be working. I certainly would say you're absolutely right, it's going to be individualized district by district, maybe even within districts. But I would hope that the Commission would encourage more of these programs to be developed, even if it isn't on a nationwide basis.

The interesting thing about the most recent report that came out on the alternative -- alternatives to incarceration was how small that book was. And that because I agree with Judge Lasnik and Judge Mollway that judges are constantly looking for ways to basically address the problem of the individual defendant so that recidivism isn't really going to be the issue in that particular case. That's number one.

We were all very surprised, at least I was, when the Bureau of Prisons terminated the Boot Camp Program, especially those of us who had come from the state court system -- where I was a district attorney for

a number of years -- and found that in particular cases it seemed to work rather well. But I understand that, according to the Bureau of Prisons' report, that overall it wasn't cost-effective.

Well, you know, looking at sentencing as an individualized issue, as an individualized issue, there are those cases in which it makes a great deal of sense to be able to put *a* particular defendant in *a* particular program. So I would love to see the Commission use some energies and resources to try to see whether we can develop more of these programs, because, number one, especially California, you know, you're going to find that it's absolutely prohibitive putting more and more people in jail. It's not effective. It's prohibitive.

And so there is going to be a fiscal issue of looking for other types of situations that may address these problems, and I think the Commission could be helpful in

that regard.

COMMISSIONER WROBLEWSKI: It's interesting the example that you pointed out, the Boot Camp, because that decision was evidence based. It was based on research that showed, as compared to other programs, for example, the Federal Prison Industries, the Drug Treatment -- the Residential Drug Treatment Program, that that's much less effective, in some cases actually counter productive to go through that program.

Can I just ask you, Judge Breyer, one question about the -- I think what you called the shadow guideline system that started to creep in. And what you said rang true to me because we've been hearing from the U.S. Attorney's Office in the Northern District of California and others, in fact Karen Immergut is going to be -- from the District of Oregon -- is going to be testifying about the greater use of 11(c)(1)(C) pleas. And I think that's

consistent with what you're talking about. Basically the parties are getting together and they are deciding what facts and factors should go into the determination.

They're coming to court and saying, "We've worked it all out here, take it or leave it."

Do you have any -- any reason -- or do you have any understanding of why this is happening? Is it just -- is it possibly because of greater uncertainty at the district court level in terms of sentencing? Is it *Booker*? Or is it completely underrated and because of something else?

JUDGE BREYER: No, I think it's *Booker*. I think that one thing parties dislike in the criminal justice system is uncertainty. They can live with a lot, but what makes it very, very difficult is the uncertainty. The -- and when the judges have the discretion to exercise their discretion in a particular way, that introduces, that

introduces uncertainty into the process.

Every judge may have a different practice. I do accept, and some judges don't, by the way, the (c) plea with the proviso, of course, that I'm going to make my own independent inquiry and determine whether or not I'm going to accept the disposition. In other words, I accept the plea but I don't necessarily accept the disposition and then I -- if I don't, I simply send it back to them and set aside the plea, if I need to do that procedurally.

So it doesn't bother me that they are trying to negotiate a disposition. What bothers me about it is that that disposition is frequently based on a set of facts or not that I don't know about. And if I don't, then actually I have transferred the sentencing power that I really think for many, many reasons ought to remain with the judge. You know, a judge appointed by the President, confirmed by Congress, who exercises

independent judgment. I think that's a key role for the judiciary, and to transfer that power to either the executive branch or to, depending on what district you're in, to -- to defense counsel, I for one don't like that because I don't think it's their role to set the sentence.

So I have a healthy, healthy or not, I have a suspicion -- some people would say it's not so healthy -- I have a suspicion about (c) pleas. And it's not that I want to fashion the particular sentence. It's that I want to know what the facts are in order to fashion a particular sentence.

JUDGE MOLLWAY: Can --

ACTING CHAIR HINOJOSA: Go ahead. I'm sorry.

JUDGE MOLLWAY: My own experience with those kinds of plea agreements, and I don't have that many of them before me, but they're -- I don't think in the ones I've had presented to me have been driven by *Booker*

considerations. That they -- the ones I've seen have tended to come up in cases where there is a statutory sentence that the parties are so concerned about because it's so high and they have difficult trials, if the government is going to go ahead without a plea agreement, and so both sides compromised.

I recently rejected one such plea because it required me to find substantial assistance had been given to the government, and I said I didn't see it. I said you can't identify substantial assistance to me just giving it that name, but it, in essence, consisted of everybody pleading together but nobody was willing to say "I caused him to plea," because they wanted them all to be accepted. I didn't have the sense that it was a *Booker*-related kind of phenomenon.

COMMISSIONER FRIEDRICH: I just have a question for the three of you. A number of witnesses who testified before the Commission have argued that in part to remain

more relevant, the guidelines, that the Commission should take steps to try to address the kinds of factors the district courts are typically considering under 3553(a) and varying, particularly offender characteristics.

And the problem with doing that of course is twofold. On the one hand, Congress has given, and since the Reform Act, some clear direction to the Commission that certain characteristics like race, for example, should be -- the guideline should be entirely neutral as to that factor; and as to others that it's generally inappropriate for the guidelines to consider other factors, education and things like that. And thus the guidelines and Chapter 5 contain the so-called forbidden factors and discourage factors that aren't forbidden, but aren't ordinarily relevant except in an exceptional case.

And so there's the statutory problem and then on top of it there's the

practical problem. If you look at the cases post-*Booker* across the country you can read one district judge finding the facts the defendant has a college education and a job as a mitigating factor and the defendant's going to be able to pay restitution, et cetera, reduces the sentence for that reason.

On the other hand, another judge finds it an aggravating factor. You know, 'You didn't need to be doing this fraud. You have an education. You had a job.'

And so I'm just interested in your views on, one, whether that's something that the Commission should step into and is it even as a practical matter, you know, and a legal matter -- can the Commission --

JUDGE LASNIK: Again, if you go back to the fact that we're all trying to stop, in addition to having fairness and equity in sentencing, to stop people from committing offenses in the future, some of those factors are determinative of recidivism.

Age, for instance, is a factor that the statistics clearly demonstrate. The at-risk population is more likely to commit future crimes than above 40, or something like that.

So I think it's -- but we would all agree that we do not want to go back to a situation that sentencing was when it was, 'Oh, you remind me of my niece, so I'm going to give you a break' and white male judges were favoring certain people over others.

And the very first sentencing I did as a young prosecutor, I'll never forget it, went in their bright-eyed and idealistic, and it was a welfare fraud case with an African American. And the sentence, the judge looked down, you know, interrupted the pitch and said to the defendant, "What kind of car do you drive? I bet you drive a Cadillac? Does he drive a Cadillac? A nice, big white Cadillac."

And I was so -- I felt so awful and so much like I needed a shower that, you know,

those sort of experiences stay with you. There was a lot of racism, sexism, and every kind of ism in the state judiciary and I'm sure in the federal judiciary too. So you make a great point.

The more we start looking at individual factors, the more those things might creep in much more unconsciously than that particular racist judge was very conscious about what he was doing, so it's a difficult question. And I think that the Commission needs to be very careful about opening the valve in some of those areas.

But I do think the prohibitions now go too far and I think there [are] a number that you should think about amending. And I think Tom Hillier's -- they cover a little bit in their presentation later, but it's a great point. Very difficult to balance that, being fair to everyone but also taking into account some of the demographics that do matter for recidivism.

ACTING CHAIR HINOJOSA: Our time is up. I thank each one of you for having taken --

JUDGE LASNIK: It was an honor to be here.

ACTING CHAIR HINOJOSA: Thank you all very much. We appreciate your comments and thoughts.

And we'll break until -- the next panel is at 11:45.

(Recess taken from 11:36 a.m. until 11:50 a.m.)

ACTING CHAIR HINOJOSA: We're ready to get started with the third panel. This is a "View from the Probation Office." And we are very fortunate to have three individuals who represent different probation officers of the Ninth Circuit that we're having the hearing in.

And we have Ms. Marilyn Grisham who was appointed as the first female U.S. probation officer in 1987 in the District of

Idaho. In September of 1998 she was promoted to senior U.S. probation officer as the drug and alcohol treatment specialist, and then became a supervising U.S. probation officer. And in September of 2003 she actually became the chief U.S. probation officer for the District of Idaho.

We have Dr. Chris Hansen who was appointed as the chief U.S. probation officer in the District of Nevada in the year 2003. Prior to being in Nevada he had worked as a U.S. probation officer in the Middle District of Florida for 14 years serving as a line officer, intensive supervision specialist, and later as a supervisor. He and his staff have actively been involved in advancing evidence-based practices in the general probation system.

And we have Ms. Elizabeth Kerwood who is the deputy chief U.S. probation officer for the District of Hawaii. She began her career as a federal probation officer for the

District of Oregon in 1983. She became the after-care specialist in 1991 and a supervisor in 1992. And she became the deputy chief for the District of Hawaii in the year 2002.

We are fortunate to have these three individuals with the experience they bring to their work to address us today. And we'll start with Ms. Grisham.

Did you want me to start some other place?

(Laughter.)

ACTING CHAIR HINOJOSA: I'm flexible. This isn't a courtroom.

MS. GRISHAM: Well, yes, but my colleague might not appreciate it.

First of all, thank you so much, Commissioners, for this opportunity for Probation to share our thoughts with you about the guidelines. And I would kind of apologize for my written statement, not exactly knowing the audience, that we're absolutely preaching to the choir. So I'm going to kind of put

that aside --

ACTING CHAIR HINOJOSA: Sometimes it's okay to preach to the choir.

MS. GRISHAM: -- and, based upon kind of the discussion this morning, maybe choose some other issues to highlight that will lend themselves more to discussion.

As I did say, though, in my paper, I really feel I've had the unique opportunity as a Probation Officer, Line Staff, to author both pre- and post-guideline presentence reports, so I can bring that perspective to the table.

Having said that, the guidelines definitely were kind of a scary thing for us when they were implemented in 1987, but definitely needed. And Idaho, as you probably know, is a very rural state, the population probably just over a million now, and it's growing by leaps and bounds, but we have a very diverse geographic area. It's a big state, six Indian reservations. And Boise is

the Capital.

So we deal with a lot. We've only have two district court judges. My chief judge will be here tomorrow. If I could put in one plug, it would be that we need a third. If there's any help out there for that, we'd appreciate it.

But prior to the guidelines I did see sentencing that did take into account gender, race, ethnicity, those issues. So we welcomed the changes that the guidelines brought in that respect. And we really appreciate our role with the guidelines as that neutral party putting that presentence together, collecting information, and writing it up, working for the courts so that we can be neutral.

And we feel like we have a whole different voice now than we did pre-guidelines. And, again, that's much appreciated. As I tell my staff, it's my belief, when you're writing a presentence

report, that you want to write it so that you judge who, in all likelihood, some of the sentencing decisions are going to appeal, because most of them are, you want him to prevail on appeal based upon your research and directive that you've given him. So we take our job very, very seriously in that respect.

Moving forward now, if there were some changes to the guidelines, we'd love to see that the two-point reduction for acceptance of responsibility at 3(E)1.1 just be a given in a plea situation. We have fought for 22 years for and against giving it and not giving it [inaudible] and it always ends up that we get it, whether we believe that that's accurate or not. So I think that would be worthwhile to take a look at.

It's been touched upon a lot today, the white-collar-crime issue. It seems to be that those sentences are departed upon more frequently than other types of defendants. And I think there's probably issues with that

that can be addressed.

Some of the concern in our office in what we see in prosecutions is that the government seems to be controlling the outcome of the sentencing decisions via the plea agreements. They're very structured, a lot of times what they're mentioning in there, and then not presenting evidence at the sentencing hearing to support controverted issues, even though they have the evidence, they have the ability to do that. They don't want to jeopardize their written plea agreement.

And so while we're the neutral party in gathering all the facts sometimes it seems, you know, we're doing it all for naught, because it's laid out and that's the way it's going to be.

Another issue that we feel is of concern [] is the drug quantities seem to be disparate. We are a huge methamphetamine District, always have been. We knew how to spell [] methamphetamine in 1988. I don't

know when it hit the Beltway, but those people are going away for a very, very long time.

When we compare that perhaps to marijuana, it would take boatloads of marijuana to get the same sentence as a pound of methamphetamine. So we would like to take Congress and Sentencing Commission hopefully to take a look at that.

And kind of in line with that, the mandatory minimums appear to us to be too stringent, especially in some of the drug cases, especially the crack cocaine. We are not a crack cocaine District. We only had four cases that were affected by the retroactive amendment. And one was already out. But be that as it may, we still believe that that's way too stringent.

They've talked a lot today about alternative sentences. We certainly would like to see them. I'm not sure in our district, given the gravity of the offenses that are prosecuted, that there would be many

people known people that would qualify for that, but there certainly are some: Diversion, drug courts, other types of alternatives would be welcome for us.

However, hand-in-hand with those kinds of things are -- they're resource-driven for us. And we struggle with reduced workload via the workload formula, trying to do more with less. And coming from kind of a geographically-challenged state -- I mean I have four satellite offices, two are manned by one probation officer and a half-time clerk, so there really is only so much we can do with the resources that we have. It would simply take more resources, more money coming our way to really engage in those alternative-type sentences throughout the state.

We recently implemented a drug court in Boise last September, and just now started another one in the eastern part of our state last month. We don't have, you know, empirical data to share, because they are so

new. But it's a struggle, because they are very, very different, intensive programs. They wanted to start one up north and I asked them to hold off because I just don't have the officer power to deal with it at this point in time.

Another thing that we see in Idaho is an awful lot of immigration cases being prosecuted. For us they're very time-consuming cases. There is just an abundance of case law out there that we have to be aware of and deal with. The *Taylor* approach, which they talked about this morning, it's a challenge, a lot of times to get records that are needed for that *Taylor* categorical approach.

So I mean, if we don't have them, we're certainly not going to go there with the enhancements, but we are probably missing a lot just because we can't get the records. But even still I think that the sentences for immigration cases are just too high. They're

costing the public too much money via the prison system.

I mean I know several years ago they kind of made more distinctions in those special defense characteristics. Perhaps there could be more. I'm not sure what the answer is. But 16 levels is huge. And that's most of the cases that we see, because our prosecutors go after the more egregious 1326 cases.

And finally I want to say that we are very grateful for the Sentencing Commission. We use the staff at Sentencing Commission, the hotline as a resource. Often we're often asked, prior to sentencing, by the judges to contact the Commission to get their take on the issue. And the website provides a lot of guidance and great information, as well.

To the same degree I guess a plug would have to go also to the general counsel's office, because we use them an awful lot, as

well. We have great resources. We work with great people. And truly post-1987 our role changed significantly. And I think we're really grateful for that. It's much more challenging, much more interesting, and I think has caused us as a system to just become that much better.

So thank you.

ACTING CHAIR HINOJOSA: Thank you, Ms. Grisham.

Dr. Hansen.

DR. HANSEN: Good morning. Thank you for allowing us to be here. I understand we are between you and lunch. So we'll move the comments along. I had the opportunity to review some of my colleague's testimony before you and especially Greg Forest. And I didn't want to reiterate what he said, but I agree with many of his points.

As you no doubt are aware the United States incarcerates more of its citizens than any other country in the world.

A recent article in the *New York Times* noted the United States has less than five percent of the world's population but it has almost a quarter of the world's prisoners. One in a hundred individuals in the United States are incarcerated in prisons or jails. One in 31 are under some form of correctional control.

David King, who's the Chairman of the American Conservation Union, noted, "The fact that so many Americans, including hundreds and thousands who are a threat to no one are incarcerated. That means that something is wrong with our criminal justice system and the way we deal with both dangerous criminals and those whose behavior we simply don't like."

At mid-year 2007 the federal prison population grew by 3.1 percent. I mention these facts and figures to bring attention to the fact that we can't keep building federal prisons to deal to deal with our criminal justice population. To deal with the systemic

political issues goes far beyond the control of the Commission.

I can compliment you all on your unwavering efforts to end the disparity between crack and powder cocaine, even when it was unappealing to do so.

I also want to compliment the Commission on its symposium on alternatives to incarceration, and I hope that the Commission continues to study alternatives to incarceration.

I'd also note that we are in a green state, and we should have green symbols on all our Federal Bureau of Prisons and state prisons because we are excellent recyclers. Except it's human recycling we do.

The Commission asked for some points that we would touch on. I'll touch on a few of those.

First, the sentencing, post-*Booker*. *Booker* has opened the door for judges to make what I call the whole person in accordance

with 18 3553(a). The court now has greater discretion to determine a reasonable and just sentence. The court now has the ability to more freely considered the unique characteristics of each case, each defendant than previously.

The advisory nature of the sentencing guidelines allows the court to consider other imposed sentences of similarly-situated defendants. In the post-*Booker* world the Probation Office plays a critical role in providing the court with a true and accurate picture of the defendant. This role prior to *Booker* had become rote.

With accurate calculations, the guideline range paramount, the defendant's characteristics has become benign. Probation Officers in the post-*Booker* world must be trained or retrained to analyze the unique characteristics of each defendant. And this will provide the court with the rationale and justification to provide a just and reasonable

sentence, including a variance, if warranted.

The role of the guidelines. Perhaps there is no more important motivator for the creation of the sentencing guidelines than the desire to eliminate sentencing disparity. Based upon the comments of the judges in the District of Nevada, it would seem that the sentencing guidelines are viewed as inherently reasonable. This is further supported by the high number of sentences which continue to be imposed within the calculated guideline range.

The sentencing guidelines were designed to capture the specific acts committed by defendant during the commission of the primary offense category, not simply qualify the statute which has been violated.

The sentencing guidelines also attempt to assign a specific value to criminal history behavior and provide an incremental punishment for repeat offenders.

Potential changes to the guidelines

could include a revision to allow the court to depart from the applicable guideline range based on the history and characteristics of the defendant. 18 3553(a), which 18 3553(a) directs the court to consider upon imposition of sentence. The guidelines currently discourage such consideration.

The guidelines could include a uniform reduction available to defendants being sentenced as to immigration offenses who enter a timely plea. Currently, a few districts offer fast-track reductions, which are otherwise unavailable in most Districts. This would serve to further diminish sentencing disparities between Districts.

Based on my opening comments, the Commission should increase the availability of probation for low- risk, nonviolent offenders. Probation is a low-cost and effective alternative to imprisonment. As noted, the Commission should continue to follow up on its alternative to incarceration in a symposium.

Federal sentencing system balanced between judicial discretion, uniformity, and certainty. The system appears to balance the objectives of judicial discretion, uniformity, and certainty. This is due to a continued reliance upon the guidelines to set an advisory sentencing range based upon specific factors related to the offense and the defendant's criminal history which are uniformly calculated.

The sentencing guidelines offer the court a starting point for the determination of an appropriate sentence, which is utilized in combination with those considerations contained in 18 3553(a) when formulating the final sentence imposed. And that is where the presentence report is paramount.

How should offense and offender characteristics be accounted for in federal sentencing? What changes could be made to account for these characteristics?

Experience has shown the guidelines

focus on the details of the offense. Increases or decreases to the guideline calculations are based on the unique characteristics of the offense and address specific overt acts.

It would seem, however, that the guidelines provide a lesser consideration for the characteristics of the defendant. Most of the guideline applications which address the defendant's characteristics in Chapter 5 are universally labeled as "not ordinarily relevant," and are thus deemed discouraged factors to be considered at sentencing.

This appears to be in conflict with the directives of 18 3553(a)(1), which begins with: The first factor the court is directed to consider in imposing a sentence is the nature and circumstances of the offense and characteristics of the defendant.

Certain characteristics of the defendant are indicative for the risk of recidivism and are captured by the provisions

of Armed Career, Criminal Career Offender, and Safety Valve, which focus almost entirely on criminal history and not on the other characteristics of the defendant.

Other pertinent characteristics which may also aid in the assessment of risk and recidivism are not encouraged as factors warranting significant weight in the imposition of sentence, for example, a defendant who is terminally ill may pose a much less significant risk of recidivism.

What kind of analysis should [a] court use when imposing a sentence within or outside the guidelines sentence range.

As I've noted, the court should rely upon both the analysis of the offense and defendant pursuant to all guideline applications and then utilize a comprehensive review of the factors of 3553(a). The combination of both guideline and calculations and 3553(a) factors provide the basis for analysis and result in a thoughtful,

reasonable, and just sentence.

This is an area where the Probation Office plays a critical role, as I've noted, and must break free of the pre-*Booker* rote presentence reports, as I have previously noted.

How have *Booker* and subsequent Supreme Court decisions affected appellate review:

In *Booker*, the Supreme Court ruled that sentencing guidelines were advisory in order to comport with the Constitution, and that the federal courts of appeals can review criminal sentences for reasonableness.

Immediately thereafter, there appeared to be wide dissent as to what the standard for reasonableness was and what the review would thus incorporate. The vagueness led to a split in the circuits in their determination of what constituted a reasonable sentence. The circuits split and obviously ambiguity led to the Supreme Court's

subsequent ruling in *Rita*.

The Supreme Court attempted to resolve the ambiguity as to reasonableness and stated that a sentence within the now advisory guideline range was presumptively reasonable.

The Supreme Court also noted that a statement of reasons pursuant to 18 3553(c) on the record by the judge was legally sufficient. However, the appellate courts then differentiated themselves from each other again with decisions made as to what constitutes a specific-enough statement of reasons.

Since then district court judges have responded by making additional efforts to satisfy the appellate courts by putting [on] the record that they have thoroughly considered the parties' arguments and other reasons for imposing what is a reasonable sentence.

As part of the recommendation, there was a recent request by the American Bar

Association to amend Rule 32. And the Probation Office recommends that no changes occur, more specifically, as to the proposed changes proffered by the Bar Association. I have listed several reasons why we should get that mandate, but I'm not going to go ahead and read those now.

Recommendations the Commission may make to Congress with respect to statutory changes regarding federal sentencing:

The mandatory minimum sentences may be revised (sic) for certain defendants who have committed a nonviolent offense and pose a relatively low risk of recidivism. We've seen in our district how a Mexican National who came in with a trunkload of drugs, acting as a mule, with no prior criminal record and no established tie with [the] United States, was sentenced to a severe minimum mandatory sentence.

A sentence imposed below the mandatory minimum may well be adequate and not

greater than necessary to meet each of the goals of sentencing.

I would also urge the Commission to review the research literature to determine the types of defendants who would do well on community supervision without the need for specific imprisonment. We cannot continue to build prisons as a way out of this complicated problem.

As my opening comments alluded to, we are a world leader in incarceration of our citizens. This is a costly and at times an unnecessary response to low risk, nonviolent offenders when alternatives are available.

I encourage the Commission to continue to study this issue objectively with the assistance of professionals at every level in and outside of the criminal justice system.

And I want to thank you for attention.

ACTING CHAIR HINOJOSA: Thank you, Dr. Hansen.

Ms. Kerwood.

MS. KERWOOD: Good afternoon esteemed members of the U.S. Sentencing Commission and members of the audience. Thank you for inviting me to represent the District of Hawaii, the Probation Office in Hawaii. I feel very honored to be here and to share their thoughts with you.

The District of Hawaii is an island community rich in diverse cultures, beliefs, and socioeconomic backgrounds. Because of this diversity and the relatively close proximity in which we reside, the underlying values of living in harmony; tolerance for individual differences; treating each other with compassion and dignity; and role modeling or teaching the skill sets which support these values to those who have gone astray permeates how we conduct business in the probation office.

Additionally, when the conduct has the imminent potential of resulting in harm

either to our community, to a specific person, or to the offender himself and all the efforts towards rehabilitation have failed, the Probation Office pursues action for timely and appropriate consequences.

It is with this backdrop that I share our experience of how the U.S. sentencing guidelines and the Supreme Court on *U.S. versus Booker* have affected federal sentencing guidelines in the District of Hawaii.

It is also from this island prospectively that I respectfully share our thoughts on how devoting resources to crime prevention, rehabilitation, and incorporating collaborative efforts of the offender, the probation officer, and various stakeholders in the community to which the offender will ultimately return is an essential component of reducing recidivism, thereby safeguarding public safety.

As you know, the U.S. Sentencing

Commission was established as an independent agency in the judicial branch of government with the express purpose of establishing sentencing policies and practices for the federal criminal justice system.

The sentencing guidelines were specifically designed to incorporate the purposes of sentencing enumerated 18 U.S.C. 3553(a) and to reflect, to the extent practical, advancement in the knowledge of human behavior as it relates to the criminal justice process.

In the District of Hawaii the advancement in the knowledge of human behavior relating to the criminal justice system is guided by the meta analysis of research on criminal behavior and evidence-based practices that focus on the outcomes of various treatment and intervention modalities in reducing recidivism.

It is notable that even before the passage of the Second Chance Act, due to

primarily to our underlying community values, the District of Hawaii embarked on creating a collaborative alliance with the offender and other support systems to ensure a more meaningful transition into the community for the offender.

As succinctly stated by Assistant Deputy Chief Probation Officer Burton Maroney from the Southern District of Iowa, "In the end, our goal is to have offenders see themselves as being a part of the community and not see themselves as being apart from the community."

In this testimonial statement, I bring a message from the District of Hawaii that the Supreme Court decision in *Booker* acknowledges the unique circumstances of each offender's background and the contributing factors culminating in criminal conduct and maintains the integrity of the Sentencing guideline system, albeit, advisory in nature.

Additionally, revisions to the

advisory sentencing guidelines which incorporates principles of the current research on criminal behavior are a necessary component of addressing the purposes of sentencing, specifically, just punishment, deterrence, incapacitation, and rehabilitation.

In 2005, pre-*Booker* fiscal year, 69.9 percent of offenders received sentences within the then mandatory sentencing guideline system; 26.1 percent received a downward departure based on substantial assistance; 2.2 percent received an upward departure; and 2.2 received a downward departure.

In the 2008 post-*Booker* fiscal year, 42.8 percent of offenders received sentences within the advisory guideline range; 30.9 percent received a departure based on substantial assistance; and approximately 29 percent received a variant sentence below the advisory guideline range based on 18 3553 factors or a combination of a guideline-

supported departure and 18 3553 factors.

In comparison, the pre-*Booker* 2005 and post-*Booker* 2008 statistics shows an appreciable progression and movement toward individualized sentences.

Following *Booker*, the District of Hawaii made a philosophical shift and implemented evidence-based practices, EBP, in the presentence process as well as in the supervision practices of offenders.

Briefly, EBP entails the objective, balanced, and responsible use of current research and the best available data to help guide practice decisions such that outcomes are improved.

The District of Hawaii is very fortunate and is one of the grant recipients from the Office of Probation and Pretrial Services of the Administrative Office of the United States Courts to implement EBP. As such, in preparing presentence reports, probation officers conduct presentence

investigations in the spirit of motivational Interviewing, MI.

This style of interviewing enables the defendant to share information in a collaborative, nonauthoritative atmosphere which then triggers "change talk," for the identification of areas in the defendant's lifestyle or desired change.

The incorporation of MI in the presentence interview has also resulted in better identification of criminogenic needs and 18 U.S.C. 3553 factors to assist the court in fashioning an individualized assessment and sentence.

Also in the supervision of offenders, we also utilize assessment tools to identify risk factors and we introduce needs to help create a collaborative alliance to promote the offender's success.

In addition, we are using various modalities. We are using cognitive behavioral techniques, interactive journaling, offender

workforce development, and reenter programs to facilitate the offender's success.

And it's also noteworthy to mention that the passage of the Second Chance Act of 2007 affirms the need for the collaborative efforts of all components of the correctional system to work towards the common goal of reducing recidivism.

In his concurring opinion, Eighth Circuit Court of Appeals Judge Myron H. Bright noted that it is clear that the spirit of the Second Chance Act of 2007 intends for the entire correctional system to work towards the rehabilitation of prisoners for the purpose of reducing recidivism.

In this regard, the U.S. Sentencing Commission can play a significant role in a comprehensive reentry model and make a substantial impact on the rehabilitation of offenders in reducing recidivism.

When I asked my supervisors what information regarding the guidelines can I

share with you, they indicated -- for the most part they said the guidelines take into account most of the relevant facts and the circumstances of a crime.

However, with respect to 2B1.1 there continues to be ambiguities which result in complex and time-consuming efforts to seek clarification, both through consultation with the Sentencing Commission, case law research, and prolonged fact-findings at sentencing.

Additionally, in particular, in Application Note 3, loss is defined as the greater of "actual" or "intended" loss. In applying this definition, it would appear that there would be two different values.

However, according to representatives from the U.S. Sentencing Commission during a recent training in Hawaii, "intended" loss would always be the greater value since it includes "actual" loss.

This position is neither supported by the definition of "loss" in application

notes nor by the various circuit opinions. To remedy this situation, if it is truly the U.S. Sentencing Commission's position that intended loss will always be the greater of losses, it should amend the application note to make the intention clearer.

Additionally, during a recent sentencing involving the determination of the base offense level under sentencing guideline 2B1.1, the sentencing judge found that 2B1.1 is sufficiently ambiguous in syntax to mitigate against applying the higher alternative base offense level. I believe that Judge Mollway referred to that in her testimony, as well.

It is our district's belief that the Sentencing Commission is an independent entity that should stand behind its opinions when providing a position pertaining to the interpretation of a particular guideline or application note.

In this regard the nonbinding

waiver that automatically accompanies an opinion rendered through the U.S. Sentencing Commission Hotline Staff undermines the validity of the Sentencing Commission's interpretation.

In conclusion, we applaud your efforts in meeting the statutory obligation and keeping the guidelines evolutionary. We respectfully encourage, however, that the Commission consider the evolving research-driven policies and practices of our correctional system when contemplating amendments to the sentencing guidelines.

If future policy and guideline amendments keep in step with the criminal justice and social research concerning recidivism, the reentry of offenders, public safety, and the need for the Sentencing Reform Act to reduce recidivism, to reduce excessive and unnecessary lengthy periods of incarceration can be assured a progressive collaborative model to address the statutory

purpose of sentencing.

I believe, as Judge Sessions said earlier at the beginning of this session, that we all are part of a sentencing structure of the country. And we need to continue to work together, to use our resources wisely, to look at what evidence-based practice is showing, and to somehow always keep the sentencing guidelines relevant to what's going on with the country.

Thank you very much.

ACTING CHAIR HINOJOSA: Thank you, Ms. Kerwood.

And we'll open it up for questions.

Judge Sessions.

VICE CHAIR SESSIONS: Thanks. And since you just mentioned my name, I'm going to ask you a question, --

MS. GRISHAM: Sure.

VICE CHAIR SESSIONS: -- actually the broader question.

In Idaho, Ms. Grisham, talked about

your reentry program, and, you, as well, talked about the collaborative process in which you now are approaching defendants in a different way.

When you couch it in terms of reentry, my question is: Have you thought about options -- when you start speaking of alternatives to imprisonment, have you thought about the options or the lessons that you've learned in reentry programs? And can you suggest ways in which that can be incorporated in the presentence process, which is essentially related to alternatives to imprisonment?

My question is: Have you thought about the possibility of looking into these kinds of treatment options on a presentence -- in the presentence arena? And, if so, do you have suggestions to the Commission as to how we could encourage that kind of alternative?

DR. HANSEN: It is a very difficult question. Hawaii and Nevada are two of the 18

grant-funded districts. I can tell you -- just big picture -- probation has been a failure nationwide, because we don't do anything with offenders. That's been primarily the way we've operated. I mean we have also operated under the assumption that "I direct you, stop smoking." And you will walk out and put away your cigarettes and stop smoking.

We realize that that has not worked. And we have changed the way we've done business and changing the culture, and looking to the evidence to what works.

In Nevada we've implemented a program for drug treatment for methamphetamine addicts. We looked at the research to see what program actually works. We went there; we studied it. We hired a counselor that did that. We partnered with the Bureau of Prisons to run this program in a halfway house.

The red tape, the bureaucratic stuff we had to put up with to try and get

this to fruition was very difficult. But we did, and we have a real high success rate.

We do that. We do motivational interviewing with people to find their intrinsic motivation. But a lot of this stuff is untested as of yet. We've hired researchers to look at what we are doing now.

We actually do a risk needs assessment of individuals before -- once they get out. We do a risk needs assessment of them at the presentence stage to see, all right, what are their risks. Are they going to be a high risk of violence and a high risk of recidivism. But that never makes a presentence report, because the --

VICE CHAIR SESSIONS: Why not?

DR. HANSEN: The objections of the Public Defender to say we're basing a sentence on an instrument is very hard to overcome. We are -- because these instruments haven't been tested on federal populations. So what we are doing now is researching instruments. We have

researchers that are looking at these to validate them with our populations.

We don't do psychosexual evaluations before you get a case of a sex offender. Where you could say this is a low-risk offender, and I could tell -- we -- our Public Defenders won't let us do that. They won't let us provide you with the risk and needs. So it has to be a comprehensive education.

So I'm not sure if I'm answering your questions, but a lot of these are difficult and a lot of the stuff that we're doing now is untested on the federal population, but we are conducting a lot of research to see if we are making a difference to reduce recidivism.

But I agree with you, it should be on the front, the judges should be informed of this. We're trying to work with the suspicion of the Public Defenders to try and work this out so we can give the judge a complete

picture.

They won't let us talk to them about a lot of issues. They're just saying motivational interviewing, trying to give the judge a complete picture. The position of the Public Defender's Office is: My only goal at that point is getting the lowest sentence possible. So I really don't care what happens after, before, but my role is the lower sentence. So if you're going to try and tailor stuff to when they get out, and they're going to talk about that, I don't want you talking to them about that.

So those are some of the hurdles we are overcoming to try and put this stuff in the presentence report to give you a comprehensive picture in order to fashion a sentence.

MS. GRISHAM: At the pretrial stage, as well, the pretrial conditions are based upon the least restrictive conditions that will assure community safety and the

person's reappearance. And so those wouldn't necessarily jibe with that, if you will. That goes kind of way beyond what would minimally be necessary to achieve those two goals. And we would run into severe resistance with the Public Defenders, because they don't know.

VICE CHAIR SESSIONS: What about low-level drug defendants who come in? Let's say, you know, they have a courier role or they're low-level nonviolent drug defendants who obviously have an addiction. Oftentimes that's the case. Are you involved in getting them into treatment and does that become a part later on of the presentence process?

MS. GRISHAM: Typically, in our district, it would start with just testing. If they're out there and have a drug problem, obviously they're going to be tested. Now bear in mind that the Public Defender will not let them speak to a pretrial officer during that stage about drug use.

So we kind of have to look at what

they were arrested for, collateral contacts, what they're saying, perhaps they have other drug-related arrests, and make a determination that, yes, they've got a drug problem, so we will test them.

If they are failing at the testing, if they're testing positive, then we will offer them treatment. We are a combined district here, and so we are able to take advantage of the alternatives to federal detention money yearly. So that really helps us budgetarily.

I would say a majority of our defendants are not your low-level persons and they're detained. So it's really a small population that we're dealing with that is out. But, yes, we will test them and then we will treat them. And, you know, depending on success or failure, they may or may not make it in the pretrial stage on a release situation for the entire time.

DR. HANSEN: If I could just speak?

One case of that I remember vividly. It was a minimum mandatory, ten years to life, crack cocaine case. A drug-addicted lady was doing crack. She had four or five children. She faced a minimum mandatory of ten years. She was put into residential treatment at the pretrial stage. She did phenomenally well. The first time in her life, the first time in her adult life she was clean and sober. That followed her to the presentence stage.

The judge departed down to probation -- she had HIV -- and gave her probation. She was one of my most successful cases that I dealt with, probably for [the] last three years of her life before she passed away.

That is one case where, yeah, it started in the pretrial stage of getting drug treatment. The court recognized this. And everything about her was related to addiction. All her arrests -- I mean, it is quite clear. But there's never been any resources to treat

like that.

And until we developed our program -- the inpatient programs are 28 days. There's nothing that 28 days is going to cure. And we were spending about $150 a day on a 28-day program. Luckily, this offender got into a long-term program, which is what she needed anyway, and it worked. And so there is one case I can say that it got through the presentence, the pretrial, and it came to sentencing.

MS. GRISHAM: And I think that second half of your question was, certainly, it is reported it in the presentence under adjustment to pretrial supervision. So either way it's reported there.

ACTING CHAIR HINOJOSA: Dr. Hansen, I guess in this case, in your success case she had qualified for Safety Valve, because you said she was facing the high mandatory minimum of ten years to life. So she must have qualified for Safety Valve.

DR. HANSEN: You know, I'm not sure how the court did it, Judge. I don't think she was a Safety Valve case, though. But I'm not sure how court departed down, whether it's for health reasons, or how we managed to --

ACTING CHAIR HINOJOSA: But if it's a mandatory minimum, I don't know that they could have used the health reasons.

DR. HANSEN: I'm not -- somehow the court passionately -- the U.S. Attorney didn't object. So I figured it was a --

ACTING CHAIR HINOJOSA: And you had the other case that you mentioned earlier, the illegal alien, I believe, who had faced a mandatory minimum, but was a courier. I guess that person did not qualify for the Safety Valve?

DR. HANSEN: If it was a first-time offender? I believe that person did. But the sentence was still extremely high, under Safety Valve, that they received.

ACTING CHAIR HINOJOSA: Okay. The

other point is you all have talked about Evidence-Based Practices. And most of this has occurred after somebody is released, or they're on supervised release, or the cases that have probation is to avoiding recidivism, and that that is the purpose of Evidence-Based Practices. That is one of the subfactors of a 3553(3)(a) factor. But even under (a)(2) where the issue of recidivism is mentioned, which is to protect the public from further crimes of the defendant, even under that factor that has four subfactors, the others include more adequate deterrents to criminal conduct, to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, as well as providing the defendant with needed educational/vocational training, medical care, other correctional treatment in the most effective manner. And then we have all the other factors, including the sentences available. And I'm not going to despair you.

Ms. Grisham made the point, which I think a lot of people make, which is most of the federal felony cases are very serious offenses. And so the question is: How do we put all this together? Evidence-based practices is talking about deterrence. Now it's talking about recidivism studies.

But we have all these other factors that we're supposed to be concerned about, as well as realizing that these are mostly serious offenses, at least in the eyes of many. Do we concentrate on just one factor as opposed to the others? Does this recidivism take precedence over these others, or how do we use the Evidence-Based Practices with regards to some of these other factors, including deterrence and conduct, which is viewed as serious by many at the federal felony level?

MS. KERWOOD: I think I'd like to respond to that, because I think in the past we've always treated the offenders the same,

because they fall in a certain guideline. They have a range of zero to six, or whatever.

And when we are looking at Evidence-Based Practices, when we say look at the offender's needs, look at the risk level. I think that's what we're trying to do more and do better of. If we can identify the offenders' risk level, then we can say perhaps then they need to have a higher sentence. They have --

ACTING CHAIR HINOJOSA: That's a deterrence. That's a recidivism factor. What about the other factors that we're supposed consider? How can we use Evidence-Based Practices for those? I mean, we're actually asking the question as to can we do studies that help us with regards to our system, or these other factors?

MS. KERWOOD: I agree with how --

ACTING CHAIR HINOJOSA: And the work that you all have done, which I think is commendable, what probation officers have done

with regards to the work that is being emphasized with regards to what we're supposed to do. I have always told probation officers: Your job is not to put somebody back in prison. Your job is to try to see if there's some way that we can keep people out of prison the ones you're dealing with. It's a very difficult job.

Evidence-based practices is an attempt at that. But then when you put it all together, how can use that for some of these other factors, or can we get Evidence-Based Practices to give us that information?

DR. HANSEN: Judge, those are very difficult questions. And we don't have the answers for you on those, because they are difficult questions. What we're finding is people don't need to be incarcerated for as long as they're being incarcerated for. A little bit of incarceration goes a long way.

Canada, we're up in arms because they only incarcerate one in 500 of their

citizens, and we're at one in a hundred.

It's a very difficult proposition for us to say we are going to reduce the penalties or to do less time, based upon the research that says: If we do this you, we can make you a success, but we still have to punish you.

That's kind of the dilemma of -- you know, we have research shop. It's Washington State Public Policy Institute. They had to make a determination if they were going to build two new prisons in the next 20 years. They looked at everything and said: All right, if we do this it reduces recidivism. We can save money. We could do this, and it reduces recidivism and saves us money. And they looked at every program. And the example you made was the boot camp. Research says basically it doesn't work. And we're throwing a lot of money at this program, and it doesn't work.

So I'm not sure how we can tie all

the research in. But what it's saying is we don't need the -- as long [] sentences as we have. We have shorter sentences, but be able to provide the offender adequate treatment when they get out.

And we are 93 separate Probation Offices, with 93 separate services and 93 ways of doing business. And part of the thing with the Administrative Office who has grant-funded us to do these programs and then see what works and propagate through the rest of the country. I can tell you that we started this.

The states have -- some states have been far more advanced in the federal system. And we used to be leaders of this type of work, where we could develop programs that work. We have failed miserably.

Now we are turning to the states to look at what works, and we are trying to replicate some of those with our offenders.

So it is a difficult question you have posed to us, and I'm not sure we've

provided you any guidance along that way. I do know that when we started our Evidence-Based Practices, we were given money and said, "Here's money, go do stuff."

It was almost like going to an Asian restaurant and ordering one out of column B and one out of column C. And we put all these programs. We didn't do as Hawaii did to develop the foundation, the risk needs, to determine what the risks are, what the needs are.

The researchers were telling us that you have some low-risk offenders, that if you mess with too much, you mess them up. If you're from the South, it's kind of like making biscuits. If you mess with the dough too much, you screw up the whole biscuit. And that's what we found with low-risk offenders.

So what we're doing is we're not supervising them as intensely. We did supervise everybody the same. So you're 80-year-old-bank embezzler, he got the same as a,

you know, a 25-year-old carjacker.

Now we're realizing the errors of our way and starting, but it's going to be a slow process. It's not going to occur overnight. And we are looking at -- we're hiring researchers for the first time. We can talk to you about research. This was never in our field to talk about research, at least on a federal level.

I don't know in my career if I've ever read any research, because we were guided by gut. Now we're turning to research and saying what works. So if we can incorporate that at the presentence stage and start developing that, so the judges have a more comprehensive picture of what the risk is this offender poses, and develop a just sentence that would reduce that risk, public protection, and also try and negate them from recidivatity once they're released. I mean I think that would go a long way.

VICE CHAIR CARR: Dr. Hansen, if I

understood you the risk analysis that you do when someone's going to be released from prison, you also do at the time that the presentence report is prepared, but it never makes it into it because defense counsel would object. Did I understand that correctly?

DR. HANSEN: Yes, sir.

VICE CHAIR CARR: And they object because they're concerned that the results of that risk analysis might end [up] aggravating the sentence?

DR. HANSEN: Yes, sir.

VICE CHAIR CARR: But isn't it also true that the results of that risk analysis, in many cases, might end up reducing the sentence?

DR. HANSEN: You would think.

VICE CHAIR CARR: And, Ms. Grisham, you mentioned the problem with the two points for acceptance of responsibility. I take it that means that the prosecutors are often coming in and arguing against it?

MS. GRISHAM: Well, it used to be that way. And, you know, the joke was, "Okay, do they have to cry in the office? What is remorse? What is contrition?"

And I think that they've backed off of that. But we still get the offenders now that will plead guilty, but they're going to frivolously contest, rather than conduct, or, you know, the other verbiage in that guideline.

So we still are saying, "Well, yes, even though they pled guilty for these reasons, they don't deserve a two-point reduction in acceptance of responsibility, but it would never fly.

VICE CHAIR CARR: Okay. But is the issue that the prosecution is coming in and arguing against it, or the probation officer is saying this defendant doesn't deserve it?

MS. GRISHAM: It's more the issue of the probation officer saying they don't deserve it, yeah.

VICE CHAIR CARR: And the other item in terms of -- I think you said the white-collar cases, where the government doesn't come out with the supporting facts. Is that a case where it appears that the government is giving the defendant a break and is withholding facts that might enhance the sentence, if the probation officer had the full picture?

MS. GRISHAM: Yes.

VICE CHAIR CARR: Okay.

COMMISSIONER HOWELL: I have a question, although we're just before lunch, and this is like the difficult question.

(Laughter.)

COMMISSIONER HOWELL: I actually was looking forward to this panel to explore with you or have you illuminate for me exactly how judges know, when they're sitting with you, going over a presentence report, are actually determining whether or not to give a variance and how much that variance is?

And, Dr. Hansen, I was interested that -- I mean you focus in your written statement and your oral statement about how, you know, it's a very important, you know, critical role the Probation Office is playing in going through those 3553(a) factors, and helping to analyze those for the court.

Do you all also, in addition to reviewing the 3553(a) factors, also give recommendations to the court on how much of a variance might be appropriate in a particular case?

DR. HANSEN: Yes, we do, but --

COMMISSIONER HOWELL: And how do you come up with that variance number? I'm really interested in the process that you all go through. And is that empirically based, and how are you figuring out what to recommend to a judge on how much to vary?

DR. HANSEN: I wish I could say it was evidence-based. I mean we are looking at the characteristics of the offender and

looking at their risk level, looking at our risk needs tool. But as far as the exact sentencing range, that is an individual officer with their supervisor in coming up with that.

And you made a comment about us sitting with the judges. That doesn't happen. We don't really sit with the judges. There are some --

COMMISSIONER HOWELL: I think there are different practices.

DR. HANSEN: There are some senior judges that -- or the old-fashioned judges that we do sit with and go through with that and kind of lay out a lot --

COMMISSIONER HOWELL: I'm dating myself from when I was a clerk.

DR. HANSEN: But that's why we really need to have more information in the presentence report, so that that way we can, but we do make those recommendations.

COMMISSIONER HOWELL: Well, I mean,

I think we're going to hear later on from one of the -- an AUSA from the District of Nevada, who says, you know, the District of -- District of Idaho -- excuse me -- the District of Idaho believes that judges are using the bottom of the guideline range as a new maximum.

I mean, are you finding that? And then you're saying that this is the guideline range, you know, here's the bottom of the guideline range; that's the new maximum, and here are all the 3553(a) factors, and we recommend that you vary off from that low guideline range by a certain amount?

DR. HANSEN: We are not seeing that, the low guideline --

COMMISSIONER HOWELL: You're not seeing that.

DR. HANSEN: -- range as a ceiling.

COMMISSIONER HOWELL: So when you look at sort of the age of a defendant, and you look at [various] factors, do you have a

meaning within the probation officers about -- to have some consistency there, and how much of a variance you're recommending, or is it just up to an individual Probation Office how much of a variance they're going to recommend to a particular judge?

MS. KERWOOD: In our office the officer has a lot of latitude. And they'd staff that case with a supervisor. And we have two supervisors for the Presentence Unit. And they would try to have some consistency there.

So what they generally do is that they, in their group meetings, is that they share their thoughts on what types of variances have come about. In our confidential recommendation to the court, we do identify some issues for variances of 3553(a) factors, but we do not state specifically one or two or three levels. Then our officers may independently say that to the judges, but in our reports we don't say

exactly what -- how many levels.

MS. GRISHAM: Because that would be objected to vehemently and vigorously. And so we couch it as, you know, these are something you may want to consider as a variance. But we make, in a presentence report, absolutely no recommendation. But then in the recommendation we would.

And one judge, those are confidential, then the other they are not. But we operate the same way. And we only have one supervisor that reviews them all. So there is some consistency. But, like Chris said, it's not based on any empirical evidence. So we're still using -- still using the gut.

DR. HANSEN: We usually find if the Public Defender is upset with us and the U.S. attorneys are upset with us, we did something right.

MS. GRISHAM: Yes, that's a good thing.

COMMISSIONER HOWELL: Well, you know, we've heard from Judge Breyer that he suspected there were some shadow guidelines being --

MS. GRISHAM: Absolutely.

COMMISSIONER HOWELL: And I sort of think that -- he has cited some reasons for shadow guidelines, but I also think in this whole new arena of the variances and the recommendations that probation officers are coming up on the degree of variances and whatever factors probation officers are using about the factors for variances, and then the degree of the departure associated with each of those factors.

The probation officers may also be coming up with their own sort of shadow guidelines or shadow variances. Do you think that that is something that's developing, not just in your districts, but across the board?

MS. GRISHAM: I don't. I don't see it. I don't think so.

DR. HANSEN: I'd say not.

VICE CHAIR SESSIONS: But you do see a shadow guideline system between the defense lawyer and the government?

MS. GRISHAM: Absolutely. I had one prosecutor, one time I called him up, and I said, "This is the plea agreement." And it was a separate -- "And we took the guidelines you used. And why did you use that? Why didn't -- why didn't you go here?"

And he goes, "Well, I know that's right. I was -- but, you know, this is our plea agreement. And we weren't going to say anything unless you caught us."

So, yeah, all the time that's happening.

VICE CHAIR SESSIONS: Do you think the substantial assistance departures are used in some way to circumvent the guidelines as well?

MS. GRISHAM: Absolutely.

VICE CHAIR SESSIONS: The severity

of the guidelines?

MS. GRISHAM: Absolutely. And in Idaho, and I speak about it in my paper, I mean we're a small district, but for some reason we have a lot of multidefendant drug cases. And it's not uncommon for every one of those defendants who enters a plea to get a 5K. The amount of the 5K at sentencing that the government is recommending will be different, but every one of them.

COMMISSIONER FRIEDRICH: Similarly, are you all seeing more use of mandatory minimums in the offenses that contain the criminal penalties or 924(c)s that could be more enhancements, or are you observing the prosecutors are doing that more, particularly in like Hawaii where your departure and variance rate is considerably above other districts within the Ninth Circuit? I'm just curious. Anecdotal we're hearing that is occurring. I was just wondering whether you're observing that in your respective

districts?

MS. KERWOOD: I think that then they are still using the mandatory minimums. Are you talking about in terms of the U.S. Attorneys that --

COMMISSIONER FRIEDRICH: That are charging, charging --

MS. KERWOOD: -- that are charging.

COMMISSIONER FRIEDRICH: -- offenses that contain mandatory minimums.

DR. HANSEN: To try and steer the guidelines -- the ranges will stay out there, --

COMMISSIONER FRIEDRICH: Right. Correct.

DR. HANSEN: -- but the court won't go far down --

COMMISSIONER FRIEDRICH: Correct. And 924(c) and 851 enhancements. Are you not seeing more of those, because we're under the impression that that's happening more often to ensure that departures and variances aren't --

you know, they're not probationary sentences.

MS. GRISHAM: We're not -- we haven't noticed any difference in the 851s being filed. That's a big bargaining tool. And they use it, you know, post-indictment. We are seeing the 924(c)s.

But, in truth, we've always seen them in the District of Idaho, so I don't think that's changed for us.

DR. HANSEN: Now I'm not sure if we're seeing any more or not. I couldn't guess on that.

MS. GRISHAM: But we have -- we have. And we still are seeing them when they do the 5K in conjunction with the 5Ks with 3553(b). So that opens the door to go through that.

ACTING CHAIR HINOJOSA: Ms. Grisham, you pointed out the meth cases in your district and the penalties in the meth cases. And, as you're aware, pure meth has the same threshold levels for the mandatory

minimums as crack does. And did you all have any opinions with regards to meth and if there was a change in crack, as to how you view those particular sentences?

MS. GRISHAM: I do think that they are getting -- you know, that methamphetamine defendants are getting way too much of a sentence. So I'd love to see them come down. And over the years, I mean, as you know, it's crept up, not gone down.

And, you know, you can't sentence a drug defendant to life anymore. They're capped. But prior to that we've had life sentences in the District of Idaho for drug defendants. So, you know, they're doing 10 years, 20 years for not a lot of methamphetamine.

DR. HANSEN: We see a lot of the meth being brought in from Mexico now because we've done a good job of stopping production in --

MS. GRISHAM: Right.

DR. HANSEN: -- the United States. So the real dealers that we're seeing now, unless they're catching them coming across the border right then, are addicts that are dealing methamphetamine. So it's such a destructive drug, they'd do anything to sell their product.

ACTING CHAIR HINOJOSA: Does anybody else have any other questions?

If not, we want to thank you very much. We realize the roles that you all play every day in the sentencing process and we thank you for taking time from your districts to come and share your thoughts with us. Thank you.

And we will break for lunch now. And we'll be back at 2:30.

Thank you all very much.

(Luncheon recess taken from 12:52 p.m. to 2:53 p.m.)

A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

(2:53 p.m.)

ACTING CHAIR HINOJOSA: Our next panel is a "View from the Executive Branch." We have two individuals on the panel.

Ms. Karin J. Immergut has served as

U.S. attorney for the District of Oregon since October of 2003. She also currently serves on the Attorney General's Advisory Committee. Prior to her appointment as U.S. attorney, she served as an assistant U.S. attorney in the District of Oregon for two years and as an assistant U.S. attorney for the Central District of California for six years. And she also served as the deputy chief of the narcotics section and chief of the training section there. And she is a graduate of Amherst College and received her law degree from Boalt Law School at U.C. Berkeley.

Mr. Lawrence G. Brown has served as a first assistant U.S. attorney for the Eastern District of California since March of 2003. And recently he's been named as the acting U.S. attorney for that district. He has been executive director of the California District Attorneys' Association from 1996 to March of 2003. And actually in 2001 he served as president of the National Association of

Prosecutor Coordinators and board member of the National District Attorneys' Association. And he is a graduate of U.C. Davis Law School where he served as a visiting professor.

Which one of you is going to start first?

MS. IMMERGUT: I will.

VICE CHAIR SESSIONS: Can I just add a couple of things to Ms. Immergut's introduction? She's soon to become a state judge.

MS. IMMERGUT: So I feel completely differently today than I did yesterday, not that I mind.

(Laughter.)

VICE CHAIR SESSIONS: She also practiced in Vermont. She went to Amherst. I went to Middlebury, but...

MS. IMMERGUT: Thank you.

Well, thank you for the opportunity to speak with you about the federal sentencing policy today and the state of the federal

sentencing guidelines. We at the Department of Justice are pleased that the Commission has undertaken a comprehensive review of federal sentencing. We believe that the review is timely and very important.

Your leadership during this period of change in federal sentencing policy is welcome. The Commission has a unique role to play in reviewing federal sentencing policy with unmatched and valuable data and analytic capacity.

As the Attorney General indicated in a letter to the Commission last month, the Department has recently begun a comprehensive review of sentencing and corrections policy, and we very much hope to tap into the Commission's experience and capabilities during that process. I'll say a little bit more about the Department's review in a moment, but for now let me just say that we do look forward to working with you over the coming months on this extremely important

project.

It's no secret that the federal sentencing system, which includes both sentencing guidelines and mandatory minimum sentences, has been the subject of significant criticism over many years and it has also undergone significant change.

The Supreme Court's decision in the *United States versus Booker* from 2005, when it rendered the guidelines advisory has dramatically changed the way business is done in the federal courts. Clearly, the sentencing courts are no longer bound to follow the guidelines, but merely must consult those guidelines and take them into account during sentencing.

As you well know, sentencing demonstrates that *Booker* and subsequent cases have had an effect. The percentage of defendants sentenced within the guidelines has dropped from 72 percent to 60 percent and to 45 percent in the Ninth Circuit. The rate of

within guideline sentences differs markedly in different districts and circuits around the country.

The total impact of the new jurisprudence and these differing policies is still not entirely clear, but the signs point to increasing sentencing disparity, including disparity based on differing judicial philosophies among judges working in the same courthouse.

At the same time, the number of inmates in federal prisons, state prisons, or local jails has quadrupled since 1980, reaching over 2.2 million today. The burgeoning federal prison population strains our existing resources and limits the number of qualified prisoners who could receive the drug treatment and other services they need while in prison. Ninety-seven percent of all prisoners are eventually released, sending about 45,000 individuals back into the U.S. communities each year.

Statistically, a significant number of those will then reoffend or be charged with probation violations and end up back in custody. All of this, jurisprudential changes, differences in prosecutorial practices, differences in judicial philosophies, a very large federal prison population, and more lead us to the conclusion that a thorough and comprehensive review of federal sentencing and corrections policies with an eye towards possible reform is warranted.

The Department of Justice shares the Commission's commitment to a sentencing and corrections system that protects the public, is fair to victims and defendants, and eliminates unwarranted sentencing disparities and reduces recidivism.

We firmly believe that our criminal and sentencing laws must be tough, predictable, and fair and not result in unwarranted disparities. Criminal sentencing

laws must provide practical and effective tools for federal, state, and local law enforcement, prosecutors, and judges to hold criminals accountable and to deter crime.

The certainty of our structure is also critical to disrupting and dismantling the threat posed by drug-trafficking organizations and gangs that plague our nation's streets as well as dangerous illegal drugs and violence. It's also vital in the fight against violent crime, child exploitation, sex trafficking, and it's essential to effectively punishing financial fraud.

Ensuring fairness in the criminal justice system is also critically important. Public trust and confidence are essential elements of an effective criminal justice system. Our laws and their enforcement must not only be fair, but also must be perceived as fair.

The perception of unfairness

undermines governmental authority in the criminal justice process. It leads victims and witnesses of crimes to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public in to questioning the motives of government officials.

The Department of Justice is committed to reviewing criminal justice issues to ensure that our law enforcement officers and prosecutors have the tools that they need to combat crime and ensure public safety, while simultaneously working to root out any unwarranted and unintended disparities in the criminal justice process that may exist.

As the first step last month the Department announced its intention to seek the elimination of the crack and powder cocaine sentencing disparity. The Department's commitment to addressing this policy stems from a position that the U.S. Sentencing

Commission first took 15 years ago when it reported on the differences in sentencing between crack and powder cocaine.

Since that time a consensus has developed that the federal cocaine sentencing laws should be reassessed. Indeed, over the past 15 years our understanding of crack and powder cocaine has indeed evolved. It's not hyperbole to say that the Commission has played a tremendous role in contributing to our understanding of this issue.

That refined understanding, coupled with the need to ensure fundamental fairness in our sentencing laws, policy, and practice necessitates a change. We will be working with members of Congress over the coming months to address the sentencing disparity between crack and powder cocaine.

Our review of sentencing and corrections policy cannot end with addressing the penalties for crack cocaine, however. Last month the Attorney General asked the

Deputy Attorney General, David Ogden, to form and share a working group to examine federal sentencing and corrections policy.

Currently I chair the Attorney General's Advisory Committee, and as chair of that committee I also serve on the Sentencing Policy Working Group. The group's comprehensive review will include possible recommendations to the President and Congress for new sentencing legislation affecting the structure of federal sentencing.

In addition to examining federal cocaine sentencing, this review will examine the structure of federal sentencing, including the role of the guidelines and mandatory minimums; racial and ethnic sentencing disparities; alternatives to incarceration; and reducing recidivism through effective reentry programming; as well as the Department's charging and sentencing policies.

The Sentencing and Corrections Working Group review will include not only

discussions with the Department of Justice; we will reach out beyond the Department to the federal judiciary, law enforcement agencies, the defense bar, victims' groups, civil rights and community organizations, academics, and others as part of our work. We hope to work closely with you and benefit from your own experience and your extensive collection of data on federal sentencing.

Now I'd like to turn my attention to the regional impact of the Supreme Court's decision in *Booker*, which has led to some significant changes in my district, the District of Oregon, on both the trial levels as well as in appellate practice and, as a result, on our charging and plea practices within the district.

My comments are based on my experience and the experience of my office alone, and they don't necessarily represent the views of the Department of Justice as a whole.

Within the District of Oregon, as I'm sure is the case in many districts around the country, sentencing tendencies have always been somewhat unique to the judge, but the differences since *Booker* have become more pronounced. Some of our judges continue to follow the advisory guidelines in the majority of cases. Other judges routinely decline to impose a guidelines' sentence and instead impose sentences with variances from moderate to significant.

With one unusual exception involving a seaman's manslaughter conviction, sentencing variances in Oregon result in lower, not higher, prison terms. These variances are generally made without prior notice to the government.

Since the Supreme Court's decision in *Irizarry*, prior notice is no longer required for variances, as distinct from guideline departures. Nevertheless, we've asked that our district judges provide us with

notice so that we're more prepared to provide meaningful input at sentencing.

In surveying my office, the overall number of guideline variances does appear to have increased. Moreover, the extent of those variances appears to have risen. When a judge deviates from the guidelines today, he or she does so in a fashion that's more dramatic than what we previously observed when the judges looked to Chapter 5 of the guidelines for departure guidance.

For example, in *United States versus Autery*, the defendant was discovered during an internet sting operation attempting to purchase custom-made child pornography videos from two different independent investigators. Autery also had a computer with hundreds of images of child pornography. He pled guilty to unlawful possession of child pornography and his advisory guideline range was 41 to 51 months.

At the sentencing hearing there

were no objections to the guidelines' calculations and the only dispute between the parties was where within the range Autery should be sentenced. The district judge sentenced Autery to probation, relying exclusively upon the statutory factors set out in 3553(a) and relied heavily on the absence of evidence that Autery had ever actually touched any children or molested any children as well as his lack of criminal record. There were no other unique and mitigating circumstances in that case.

The court rejected our argument that proof of child molestation would have resulted in a different charge and different guidelines' calculations. We appealed Autery's sentence and the Ninth Circuit affirmed, citing the highly deferential standard of review envisioned by the Supreme Court in *Gall* and *Rita*.

Under a pre-*Booker* mandatory guideline scheme, Autery's sentence would

likely have been within the 41- to 51-month range agreed upon by the parties.

In child sexual exploitation cases district judges throughout the Ninth Circuit often grant downward variances, particularly in possession cases. Some of these variances are based on claims that the particular defendant has not committed a hands-on offense against a child. For example, the statement "he was only looking at pictures" has often come up.

In another case a defense psychologist opined that the defendant was not a pedophile or was at low risk for committing a hands-on offense. Some judges have cited the defendant's lack of criminal record which, of course, would not have been a viable ground for departure under the guidelines, but may be used as a ground for a variance.

These variances have had an impact on our charging decisions. We routinely now charged counts carrying mandatory minimum

sentences, such as receiving, transporting, or distributing child pornography, in cases where the evidence supports those counts in addition to the possession counts.

We routinely allege prior convictions, where applicable, which enhance both the mandatory -- the statutory maximum and mandatory minimum penalties. Many AUSAs require the defendant to either plead guilty to a mandatory minimum count or at least agree to an 11(c)(1)(C), binding plea, guideline sentence with no variances or departures.

We've also seen many variances in cases involving crimes of violence, such as bank robbery. One such case involved a bank robber who received a substantial downward variance despite the fact that he gave the teller a demand note announcing that he had a gun and, indeed, a gun was found in his possession shortly after his arrest some 30 minutes after the robbery.

Another judge granted a 60-percent

variance in a child sex abuse case where the defendant actually did abuse three children, all of whom were under the age of 12 at the time of the abuse. Indeed, one was five, one was eight, and one was 11. The abuse occurred over a two-year period. Such a sizable variance is difficult for victims to understand. Moreover, the lack of predictability in these cases is troubling for crime victims who have genuine concerns about a defendant's future release from custody.

The scope and content of sentencing hearings has also changed. Sentencing hearings have taken on a more trial-like appearance following *Booker*. Numerous setovers are sought and granted to give defendants an opportunity to put together mitigating evidence for the judge's consideration at sentencing as relevant background information under 3553(a).

These hearings have prompted AUSAs, in turn, to be more active, play a more active

role in gathering victim impact evidence to counter defense mitigation material and to ensure that the court's focus is not limited to the nature and circumstances of a particular defendant.

Meaningful consideration must also be given to the seriousness of the defense conduct and the need to deter the defendant and others from criminal activity. Asking victims to attend sentencing hearings and the increased reliance upon victims at sentencing hearings is attributable to the changes brought about by *Booker*.

Requiring victims to relive their victimization in these hearings is, frankly, an unfortunate consequence for victims who have already been traumatized once for the crime itself.

One recent example of an extensive mitigation sentencing presentation took place in a cocaine case involving a career offender who bought and sold kilo quantities of crack.

The defendant had been on pretrial release for almost two years when he came before the court for sentencing, having sought and received numerous extensions of his trial date.

While some of that time was spent operating with the government, much of the rest of the time was spent reestablishing himself in the community. Now this defendant did, in fact, make several positive steps forward, securing employment, actively participating in his children's lives in a manner that he never before achieved prior to his arrest.

Because of his cooperation, we filed a motion for a downward departure of five levels under 5K1.1. The district court granted the departure for cooperation but granted 12 levels instead of five sought by the government. The court then turned to the statutory factors, varied entirely from the adjusted guideline range, and imposed a

sentence of probation, despite the fact that two other cooperating codefendants with similar criminal histories had received sentences of 70 to 80 months.

This case illustrates how application of the statutory sentencing factors, untethered to the guidelines or to the considerations found in Chapter 5, can lead to results that are anomalous and out of step with sentences imposed upon other similarly-situated defendants.

Drug cases and significant sentences driven by drug quantity determinations have always been a point of concern for judges in our district. The chief of my drug unit reports that variances of two levels are now the norm.

The way in which we charge and negotiate pleas has also changed since the guidelines became advisory. Overall, our reliance upon binding plea agreements under 11(c)(1)(C) has increased and charging

mandatory statutory minimum sentences, where applicable, has increased.

Much of this has been driven by the goal of providing some consistency and assurance in sentencing, particularly in cases that involve victims. For example, in child pornography cases we will use both possession and receipt charges to negotiate. A possession charge for a first offender carries no mandatory minimum term, while a receipt for a first offender does.

In gun cases involving criminals with violent histories, we charge them under the Armed Career Criminal Act and find that in many instances judges impose the 180-month mandatory minimum term, regardless of the guideline range.

In illegal reentry prosecutions of criminal aliens we now use 11(c)(1)(C) agreements routinely since many of these cases are handled on a fast-track system. Following *Booker*, some of our judges have been applying

3553 factors to vary downward from negotiated sentences for criminal aliens even in the absence of a presentence report. To ensure consistency among similarly-situated defendants and to avoid the increasing burden on the U.S. Probation Office, we now use binding pleas.

Since *Booker*, the types of cases we prosecute have generally not changed with the exception of cases involving felons in possession of firearms. For felon-in-possession-of-firearms cases, we are now far less likely to prosecute a defendant if a probationary sentence is likely.

In canvassing other districts in the Ninth Circuit, nearly all emphasize a wide variation between different judges within their districts. Most districts report similar experiences to those we've seen in Oregon, although many note that they have been relying on mandatory minimum sentencing charges well prior to *Booker*.

The Northern District of California, for example, reports increasing use of 11(c)(1)(C) binding plea agreements. Nevada reports that white-collar sentences have experienced a downward trend. And the District of Idaho believes the judges are using the bottom of the guideline range as a new maximum.

One of the starkest examples of *Booker* is from the Commonwealth of the Northern Mariana Islands. There a high-ranking Mexican drug cartel member was originally sentenced to 360 months. Following an *Ameline* remand, his sentence was reduced to 120 months, the mandatory minimum statutory term.

The Ninth Circuit held in *Carty* that district courts must continue to correctly calculate the advisory guideline range and then use that range as a starting point for determining and appropriate sentence. We've seen that our judges continue

to faithfully calculate the advisory guideline range.

Once that process is complete, however, the advisory nature of the guidelines under the Supreme Court and Ninth Circuit precedent dictate that the advisory range is not presumptively reasonable and is simply one of many factors that the court should consider.

For the most part, there is no seamless flow from guideline computation to the reasonableness analysis undertaken under 3553(a). Instead, in cases in which the judge makes a significant variance, the guidelines are properly calculated and then sidelined during the court's consideration of statutory factors.

When judges consider a sentence under the statute the proceeding often becomes one that resembles a pre-guideline sentencing where there was an upper range, sometimes a lower range, and then a vast sea of discretion

in between.

Several recent decisions from the Ninth Circuit affirming massive downward variances under 3553(a) to probationary sentences, such as *Whitehead*, *Ruff*, and *Autery*, have also had an impact. These decisions employ such a deferential standard of review that sentencing judges now know that any sentence they impose will be affirmed as substantively reasonable as long as they commit no procedural errors and properly calculate the advisory range.

In addition, we have experienced a sharp increase in the number of sentencing appeals. Prior to *Booker*, a district court's discretionary refusal to depart was unreviewable on appeal. After *Booker*, all sentences are subject to review for both procedural and substantive reasonableness. Any defendant who is dissatisfied with his sentence, regardless of whether that sentences is within, above, or below the guideline

range, now has a right of appeal. And defendants are exercising that right with increased frequency.

While *Booker* has had a significant impact on how we negotiate pleas and litigate sentencing issues, we are still successfully prosecuting a broad range of federal crimes and, for the most part, we're receiving lengthy sentences for the most egregious cases and the most violent repeat offenders.

Regardless of the sentencing structure in place, we remain committed to prosecuting cases that merit punishment and deterrence. We've used the tools available to us to provide some consistency in sentencing to be fair to defendants sentenced to similar crimes and who share similar criminal backgrounds.

We also continue to use the guidelines as a tool to help inform victims about the possible consequences of a particular plea and potential sentencing

outcomes. The guidelines continue to serve as a reference point for prosecutors, defense counsel, and judges; and the empirical base helps to inform the justice system about the national experience.

Thank you for the work that you're doing on this important issue and for the opportunity to share the experiences of my district. And I welcome any questions that you have.

ACTING CHAIR HINOJOSA: Thank you, ma'am.

Mr. Brown, sir.

MR. BROWN: Thank you. Mr. Chairman, members, thank you for the opportunity to address you today and provide some input from our district on the impact of the *Booker* decision and its progeny. Our district from the Oregon border down through Bakersfield, California, encompassing California's Central Valley, the Sierra foothills. We have a population of seven and

a half million residents. Thirty-four of California's 58 counties are in our district.

We have large urban communities in our district as well as vast rural regions. As a result, our counterparts in both prosecutor offices and in law enforcement agencies run from very large to very, very small. We have, I believe, an outstanding relationship with these agencies and become an important ally for them in targeting some of their worst offenders.

Our crime problem runs the full spectrum. We have a number of organized violent street gangs throughout the Central Valley of California. While perhaps not as notorious as those down in places like Los Angeles, they are just as ruthless. Places like Fresno, Vallejo, Stockton are overrun with ethnic gangs. The level of violence and disregard for human life associated with many of these gangs are chilling.

There's also large-scale drug

trafficking within our district. Interstate 5 runs north and south through the entire length of our district and Interstate 80 runs east and west, both major drug corridors in the Western United States.

Methamphetamine trafficking and abuse is particularly acute in our district. As a result, federal law enforcement agencies served on a number of Safe Streets and Project Safe Neighborhood task forces, as well as high-intensity drug-trafficking area task forces.

We have been an important ally on those task forces because the criminal community generally fears "going Fed." They know that the sentences in the federal criminal justice system are generally lengthy and they won't serve their time reunited with their fellow gang members in a California state prison.

I've been told firsthand of targets of gang sweeps when the targets are laughing

and joking around as they are being transported on the bus until they realize that they've passed the exit for the county jail and they're off to federal court in Fresno.

The federal justice system must be a high-impact system, taking cases that matter to the criminal community and to the community at large and to victims. The vast majority of cases, of course, are handled locally in the state court system, as it should be. The system traditionally has had that impact, but that in part is because there's been certainty in the sentences being imposed. With sentencing guidelines now advisory that certainty is very much in question.

Our district's enforcement challenges are by no means limited to just controlled substances and violent crime. Our district has served as ground zero in mortgage fraud. Last year we indicted more mortgage fraud cases than any district in the nation, returning 49 indictments. There's many

reasons, but one might be that half of the ten top for home foreclosures in the United States lie within our federal district.

Finally, another significant enforcement priority are crimes involving the exploitation of children. For the past several years our district has also led the nation in the number of indictments returned for child photography and trafficking of children.

I will note that in that regard one of the reasons why we did step up so significantly was that California, until very recently, was among just a handful of states that punish possession of child pornography only as a straight misdemeanor. It is our view, and that's shared by law enforcement across our district, in any event, that that was too lenient and that we had a role to serve, to complement the efforts by taking some of those offenders federally. And we've gladly done so.

Now, finally, as to the issue at hand, I think it's fair to state that prosecutors in my office were less than enthralled when the high court handed down the *Booker and Fanfan* decisions. Most of our office grew up in the guideline system, and we valued the overall consistency promoted by them. We fear that with advisory guidelines, consistent and tough sentences would be lost.

With four years under our belt, in the parlance of our profession, I think it fair to say that the jury is still out. Certainly consistency in sentencing has not entirely collapsed. The sky has not fallen in the Eastern District of California. The handling of cases has continued much the same way it had in the past. We've certainly become more conversant in 3553(a) factors. And attorneys from my office have had to engage in greater sentencing advocacy, perhaps, than they did in the past.

Sentences have remained

substantially similar to what they would have been pre-*Booker*, though there is a general consensus within my office that the sentences have trended downward somewhat, the one phenomenon being that the most routine plea agreement would be at the low end of the sentencing guidelines, but now the defense says, "Yes, but we'd like to reserve the right to argue for below that." So in some respects a low-level guideline range starts to become a ceiling, not in every case by any stretch, but it's more common than certainly it would have been in days past.

That we haven't seen wildly-lowered sentencing in our district is perhaps due to the relatively conservative composition of our judiciary and, frankly, to the presence of statutory minimum mandatory sentences in trafficking cases as well as receipt, distribution, and manufacture of child pornography. We might even concede that at times the flexibility afforded the courts has

provided a welcome vehicle for helping to resolve a particularly nettlesome case.

There have been exceptions, though, to these general patterns, particularly as it relates to possession of child pornography. I get somewhat gratified in hearing the testimony throughout the day that we're certainly not alone in this regard.

While guideline calculations might propel an offender to a sentencing range at the low end of 78 months, many judges have routinely imposed much lower sentences. Frankly, as this practice began to emerge, we more routinely now do, in fact, charge receipt, distribution, manufacturing charges if they are available so as to avail ourselves of a 60-month minimum mandatory sentence or we, too, seek (c)(1)(C) plea agreements on straight possession of child pornography cases.

The final example would be one that's both cathartic for me, since it's a

case I handled last summer where a deviation had arisen in corruption and white-collar. Last year I cotried the *United States versus Julie Lee*, a corruption case involving a fundraiser who diverted $125,000 of state grant funds from the Department of Parks and Recreation to a statewide political campaign and then attempted to tamper witnesses when her scheme came to light, courtesy of the *San Francisco Chronicle*.

At the time of sentencing after trial she was 62. She was a grandmother, a community leader, activist, with no criminal record whatsoever. However, given her role in the offense, the amount of loss, obstruction, the low end of her applicable guideline range was 46 months. The Probation Department, conducting its analysis, recommended 46 months.

The defense argued for straight probation, encouraging the judge to fully embrace his discretion that's been handed down

by the high court. This left my trial partner, who is the chief of the Criminal Unit, and myself in a somewhat delicate spot.

The judge that we were appearing before, when compared to some of the other judges in our district, commonly sentences in a more lenient fashion. We knew that if we went in and argued the low end of the guideline range of 46 months, that we'd be largely irrelevant to the sentencing discussion that was going to happen at the hearing that day.

So we made a tactical decision. We would advocate for 46 months but say in no event should the sentence be less than 21 months. The court imposed a sentence of a year and a day. This sentence has largely been derided as overly lenient.

I recognize -- what number is right, 46 months, 21 months, a year and a day, probation, high end of the guideline range? I know it's in the eye of the beholder. But to

us this was a very dramatic example of all the risks that we run in a post-*Booker* advisory guideline era. Namely, in these areas where you have well-heeled defendants, with very adept representation, who don't have significant criminal histories, who do provide services to the community, that they present a compelling case for more lenient disposition.

I believe in this era of fraud crimes, mortgage fraud crimes, and the like, warrant significant attention by both this body and certainly by the Congress.

Finally, I recognize that the balancing of competing societal interests brought to bear in any sentencing framework is complicated. I applaud the Commission for its ongoing efforts in this challenging and most important endeavor. And thank you again for the opportunity to appear here today.

ACTING CHAIR HINOJOSA: Thank you, Mr. Brown. And now we'll open for questions.

COMMISSIONER HOWELL: Mr. Brown,

you know, I think courts, even pre-*Booker*, who were deciding on downward-departure motions had to figure how much they were going to depart, the degree of departure and so on. Some districts and your prosecutors make recommendations of specific departures and had to figure out what their specific recommendation was going to be, and so on.

You know now in the world of variances it's -- courts may be using the same kind of analysis to decide the degree of variance that they're going to give, using the same kind of factors and thought process they went through in deciding the degree of departure. But that's not really clear. We're still collecting the statistics to find out the difference and degrees of variances versus departures, and there is some difference.

How in the case that you described, where the -- for strategic reasons you decided to offer up a variance amount, how did you

come up with your 21 months?

MR. BROWN: Which was precisely the question the sentencing judge asked. It is one of those sort of damned if you do, damned if you don't. You know, in part, our criminal chief has been a prosecutor for almost over two decades, and prosecuted a number of corruption cases over time, I think sort of looked at the heartland and what cases typically have gone for in the past and we did take into account the age of the defendant. She wasn't elderly by any stretch, but had some health complications. We thought the straight probation was just entirely out of the question. I thought maybe two years, my criminal chief said 21 months would go up with his number.

Right, I mean I recognize everybody is in that process of trying to divine numbers. And the challenge, though, becomes exacerbated when it's not just a guideline sentence range now that might be the sphere of

the analysis, because something we found ourselves in, the 46-months-to-straight-probation box, and again I just think the 46 months, I don't think I would have gotten about three words out at the lectern that morning.

COMMISSIONER HOWELL: Well, I mean I know how we on the Sentencing Commission figure out where we're going to set offense levels. I mean we look at statistics of similar kinds of cases and what average sentences have been, where courts have upwardly or downwardly departed.

We look at similar kinds of cases with different factors that apply, that are two -- you know, two offense levels have been applied with certain CLC special offense characteristics. Not -- I mean to gage the portionality of the offense levels that we are going to propose to Congress for consideration, and so -- but when you're in the world -- so we look at a fairly large

context when we're figuring out offense levels.

But when it comes to variances sort of like, you know, you're looking -- I'm just curious whether people are actually looking at the guidelines themselves also and saying, well, you know, two levels off for this factor and that factor, so we're going to -- if you're using the bottom of the offense -- the guideline level as a ceiling, as you said, which may be becoming more prevalent a practice, you know, perhaps we should do two levels off that or three levels off that. So I was curious to see whether you based your 21 months on some referral to the guidelines, but it seems like that wasn't the case --

MR. BROWN: No, not -- actually -- no, it was much more I think looking at the body of experience that we did have and which a sense as to what those cases generally are received.

VICE CHAIR SESSIONS: I'd like to

make a general observation and see if you agree.

We're here to evaluate the national system, with the idea that we would have a system that is relatively consistent in application across the country. And as I listened this morning, now I listened to testimony today, it's becoming more and more clear that this is not only particularly national in scope, oftentimes, but localized and, in particular, that sometimes the criminal justice system becomes quite personalized.

You know as you described in Oregon all of a sudden you have some judges who are beginning to depart or adjust, and as a result you respond with mandatory minimum sentences and 11(c)(1)(C) pleas. And I've heard other assistants say that they are faced with one particular judge who is lenient and so as a result there always will be a floor to the plea agreement.

And regard to another judge who might be down the hall and that judge would never get a floor agreement because that judge sentences within the guidelines, and that apparently is happening in each district. Oregon has, what, eight judges? And I wonder if you apply 11(c)(1)(C) pleas or mandatory minimums universally to every one of the judges or just those judges in which you fear a particular outcome? Is that really what is happening here as a result of *Booker*, that is, everybody's making assessment as to the individual judge?

They will -- you know, they're going to go outside what is reasonable and as a result you will restrict them. And, conversely, if they don't, if they sentence within the guidelines, then we'll let the sentencing judge sentence within the guidelines. Is that -- would you agree with that assessment?

MS. IMMERGUT: One thing,

certainly, you know, particularly in a district the size of Oregon or even Mr. Brown's district, you obviously get to know the judges. You know which judges particularly dislike white collar defendants or, you know, the like, which used to be more severe, who doesn't like the drug lords, so you get to know that personality.

What I try to do as a U.S. Attorney and I think the department has tried to do and I think one of the things that we're going to look at with the Sentencing Work Group, which I think is going to be valuable, is to try to reach both as little disparity as possible that isn't just based on personality and judges in a particular district but, rather, to look at, you know, how do we have as uniform as possible charging policies that make sense across the board nationally to address -- although I think regional disparities and district disparities are probably something we're never going to

completely eliminate, but I do take to heart the idea that there is some benefit to more national charging policies that our AUSAs stick to.

However, obviously the Ashcroft memo was something that people were very critical of because it tied -- you know, people thought at was too heavy-handed. So achieving the right balance where the judiciary gets some discretion, we get some discretion is something that obviously we're going to look at in this working group.

But I think in our offices we have tried to come up with policies both on -- in each office, I mean has different policies, but my office has, say, 5K1 departure policies and review policies and supervisory-approval policies and charging practices and thresholds that, again, you need a supervisor to review if you're going to deviate from a threshold, so that we are not really all over the map just deciding, you know, what does judge x

want to do today.

VICE CHAIR SESSIONS: But am I wrong that you were just talking about the increased number of adjustments pursuant to post-*Booker* and as a result your response would be to charge mandatory minimums, receipt of child pornography, a perfect example that both of you just said, reduced the charge possession, now you charge receipt so you get the mandatory minimum, and that could very well -- that could very well differ based upon the judge you're in front of.

MS. IMMERGUT: And perhaps if I misunderstood your question, yes, we are doing those things, but we are trying to do them uniformly in the district so that we are not singling out any particular judge with respect to any particular case.

VICE CHAIR SESSIONS: Do you agree with that?

MR. BROWN: Well, I do. On the charge of receipt and distribution it's kind

of so much judge specific, I think it's trying to impact sort of the culture of then negotiating with the defense, frankly, to show that we have this option. If we could just start doing it more routinely, we will. If, on the other hand, you want to do (c)(1)(C) pleas in straight possession cases, then let's talk more -- you know, a little more globally.

I do think that probably with certain judges you would see a more ready use of the (c)(1)(C) plea agreement because we would have concern. And based on our experience in front of that judge, that we run the risk of having a sentence that we think to be far, far too low.

I just talked with my branch office in Fresno and there's three district court judges and my attorneys were saying, sure, I very much do my sentencing advocacy strategies anyway depending on which judge because there's certain buttons you push or don't push depending on the jurist you're in front of.

But I agree with Ms. Immergut, there's still, you know, baseline in terms of just the plan, you know, what you're charging. I think then that becomes -- that's the more uniform approach.

MS. IMMERGUT: And I should say, just to -- one more response was that we are not always the ones who propose the 11(c)(1)(C)s, the defense has also come to us probably in about half the time to request 11(c)(1)(C)s because they want the certainty as well.

ACTING CHAIR HINOJOSA: We obviously have the adversary, and you mentioned how it operates to some extent. You've mentioned that defense attorneys ask for either departures and/or variances below the guidelines. And my question to you is: Have you or anybody in your office ever asked for a departure and/or variance higher than the guidelines and, if not, why not? And have you never seen a case that you felt that was

out of the heartland that would require higher than the guideline sentence?

MS. IMMERGUT: Honestly, I can't remember us asking for it now. And I think it's -- we're conditioned that it would be very rare for us to get it, but it's possible. I just -- you know, I would have to actually go --

ACTING CHAIR HINOJOSA: But you haven't tried it is what you're saying?

MS. IMMERGUT: I'm trying -- personally, I personally have tried to get --

ACTING CHAIR HINOJOSA: I mean I know the prior administration had the view, I think the policy was that you were [to] argue for it within the guidelines sense.

MR. BROWN: And that's where I think we are still, too. We've had training. We've had sentences where the court has done upward variance.

ACTING CHAIR HINOJOSA: On their own.

MR. BROWN: There's been a few. But I think as I said but I think it's been on the road and not sure the prosecutor was going to be too upset about that occurring. But, no, directed, it's continued then, we argue for the guideline sentencing, recognizing I recall or being summoned by one of district judges to chambers who told you're becoming irrelevant in the sentencing process if you continue just to be guideline advocates in a post-*Booker* world and he was sort of extolling the idea that we should be advocating to go further up. And I said, well, --

VICE CHAIR SESSIONS: I gather --

MR. BROWN: -- we'll win those on occasions, but more often we're on the boat.

VICE CHAIR SESSIONS: So I gather on the cases where you saw them go up, you felt that was appropriate, you just didn't know how to argue for it?

MR. BROWN: I think that'd be fair to say. Yes.

VICE CHAIR CARR: Mr. Brown, if I understood the case you were talking about, you said that you advocated in the alternative for 46 months but in no event less than 21 months?

MR. BROWN: Yes.

VICE CHAIR CARR: When the -- when the district court judge's statutory obligation is to impose a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes of sentencing, how do you articulate an argument like that in the alternative, explaining why 21 months is the bottom that's acceptable but "We want 46"?

MR. BROWN: Well, again, I think we were putting forward to the court that that should be sort of the range of consideration by the court, to reframe the numbers that he'd be looking at with the case ultimately. I mean ultimately in a judicial system it's about what's the case worth, whether in the state system or federal system, what number,

the offense is going to carry what number. And we were looking at [the] number to be sort of created at that framework, it was [to] try to have a discussion between 21 and 46 months, and hope that he goes somewhere in there thinking it's very likely he could end up in 21 months.

As you can see our skill advocacy was very effective, and he had no problem breaking through that framework and giving a year and a day, so --

VICE CHAIR CARR: They were being selective. They just were --

MR. BROWN: That's it. Right. Yes, we're not out training at the conferences on our successful advocacy technique, I assure you.

VICE CHAIR SESSIONS: I guess it was Commissioner Carr's point, was it skilled to have given that range of 25 months and at that point to place the judge in -- well, 12 months and a day is ten and a half months

versus probably the 17 or 18 with good time, 15 percent off.

MR. BROWN: I hate to be cynical, but I believe that the judge when he took the bench that day knew that the case was going to get a year and a day. And there wasn't much that was done by way of presentation in the sentencing hearing, but obviously I frankly had probably greatly impacted ultimately where he landed on the case, where to put money on.

VICE CHAIR SESSIONS: Did you lose the office pool?

MR. BROWN: I just note the fact that I got the Commission guidelines.

COMMISSIONER FRIEDRICH: Is it fair to say in light of the recent Ninth Circuit cases, like the ones you mentioned, like *Irizarry* and some of the others, that the government just is no longer appealing on substantive grounds, cases out of the Ninth Circuit; is that a fair conclusion to draw?

MS. IMMERGUT: In the cases, for

example the one that I spoke of, we have appealed, where the one defendant got a completely disparate sentence from the two defendants who got in range of 70 to 80 months and got probations, so we are continuing to appeal and getting -- where the sentences are getting worked. So we'll continue to appeal, but only think it so far appealed perhaps at some point the Ninth Circuit will find that it's unreasonable, but we're not optimistic.

COMMISSIONER FRIEDRICH: You also mentioned that you're no longer prosecuting firearms cases in which you anticipate it will be a sentence of probation. I take it those you're just referring them to the state?

MS. IMMERGUT: We just refer them to the state, which I think is -- you know, another impact added. You know, Mr. Brown addressed it a little bit, but obviously a lot of what we do in our communities is to work closely with the state and locals on different projects, whether it's gangs, or violence

crimes. And crack cocaine is an example, where there has become a reliance on our ability to use federal muscle, if you will, to have a strategic approach to reducing crime in a district. And that's something we need to look at, how that's been affected. but that with the firearms cases we can no longer guarantee -- they will bring cases to us if we can guarantee a certain sentence in federal court, and now we can't do that.

VICE CHAIR CARR: You know, I remember a few years ago that the Oregon judges used to meet every week and go over all of their sentences and come essentially to consensus. Is that no longer the case in your state?

MS. IMMERGUT: We had what was called a sentencing council, and the Ninth Circuit said we couldn't do it. And I forget [the] name now with the case, but they actually sent a clerk, how the sentencing worked, that was after -- so they stopped it.

ACTING CHAIR HINOJOSA: Do you guys have any other questions?

Commissioner Wroblewski, you don't have one single question for this panel?

(Laughter.)

COMMISSIONER WROBLEWSKI: No. I've spoken with both and I do want to -- it's unlikely I don't have a question, but I do want to say how grateful we all are, and I in particular, for you being here and for your services in your offices and in your districts. And not just now but during the course of these proceedings, we really appreciate it.

Thank you.

ACTING CHAIR HINOJOSA: Thank you all very much, and good luck with your new job.

MS. IMMERGUT: Thank you.

ACTING CHAIR HINOJOSA: And I appreciate your taking your time, and we'll break.

(Recess taken from 3:45 p.m. to 3:54 p.m.)

ACTING CHAIR HINOJOSA: The next panel is a "View from the Defense Bar." We're very familiar with two of the individuals on the panel.

Mr. Thomas Hillier has worked in the Federal Public Defender's Office in the Western District of Washington since 1975. And he became the Federal Public Defender there in 1982. He coteaches trial advocacy as an Adjunct Professor at the University of Washington. And he is a former chair and present member of the Federal Defender Sentencing Guidelines Committee. He received his Bachelor of Arts from St. Martin's College and his law degree from Gonzaga. He didn't play basketball there that I know of.

MR. HILLIER: Just inter rerum.

ACTING CHAIR HINOJOSA: Ms. Davina Chen is an Assistant Federal Public Defender in the Central District of California where

she has been both a trial attorney and an appellate attorney. In 2003 she actually served as a visiting defender with the U.S. Sentencing Commission. After law school she clerked for a circuit judge on the Ninth Circuit, Judge Fredrickson, and she received her Bachelor of Arts from the University of California Berkeley, and her Master's from Stanford, and her law degree from NYU.

Mr. Douglass A. Mitchell specializes in commercial litigation and federal criminal litigation at the Law Firm of Boies, Schiller and Flexner in Nevada. In 1995 the federal District Court for the District of Nevada appointed him to serve as a mentor training defense attorneys to practice criminal law before the court. And he is also a CJA panel attorney in Nevada. And he also clerked for a judge, for a U.S. district court judge for the District of Nevada, Judge George.

And we appreciate all three of you

being present. In defender fashion, Mr. Hillier informed me that he was going first. But in my judge fashion, I informed him that I was calling on him first anyway.

(Laughter.)

ACTING CHAIR HINOJOSA: So we'll proceed with Mr. Hillier.

MR. HILLIER: For the record, I advised Your Honor that I lost the draw on the short straw, but it is an honor to be here. And as a Federal Public Defender especially I'm grateful for this opportunity to appear before the Commission.

After this morning I had the hope that I was going to be continuing a variation on a theme that was addressed by the district court judges and the probation officers about expanding the availability of probation as a sentencing tool in federal court and alternatives to sentencing, the idea to mitigate the harshness of some of these guidelines, particularly in the realm of

illegal aliens, drugs, and child pornography.

Also we, as you can see from my written materials, are echoing another theme of this morning, which is to encourage the Commission to generate more evidence-based information related to why sentencing ranges relate to the purposes of sentencing and how evidence-based programs might assist in carving out a new emphasis in alternatives to sentencing, but then we had the panel just a few moments ago. And I wanted to kind of jump into the fray for a moment and deviate from my notes --

VICE CHAIR SESSIONS: Is this unusual for you to want to jump into the fray, to respond to the government?

(Laughter.)

MR. HILLIER: It might relate to that fiery thing that Judge Lasnik said this morning. I'm not sure but, in any event, in listening to particularly the U.S. attorney from the District of Oregon, she talked about

child pornography and some of the sentencing issues and angst that relate to that particular crime in the District of Oregon. And it is a crime that just generates a lot of emotion and revulsion and feelings that we all have about something like that.

And she spoke about how the defense sometimes gets a psychological evaluation that tells the court that their defendant is not one who's prone towards being a pedophile or being involved in harming children beyond the crime that they committed.

And I just wanted to give you a different perspective of what occurs in Seattle. We, as a group, in Seattle -- the government, the judges, the Probation Department -- recognize that in child pornography prosecution one size does not fit all. But the guidelines are very severe in a uniform way to anybody who is involved in that crime. But the defendants who come into court, after having been convicted for

committing a crime, vary tremendously in who they are, how they got involved, and what the appropriate punishment is.

And in our district, the government, as I said, recognizes that, too. And what they do is cooperate in trying to figure out who that person is and what an appropriate sentence might be. And we don't have a defense psychological report; we have a report that we would really -- if we agree to do a report and, of course, there are some clients I have where a report isn't going to help my client, so we're not going to go down that path. But if we agree to do a report by an expert who everybody believes is somebody we can rely upon, all the parties, and when we communicate that evaluator's information to the judge, we're all confident that that information is neutral, and appropriate, and science-based information.

The reason we do that is that the prosecution approached us on that in order to

be sure that we didn't paint too broadly with the child pornography penalties. And in consideration for that report we get concessions at sentencing from the government. The government agrees to reduced guideline applications and, depending upon how favorable the report is, maybe even more.

So it's not that in our district -- well, in our district we don't look at the range as the, you know, end-all, and if we don't get there, then we jump into a mandatory minimum situation with receipt. Receipt might be charged in a case where it is appropriately charged, not as a hammer to force us into a guideline range.

In addition to the consideration that the government gives us for going through this evaluation process, -- and it's very intrusive and instructive to the court -- we are able to argue to the court, if we can do so credibly, for a variance even from whatever even lower guideline range it is that we've

all agreed upon.

And we do that out of recognition of the fact that some of the penalties are just too high for some of the defendants. And I think that that's a contrast, perhaps, to sort of the reactive way that deviations from whatever variances from guidelines are achieved in some districts begrudgingly.

Sliding into the more prepared remarks, one of the themes of our written presentation, the one that I'm going to concentrate on -- Davina is going to talk about anything that's hard and answer all the questions -- is our view that probation is underused in the federal district courts and, particularly, under the sentencing guidelines. And I'm going to be direct here. I believe that it's underused because the guidelines at their inception some 22 years ago marginalized the significance of probation in the sentencing function.

And, in fact, the Commission was

very honest about saying that, "We think probation is overused and that this is a problem." And, as a result, we're saying all federal crime or nearly all federal crime is serious and, therefore, within the ambit of that statute that says serious crime ought not to get probation in the usual case. And they offered no explanation for deciding all of a sudden why it is that all federal crime was serious. It is a policy decision. It was a political decision. And it was compounded by an interpretation, we think misinterpretation, of the statutory directives in title 28 994, which say that further marginalized considerations that might drive a sentence towards probation, those -- or a defendant characteristics, special -- a defendant's characteristics [inaudible] define who that person is by saying in Chapter 5H these are not ordinarily relevant.

And the way that that came about is the Commission then interpreted 994(d) and (e)

to say that it's inappropriate to consider age, education, and drug dependency, and the sort of things in making a sentencing decision. But those statues don't say that. They say just the opposite. (e) says that it's inappropriate to use those considerations in putting somebody in prison, because it is. You don't put somebody in prison because they're poor or because they're uneducated.

But the fact that they're poor, uneducated, or they may have drug addictions, or mental health issues, or any number of -- thousands of other personal characteristics, they said in 994(d), may be appropriate to that sentencing decision. And 994(d) charged the Commission with deciding what is the appropriateness of age in the sentencing decision, and education in the sentencing decision, and family ties in the sentencing decision.

And as a policy matter, the Commission decided it wasn't inappropriate,

but the directives from Congress don't say that. And certainly now Booker says that's not the case, but rather 3553(a) factors, which are those factors under *Booker* and its progeny, are directly relevant to the sentencing decision.

So we feel that probation is underused because of some decisions that were made a long time ago that are now, in the wake of *Booker*, subject to some revision and should be revised. And there should be some critical thinking on this Commission about whether or not those policy choices were right way back then.

As Judge Lasnik said, there's all sorts of ways to inform whether or not that decision was right. So when you see, when this Commission sees a departure rate that is 20 to 1 in favor of downward departures, that's a signal. That's a signal that sentences are too high and that the marginalization of probation is not a good

thing.

The judges in surveys this Commission has sponsored have historically and consistently argued that probation is underused. The judges say in drug cases in particular, anywhere from 74 percent to 82 percent of the judges are saying, "There are times when we would like to use sentences that are less than what are advised by the guidelines in these cases; can't you do something about it?" Sixty-four percent of the judges said they would like to see a greater use of probation in drug cases.

The Probation Department spoke about the program that they have in alternatives to custody that our win-win propositions in cases, such as community service. And we would like to see more and more of these sorts of initiatives because probation is being underused. And we recognize and your studies show and other studies show that when you send somebody to

prison, it has a negative effect on that person and their involvement in the community. That person is exposed, if they're a low-level offender and they go to prison, they are exposed to, oftentimes, more serious criminals.

And criminologists have seen a relationship between that exposure and the risk of recidivism later on. And the criminologists have shown that when you pull people out of the community, out of a job, that produces a greater risk of recidivism. And all of those things suggest that when you overuse prison by excluding probation you're not just -- by creating a greater risk of recidivism you are actually harming the potential safety of the community because these peoples may go back out and do things that they shouldn't do because they've lost their bearings, they've lost their anchors in the community.

I want to do something that's a

little unusual, I'm sure in the context of this case, and finish my remarks around two cases that I handled last week. I'm not the policy one that all of my colleagues are, and I learned in the trenches basically. And these two cases I think speak to some of the problems I see with the way the guidelines are currently constructed and some of the solutions that *Booker* and its progeny have offered to you and some ideas that it has offered to you to bring more judges within the fold of the guidelines, make the guidelines more credible to judges so that the judges are using them much, much more consistently than they are today.

And I might say -- we heard today from the U.S. attorney in Oregon that in the Ninth Circuit 45 percent of the cases are within the guidelines, which means, of course, 55 percent are outside of the guidelines, but 42 percent of those 55 percent are there because of government-agreed-to departure. So

it's only talking about 11 percent of the cases that are judge-sponsored, judge-driven departures alone. So we're not far away, but there are some matters that I think can really redeem the credibility of the guidelines system, make it relevant to sessions, as you've talked about again and again throughout the morning.

The two cases I had last month were kind of remarkable in the sense that they were really similar, but they weren't because of who the defendants were. But both involved ecstasy exportations or importations. My clients were both young women in their early twenties who were recruited by individuals older than them, but -- I shouldn't say -- one was older; one wasn't -- but to go to Canada to bring ecstasy back into the country. Both cases involved about five kilograms of ecstasy. Neither client had any criminal record whatsoever. And they both had different judges, not Judge Lasnik, but

different judges who had completely different sentencing philosophies. And they pled guilty and they both attempted to cooperate.

One probably wouldn't have gotten the 5K motion in most of the districts in the country; the other one probably would have. They both got 5K motions in our district. Before the 5K motion and after the guideline calculation, both received ten-level downward adjustments to their base offense level with acceptance of responsibilities, Safety Valve, roll on the offense.

I mean it was just remarkable, ten levels. I've never seen ten levels in a case before. And generous by guideline standards, to say the least. And at the conclusion of that exercise, both had ranges of 41 to 51 months in prison. And I'd like to say, I'd like to believe that no judge in this country worth his or her judging salt would give either of these young women a day in prison, but I know differently.

So we're faced with 41 to 51, and we're going to court. We get the 5K motion and begin the advocacy of sentencing. And neither of these defendants were well-heeled. Okay. Neither of them had any money. And they didn't have [inaudible] representation either. I think they received the sentences they got despite the representation that they had.

And I did advocate. Now, you know, I wrote a sentencing memo that talked about the ecstasy guideline, how the science of the ecstasy guideline, when the information was given to the Commission, was bad science and that the court should devalue it some. And I hope this issue is revisited. I can say, based upon conversations I had with Dr. Holland, who wrote a declaration in our case and who testified before the Commission in 2001, that there are studies ongoing, one of which is going to be completed later this year, which is hopefully going to identify

what the real harms of ecstasy are. But the current medical information suggests that the harms are less than heroin, less than methamphetamine, less than alcohol, less than marijuana, less than cocaine, but it's at the same level as cocaine and just barely below meth and heroin for purposes of the guidelines.

So I made that argument, and I made other arguments, philosophical arguments about how general deterrences, ethically challenged, and those sorts of things in my sentencing memo. And I made roll-on-the-offense arguments and cooperation arguments, but mentioned none of that during oral advocacy, because none of that really mattered. This was really all about who my clients were, are, and whether or not they're going to prison made any sense. Did it make any sense; did it further any sentencing purpose.

Clearly they were deterred. Clearly general deterrence wasn't an issue.

They were anonymous. Nobody was in the courtroom other than family. Community safety wasn't on the table. And the only question was the seriousness of the offense. And, you know, that sort of subjective thing, which was measured by a drug quantity that they had no relationship to in terms of their own personal culpability in relation to that crime.

So after all of that and after the argument -- and I argued to the judges that -- for one of my defendants who was -- had psychological issues -- sending her to prison would have been devastating. It would have destroyed her. It would have made her worse. And the other defendant didn't have those same issues. But it would have been at the very best a horrible waste of time and ripped her out of her home for that time that she was there to the detriment that I've already described.

Both received -- one received two years of supervised release. She got credit

for the days she did in jail. The other received three years of supervised release with credit for the two days she spent in jail before she was released on a personal recognizance.

And the reason was that the judges understood, the courts understood that client number one needed therapy and client number two, who had been out for several years pending transfer of the case from Texas, and cooperation, and all this sort of thing, that -- and totally squared away her life, got a job, and went on to establish herself in the community.

Client number one is graduating next week from the University of Washington. Both understood that prison made no sense. It just would further no sentencing purpose. So they gave her those supervisory sentences. And they did so -- they are empowered to do that; they were authorized to do that. And they would have had a difficult time to do

that prior to -- but they were able to do that because of *Booker* and its progeny.

So I think these cases offer an example of what judges can do now, but they also offer examples of how it is that the judges don't need to go through the sort of gymnastics in order to get to these results.

The manual as it relates to roll on the offense is something that I think both judges were concerned about. Roll on the offense is given these quantitative numbers: Two levels off, four levels off, three levels off if it's something in between, which really don't amount to a hill of beans when it's a quantity-driven penalty that you're starting with.

They certainly don't measure the true culpability of defendants who have truly minimal roles in an offense or just have really no stake in that charge, but get drugged in somehow or another for any number of reasons. And that culpability is a measure

of how serious their involvement in that crime is. And the judges knew that. They knew and understood that the numbers in the guidelines didn't account for anything.

So one of the things we're recommending in our submission is that in addition to those numbers, if you want to keep the numbers in that adjustment is to say -- to an application note that says, you know, these numbers may not really take into account the true insignificance or to measure truly your client's culpability or defense culpability, and you can go below that. You can depart, that we can encourage a departure, which brings judges, when they do this, within, you know, compliance -- to use your word -- with the guidelines. I'd just say confirm swift, but...

The other is personal characteristics. Both of these defendants had major issues that the courts were concerned about. And, as I said at the outset, the

guidelines say in making a decision to be outside a range, these characteristics aren't ordinarily relevant and sometimes aren't relevant at all, yet the law now says the opposite. As I stated, I think there's been a misinterpretation of the statutes in getting to that policy decision, but it is a policy decision. But today the courts are saying the same repeatedly: That the judges must, they not just can but they must consider these characteristics in shaping a decision.

So we've recommended that you take 5H out of the guideline range because it is causing chaos, to use your term, Commissioner Wroblewski. See, I like that term. I don't think it really applies to sentencing in general. I agree with Judge Lasnik. I think they're better now than they were pre *Booker*.

But what chaos exists is because there's confusion that's generated by a guidelines manual that says you shouldn't think about this, and the Supreme Court and

the court of appeals all say you got to think about that. And that confusion, that chaos has resulted in some conflicting case law, that every day it's more and more thunder is coming towards -- resounding towards a conclusion that you must consider that sort of information. So you could go a little long ways, I believe, we believe by taking that confusion out and redefining the policy that got to -- us to that state.

In this case, as I alluded to, 5K, we received 5Ks in both cases. I'm certain in one case it wouldn't have occurred. We recommend that would take the requirement of a motion out. It really isn't required anymore for a judge to consider a defendant's cooperation or efforts to extricate herself from criminality in shaping a decision. But why give the government that hammer and similarly with accepted of responsibility that third point, in this case, in the plea-negotiation process, the first case, I asked -

- you know, I wouldn't sign a plea agreement that asked me to make concessions on guideline application seen waive a fee. I said I'm not going to do [it]. I said we'll plead to a count and leave it at that. So he reindicted and counted -- you know, did x, importation, possession, and conspiracy. So we have three counts. And so if you've got to plead to all three counts, "Well, we're not going to give you acceptance of responsibility."

And I said, "Fine, it costs my client $200 but at least she didn't get stuck with a guideline application" or a commitment to a guideline application that would have gotten her more time in jail, but that's simply because the government threatened me with no acceptance of responsibility if we didn't plead to all three.

I said, "I'll plead to one and we'll go to trial on the other two later on." I had more acceptance -- I'm not just bluffing, obviously, because we wouldn't go to

trial, but -- that's the sort of thing that, you know, who needs that hammer, and I think we should just take it away from. It's not necessary, it does[] no good.

And finally and probably most importantly, in our materials we're submitting an idea for something bigger than all of this. This fine tuning is the easy stuff. As the superintendent of our state prison told me when I was arguing about conditions the other day out there, he said, "Well, I'll take care of that. That's the low-hanging fruit," and some of these things I've suggested of low-hanging fruit, we can do these adjustments in a hurry.

But one proposal that we make in all earnestness is to devise a guideline that at the front in, in all cases that don't have mandatory minimums, allow the judge to make an in and out decision. Devise a guideline that gives advice on how to do that, on whether and under what circumstances somebody should have

to go to probation, so that in these cases, for example, a judge could say, "I invoke the new guideline and make this decision."

Now if they decide prison isn't appropriate, then they go to the guidelines for advice on how to do that. But by doing this what you're doing is creating a mechanism that brings judges within the fold of the guidelines and concerns with lack of consistency and that sort of thing diminish in the process. And uniformity is achieved to the extent that uniformity. But I agree whole heartedly with Judge Lasnik that uniformity -- fairness should not come at the cost of failing us.

And Judge Lasnik, he's immortal in our district for the time and care he takes with our clients, all clients to explain to them what it is he's doing, why he's doing it, even when the clients don't like it, they leave understanding, they feel respected, they feel they've been treated justly, as compared

to somebody who gets 20 months because "I gave 20 months to somebody else," which doesn't resonate fairly and is a price that we shouldn't be paying in this system.

ACTING CHAIR HINOJOSA: Thank you, Mr. Hillier.

Ms. Chen, you're next.

MS. CHEN: Yes.

VICE CHAIR CARR: Ms. Chen.

MS. CHEN: I go next. Can I go next?

ACTING CHAIR HINOJOSA: Yes.

MS. CHEN: I also would like to thank the Commission for inviting me to come and speak to them today. And I'm especially happy to see the Commissioners that I worked with when I was at the Commission in 2003 and also to be able to address Commissioners that I haven't had the opportunity to address before.

You know, a few weeks ago when I started to think about what I wanted to say to

you today, the Obama Administration was on the airwaves talking about measuring programs by their outcomes and not by their intentions. This time it was because they were proposing cuts from popular programs under the federal budget. You, as we know, this idea that government should work and that we should measure why the government works by evidence and analysis instead of ideology and intention is already a major theme of this young administration.

And I know that everyone here, all the stakeholders, want to make federal sentencing work. But the Commission is in the unique, indispensable, and statutorily defined role of collecting sentencing information, both empirical and descriptive; using this information to measure the effectiveness of sentencing policy in meeting the statutory purposes of sentencing; and encouraging sentencing practices that are informed by that analysis.

And obviously when acting in this, what the Supreme Court has described as its characteristic institutional role, the Commission has hard-earned and well-deserved credibility.

Acting in this role, the Commission has -- obviously it's on everyone's mind -- criticized sentencing practice that had unjust outcomes, the most obvious being the cocaine penalties. And it looks like Congress may well finally be on the verge of addressing that.

But we as defenders know that the Commission hasn't always taken its own advice. We have -- although the cocaine reports may be the most famous of the Commission's work, we as defenders are well aware that the Commission has long standing commitments to doing all sorts of research, things like its mandatory minimum report. Its research on recidivism. Its 15-year review.

And prior to *Booker* defenders

repeatedly urge[d] Congress and the Commission to address the concerns that were raised in these reports, whether it be abandoning the practice of mirroring mandatory minimums in the drug guidelines, or amending the Criminal History scoring, so that it match[ed] a little bit with what it was learning in its recidivism practice.

After *Booker*, the defenders have increasing gone straight to the courts and said, "Look, even the Commission's research has shown that these guidelines are defective. We're asking you to vary because of guidelines [that] are not effective based on [] the Commission's research." But I believe that the interests of the sentencing report, when we talk about sentencing reform we're talking about justice. So the interests of justice are best served when all the stakeholders work together. So it's not, "Oh, we couldn't get it from these people, so we'll get it from those people."

We all need to work together. In our lengthy written submission, which I understand was delivered late in the night, we made some specific recommendation about how the Commission could encourage the imposition of substances that are sufficient but not greater than necessary to meet the statutory sentencing purposes.

We encourage the use of probation and alternatives to incarceration, which Mr. Hillier talked about. We encouraged the committee to abandon the practice of mirroring mentors and memo in the guideline. We encourage the Commission reduce unwarranted severity of specific guidelines and thereby reduce disparity.

We encourage the Commission to eliminate policy statements that restrict the consideration of the beginning factors, again something that Tom [is] working on. And we encourage the Commission to urge the repeal of mandatory minimums and specific --

(Noise in background.)

MS. CHEN: I'm not going to talk about all that because we wrote a lot about that in our written testimony, among -- instead I want to address the broader issue that's raised in our written testimony. And that's the goal of and mechanisms for fostering the ongoing dialogue between the stakeholders and federal sentencing.

I was asked to speak at least in part in my capacity as an appellate attorney. So I'm going to be speaking from that [for the] rest of my very short presentation.

I have one observation and three comments based on that observation. And the first of the observation: As an appeals attorney in a very large district I review a wide variety of sentencing transcripts. And the most striking observation I have post-*Booker* is not that sentences are somewhat shorter, which they are, and not that sentences are somewhat fairer, which I also

believe is true, the most striking observation I have is that everybody, the prosecutors, the defense attorneys, the judges are talking a lot more. Transcripts are thicker. People come back with more stories from sentencing.

And they're not just saying more to advocate or explain a sentence that is outside the guideline ranges, they're also saying more to explain or advocate for a sentence within the guideline range. And I have no doubt that this, this fact that everyone is talking a lot more is a direct result of *Booker*.

I have three comments based on this observation. And the first is that I think that this is extremely healthy for [the] system. I think it's extremely healthy for the government to have to justify what tends to be its position, that the guideline sentence is sufficient but not a greater-than-necessary sentence. And, more recently, for the government [to] have to explain why they're agreeing to a variance in a crack

case.

I think it's healthy for defense counsel to be able to criticize the guidelines frontally, without hiding that criticism as somehow a *Hartmann* argument or gaming the system or circumventing somehow. Being able to criticize the guidelines frontally. It's healthy for defense counsel to be able to identify facts, even about the offense or the offender that they believe are relevant to the statutory sentencing purposes, even if those factors are factors that the Commission has deemed either never or not ordinarily relevant. It's healthy for defense counsel to be able to advocate honestly and openly and directly for a just sentence.

And perhaps most importantly, it's healthy for the client who's being sentenced to hear the judge actually explain the sentence and the reason for it. I've heard judges say many times that sentencing is the hardest part of their job. And I know you'll

all believe me when I say it's pretty hard for the defendants, too.

But I believe even when the sentence is one that is what I view to be too harsh, it's much more consistent, the seriousness of the decision that's being made, for the judge and for the client, for the judge to explain the sentence imposed thoroughly and honestly, rather than for the judge to do some math and then say, "I understand I have the discretion to depart. I'm electing not to depart in this case and in giving a sentence."

So the first comment is that perhaps as [an] unintended byproduct of *Booker*, the current sentencing system allows for a sentencing hearing. It is much more consistent with what I believe justice looks like.

My second comment is that one of the things I've learned from reading all these transcripts, and especially from attempting to

craft appellate arguments [is] that a resulting sentence either is or isn't reasonable, is that both district and appellate judges are hungry for explanations from the Commission as to the rationale behind the guideline, so that they're better able to assess whether the guideline makes sense as a general rule and whether it makes sense in this specific case.

As an appeals attorney, and I've been doing almost exclusively appeals now for four years, it's extremely difficult to explain why a sentence is or is not reasonable, especially in relationship to the guideline sentence, when the Commission has not displayed what sentences purposes the guideline was intended to serve, let alone how the guideline elements were meant to achieve that purpose.

I strongly encourage the Commission to examine each guideline, each policy statement, each adjustment to determine if and

how it furthers the statutory sentencing purposes set forth in 3553(a). If the Commission determines a factor does not further those purposes, it should be revised or removed.

For the remaining factors, the Commission should set forth an explanation of what purpose the guideline is intended to serve, how it is meant to achieve those purposes, and what evidence the Commission relied upon to conduct the -- the conclude that the guideline would be effective in achieving those purposes. If of course the factor is the result of a congressional directive, then the Commission should just say that.

The Commission should set forth the explanations in the guideline Manual itself. I think that a lot of attorneys and perhaps some judges have never looked at Appendix C, because it's really difficult to use. I have all of the guidelines up on my shelf and

rather than looking at Appendix C, I just want to pull random books to see when things have changed and then I go to Appendix C, because it's really complicated the way it is. So I think that the rationale should be in the guidelines so that people can see it.

So if, for example, the Commission's study on recidivism or a current random search supports the statements in 5H1.1, which basically says that a defendant's age is largely irrelevant to the statutory purposes of sentencing, then the Commission should so state. But if, on the other hand, looking at this research reveals that age is a relevant factor for a number of the statutory purposes of sentencing, whether it be recidivism or the relative culpability of a defendant, then the Commission should either remove said policy statement or revise it.

The reasons I make this recommendation are, one, I think it would be a really healthy exercise for the Commission to

return to the first principles of the Sentencing Reform Act. Two, I think the guidelines would have a lot more credibility with judges, practitioners, and even clients if they were grounded in something that we could understand and evaluate, they're linked to the statutory sentencing purposes.

And in the actual sentencing process, where advocates and judges are considering advisory guidelines and assessing whether they resolve the sentence that is sufficient but not greater than necessary to meet the statutory sentencing purposes, and, in my process, the appellate process, where advocates and judges are considering whether the sentence imposed is reasonable, we all need to know what the intended purpose of the guideline is before we can even begin to evaluate whether that purpose is served generally by the guideline, given careful research, or would be served in this case based on the specific facts of this case and

our client.

Put simply, by explaining the guidelines the Commission can both enhance their credibility and promote their ongoing evolution.

And my final comment stemming from this observation about how much judges are saying is that the Commission seems to be missing a lot in the manner it's collecting, reporting, and presumably analyzing this data. It's my understanding that the Commission relies primarily on the statement of reasons form in compelling -- in completing sentencing data. But in my practice as a clerk to a judge, as a trial attorney, as an appeals attorney, the only time I've ever seen a statement of reasons form was the six months that I was at the Commission.

Since I've never seen a form I have no way of knowing who filled out that form, but I understand from others who have seen the form, that it may not always be the judge.

And even when it is the judge, the form isn't really designed to capture all the stuff that the judges are saying. It's mostly box checking, and then there's a little space in the bottom to justify a non-guideline sentence.

Our written testimony contains several suggestions for how the Commission could improve the process of collecting and reporting information, but what I can say from personal experience of reviewing sentencing transcripts, on the one hand, and the Commission's charts on the other, is that the judges are saying some very interesting things that the Commission's data isn't capturing.

Finally, to conclude, the Sentencing Reform Act contemplated an ongoing dialogue between the courts and the Commission. To make this dialogue work, the Commission must clearly explain its view of the relationship of the guidelines and Section 3553(a) and hopefully capture how the judges

are responding.

I encourage the Commission to continue their work on both of these items. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Ms. Chen.

Mr. Mitchell, you'll go last.

MR. MITCHELL: Like Mr. Hillier and Ms. Chen, I'd like to thank the Commission for the opportunity to appear today and the opportunity to offer just a couple of what I think are simple suggestions about what the Commission might consider as they think about reforming the guidelines in this post-*Booker* era.

From my perspective, the sentencing guidelines seek to obtain three reasonably worthwhile goals. They attempt to promote sentencing uniformity with similarly-situated defendants. And I'm honest enough that I don't know that I believe similarity is the same thing as uniformity, but they do attempt

to promote a degree of uniformity amongst similarly-situated defendants.

Second, I also think it attempts to foster predictability in sentencing so that prosecutors, defendants, and defense counsel, as they consider some very important issues that affect a defendant's life, can have some method of measuring early in the case the potential impact on that defendant, so they can then make wise decisions as they counsel their client or prosecute a case as a prosecutor.

And the third, I think the sentencing guidelines at least in some measure tend to cultivate a degree of proportionality in sentencing. Now I pause here again to note that I'm not going to talking about the vigorous debate about minimum mandatory sentences or also the problems associated with different issues involving the severity of certain sentences recommended in certain types of offenses. But I do note that at least from

my perspective there is an effort to create some degree of proportionality within the context of variations in a spectrum of conduct related to a particular offense; and also in the context of different statutory offenses that attempt to regulate or control similar conduct.

But as with any comprehensive -- any effort to establish a comprehensive set of rules or regulations that attempt to quantify human behavior, the sentencing guidelines have made more progress in some areas than they have in others. My colleagues today, and I'm very certain my colleagues at other sentencing hearings before the Commission, have suggested a number of ways and a number of amendments that are well reasoned and well thought out and worthy of consideration by the Commission. Today, however, I just want to focus on two. Two in particular that I think are broader and should encompass some of the Commission's thinking as they begin to consider how to

refashion the sentencing guidelines.

First, I think it is important for the Commission to consider how they might refashion the sentencing guidelines to help judges acquire all of the sentencing factors in 18 USC Section 3553(a). The Sentencing Reform Act and the particular provision of the Sentencing Reform Act underlies much of the sentencing policy that should govern the Commission's decisions and analysis of the sentencing guidelines.

In the wake of *Booker* and progeny, the sentencing guidelines should be amended in two particular respects, I think, to accomplish its objective of refashioning the guidelines into something that can help the sentencing judges apply all of the 3553 factors.

The first thing is that the Commission should enhance the usefulness of the guidelines as an advisory, as opposed to a mandatory tool. As currently drafted, and

it's understandably so, but as currently drafted, the sentencing guidelines are worded and drafted in terms of a mandatory process, a process that instructs judges in particular defense characteristics and particular rules that attempt to quantify behavior. I think in a post-*Booker* world and in conformity with the factors and the policies set forth in 3553, greater effort should be made to attempt to fashion the guidelines as an advisory tool that can help structure an analytical framework for judges as they consider an individual who appears before them. This can be done in a number of ways.

First, centralizing the decisionmaking process in a mandatory set of rules is while enticing and while in some respects seemingly efficient, is not always effective. In the end I think it's important to remember that in any circumstance the sentencing decision is relating to an individual who appears before the court under

particular circumstances. Mr. Hillier has described in his final two case examples two circumstances where the situation and circumstances of the particular individual who appeared before the court were entitled to great weight and indeed received great weight in the district court.

And so while there is some attraction to the notion of a centralized decisionmaking process, I think the Commission as it considers how to reform and how to improve the guidelines should bear in mind that in almost every case the individual appearing before the court to be sentenced has individual circumstances and individual needs that need to be taken into account as the judge reaches its sentencing decision.

This notion of effectiveness in sentencing I think in the parameters of Section 3553 are very apparent in the language of 3553, which creates a judicial necessity for discretion. And I think that is most

evident in Congress' mandate within the language of that statute, that the courts consider the history and characteristics of the defendant; and that also in its related instruction, in 3553, that says that sentencing judges should impose a sentence that is sufficient but not greater than necessary. It becomes very difficult to accomplish those two sentencing objectives and those two policies without taking into account the very unique and individual circumstances of the defendant appearing before the court. It's just not possible, I think, to adequately or statutorily balance in adequate fashion those two factors without taking into account the kinds of sentencing and discretionary issues that arise in some of the rules Mr. Hillier described earlier today: education, age, other factors relate go to, for instance, boyfriends or girlfriends or other circumstances that draw people into criminal behavior who might not otherwise be there.

Second, although the guidelines currently provide an analytical framework for weighing societal factors and offense characteristics, the guidelines do not include a statutory-adequate decisionmaking role for their personal characteristics of an individual defendant. Indeed I think that if we look at the variations in kind and degree of human behavior, individual character and personal experience are practically limitless and it becomes very difficult to quantify let alone identify a defined set of characteristics that might be considered when one is called upon to weigh personal experiences, personal history, and personal characteristics. Therefore, I believe the sentencing guideline should as it considers how to reform the guidelines, the Commission should make an effort and find a way to develop an adequate role for extenuating factors and mitigating circumstances. Extenuating factors and mitigating

circumstances that play a meaningful role in a judge's decision to satisfy its obligations under Rule 3553(a).

By extenuating factors I mean those factors or facts or evidence relating to the particular offense that provide some reason for believing that the offense should be treated more leniently.

And by mitigating circumstances I'm speaking in terms of factors or evidence relating to an individual's good character or his history that suggests there is less likelihood of recidivism, for a reason to believe that the behavior is not consistent with that individual's character.

I think as the Commission finds and develops ways to take into account those two very important factors in weighing sentencing decisions for individuals who appear before the court, the Commission will develop a framework that is capable of producing even greater uniformity, more accurate

predictability, and more desirable proportionality in sentencing. Those unique characteristics of the guidelines' goals of uniformity and proportionality and predictability I think the best obtained when considering the unique circumstances of the individuals who appear before the court.

Second, in addition to fashioning the guidelines in a way that they become meaningful aids to courts who are attempting to apply the sentencing factors in 3553(a), I think the Commission should also give serious considerations to simplifying the guidelines. Again, whenever one deals with an effort to make a comprehensive set of rules quantifying human behavior, over time the risk increases that those rules and the details and complexities of those rules will result in unwanted results and unwanted consequences, not only for the individuals but for of course society as well.

And I think there is merit in the

notion of returning to a simpler, more basic concept of sentencing guidelines. Perhaps we're just spoiled in the federal District Court of the District of Nevada, but it has been my experience that the judges we appear before are good people who take very seriously their sentencing obligations and who make every effort to make the decision they think is right under the circumstances that are presented before them in relation to the particular offenses and the defendants' circumstances. And I think there is value and merit in trusting those judges to make the right decisions for each individual who appears before them in their particular, unique circumstances.

Simplifying the sentencing guidelines will accomplish that goal. It will provide judges who have good character and who have good intentions and who seek to do the right thing with the flexibility to consider mitigating circumstances and extenuating

factors as well as specific offense characteristics as they're already defined in the sentencing guidelines, and it will provide them with the ability to fashion appropriate relief which, as required by Section 3553(a), should be sufficient but not more than necessary. And, in relation to that, benefit that comes from simplifying the sentencing guidelines and developing a system that empowers judges, I think the Commission will find over time as it collects and analyzes its statistics, although I'm certainly not as familiar with them as many of you and many of my colleagues, I think over time the evidence will appear that the judges will be making very uniform decisions and they will be making very predictable decisions that prosecutors and defendants can rely upon as they counsel clients or seek to charge cases. And I think we will see greater proportionality, true proportionality in terms of sentencing decisions, after taking into account the

unique circumstances of individual defendants who appear before them.

I think that by returning greater sentencing discretion in a simpler system that includes a role for all of the factors in Section 3553 will enhance the goals with which the sentencing guidelines began. And I would encourage the Commission therefore to refashion the guidelines to give the judges the greater discretion and guidance on how to exercise that discretion in a meaningful way within the parameters of 3553(a).

ACTING CHAIR HINOJOSA: Thank you, Mr. Mitchell.

And we'll open up for questions.

VICE CHAIR CARR: You talk about extenuating factors and mitigating circumstances, which would be both be on the down side with respect to 3553(a). Do you not address aggravating factors because you're on the other team or because you think the guidelines have already gotten them covered?

MR. MITCHELL: I think the guidelines largely address most of the aggravating factors and circumstances, that there may be some others that could be added, or they may fall within such a small percentage of offense characteristics that the judges can deal with those exercising their discretion. But I think the guidelines have done a very good job of identifying offense characteristics.

I think, as Mr. Hillier pointed out, the guidelines, however, have not done such a good job of identifying and creating a role for extenuating factors and mitigating circumstances. And I think that greater attention should be paid to those two concepts.

ACTING CHAIR HINOJOSA: Judge Kozinski brought up a point this morning that I've thought about as far as having done the guidelines, having done sentencing before the guidelines. And in those days it was not

necessarily unusual for the court to consider running consecutive if someone had pled to two counts or had been convicted of two counts or more.

And so my question is: Do you think after *Booker* I now have the discretion to run sentences consecutive when somebody has pled to two or more counts and/or been convicted of two or more counts? The guidelines say no. My question to you is: After *Booker* do I -- and all the cases that have followed -- do I now have the discretion to go ahead and do that? In the case if I think the 3553 factors would make that appropriate?

MR. MITCHELL: I do. I think discretion runs both ways and I think that's part of the benefit of giving judges greater discretion, together with guidance for that discretion.

VICE CHAIR SESSIONS: Can I just follow up on this judicial discretion, because

I think you're making a strong point, to take the 3553 factors, put them right within the guidelines, remove what was the assessment according to Mr. Hillier of the earlier Commission, and therefore have more sentencing discretion with the judge able to consider human characteristics. You know, trying to jibe that with the earlier testimony that we've received from the government, is also -- and also from the judges, and that's the reaction to *Booker*.

What we seem to be faced with is a situation in which the government, in response to the discretion that is given to the judges as a result of *Booker*, might be interested in creating more restrictions on that judicial discretion by way of mandatory minimums or 11(c)(1)(C) pleas. And, in fact, the testimony earlier on today is the defense as well is interested in limiting discretion because they don't want the variability of what can happen when the case goes to a judge.

And what happens to be a tough judge, then you're likely to get a high sentence, and so the defense is going to want to control that discretion. And if it's a lenient judge, you're going to want the government to limit that discretion.

And, as a result, as a product of the *Booker* case, it has exposed in some philosophical way the interest of each of the stakeholders to stake out -- stakeholders staking out their authority. And as a result you're in this state of limbo in which the government all of a sudden sees these sentences falling, so they want [to] exercise more control over the sentencing process and the defense, when they're faced with a tough judge, and what the Chair has just indicated, you know, consecutive sentences, they're going to want to limit judicial discretion. So when you say to us let's develop a system of justice which allows more discretion with the judge by incorporating all these factors, is

that what you're really saying? Or are you just really saying that personal characteristics should play a part in the sentencing process? And, honestly, that if there is that level of discretion with judges, you together with the government would be most interested in limiting that discretion in the interests of your client?

MR. MITCHELL: Well, I think part of the problem that we see today is largely a factor [of] a hybrid sentencing process. We have a set of sentencing guidelines, as I indicated, which have a mandatory flavor to them and which have for many years now fashioned and dictated judicial decisionmaking. Now we have superimposed upon that a *Booker* analysis [which] has rendered those guidelines advisory, but we still have, as Mr. Hillier noted, a large number of judges who are largely following the sentencing recommendations and the guidelines.

And so I think we are seeing what

is a natural transition from the older sentencing guideline rule-based decisionmaking process to a more individualized sentencing crutch. And we're in that transition phase right now partly because we're dealing with an old set of guidelines that were adopted under one philosophical viewpoint and a new set of judicial decisions that have asked us to adopt a new view on how sentencing should be done.

And so I think that's why we're seeing a lot of the kinds of behavior you're talking about because we're grafting two different things into one another. I think as the Sentencing Commission looks at [how] to reform the guidelines in a way that it can take into account the post-*Booker* world, some of those factors that you've noted may become more acute and some of them may become less acute, but I think in many instances it puts the judges in a position where they can be judges, and it lets attorneys and defendants be in positions where they can be attorneys

and defense counsel --

VICE CHAIR SESSIONS: Would you be completely happy with a system in which the judge has total discretion over a sentencing decision, ultimately? Somewhere after we get past the transition period; is that what you're actually suggesting that we head for? Or are we always going to be continually involved in the various participants in the sentencing process -- I shouldn't say fighting for power -- but, you know, having their own interests and in some ways I've always come out with 5K motions or it will come out with (c)(1)(C) plea agreements or mandatory minimums, or something. That's -- I mean it's a philosophical -- a deeply philosophical question.

MR. MITCHELL: It is a very good question. And I don't know, but that time will tell. I think in a lot of ways the best of both worlds is somewhat of a hybrid. In a situation where the judges obtain guidance in

appropriate recommendations for sentencing, but guidance which is tempered by the notion that it is not mandatory in their decisionmaking process and also includes a role for mitigating and extenuating circumstances. And then give the judges that ability to make the decisions that we have appointed them to make.

And I think there is some benefit to having those benchmarks that can advise and inform judges while at the same time making sure they have the opportunity to take into account the virtually limitless variations in human behavior and circumstances that might relate to an individual who appears before them.

ACTING CHAIR HINOJOSA: Ms. Chen, were you raising your hand?

MS. CHEN: I just wanted to say that I can't predict -- I think we are in a state of transition and I can't predict what's going to happen. But I can say unequivocally

that what we have now is better than what we [had] before *Booker*. And the reason for that is what I stated in my opening remarks, is that the people are saying a lot more.

In my district we are not having that experience where everyone is agreeing to 11(c)(1)(C), whether it's sought by the government or by the defendant. In fact, the only 11(c)(1)(C) agreements at our district are the fast-track sentences in the illegal reentry context, and I have addressed that in the written testimony and won't address that here.

They're not addressed -- 11(c)(1)(C) agreements because everyone wants to go to the judge and tell them they what really think. And I think that that's really great for the system. I think it's great for all of the stakeholders that are in the courtroom and I think it's great for the Commission too, to hear what it is that they're saying.

So I've heard the testimony over there today that apparently in the Eastern District of California and in the District of Oregon there's increasing 11(c)(1)(C). I would say that in our district there's actually been a decrease in 11(c)(1)(C) because now we don't have to worry about the judge is going to giving a guideline sentence, he's going to listen to everyone, everything. And so --

ACTING CHAIR HINOJOSA: Ms. Chen, --

MS. CHEN: -- I would say it's different --

VICE CHAIR CARR: -- would you then say that the mandatory guideline system was a much better system than what we had before, if we're going to judge as to what was being said at the time of sentencing. Having done that for four and a half years without any guideline system and knowing exactly what wasn't said during that period of time, would

you then say that the mandatory guideline system then brought this openness and this transparency to the system and actually gave both sides the opportunity to respond to what judges were thinking anyway before the guideline system?

MS. CHEN: I didn't practice before the guideline system. I'm too young. But what I can tell you about --

ACTING CHAIR HINOJOSA: Well, I am old enough and have been a judge.

MS. CHEN: I would say since became a federal public defender, but what I can say is they talked a lot during the mandatory guideline system, but they talked about things --

ACTING CHAIR HINOJOSA: My question was do you think it was a better system than what was there before the passage of the Sentencing Reform Act?

MS. CHEN: I can defer to Pam on that, but can I just say that people did say a

lot during the mandatory guideline age, but it was about a lot of stuff that the defendants -- get, the defense lawyers were the only attorneys that would get it. You know what I'm saying? They were talking about the --

ACTING CHAIR HINOJOSA: Well, that does depend on the courtroom, but --

MS. CHEN: -- would the application know 14 did or didn't require helping. And after they were done with all that, then the sentence was imposed --

ACTING CHAIR HINOJOSA: Well, I don't know what courtroom you were in, but it depends on the courtroom I guess because whenever there was an application of discussion or a discussion addressed in an enhancement or a mitigating factors, you had to discuss the facts and you had to discuss the facts of that particular case and you had to discuss the characteristics of that particular defendant and the history of that defendant as well as the commission of that

particular offense. And I guess it depended on courtrooms, but I guess that's going to happen regardless of what system you had -- we had.

But I will say that under the old system, before the Sentencing Reform Act, there was no discussion or there didn't need to be a discussion other than the allocution of the defendant. There was no explanation from the court as far as saying, "I'm considering these factors" or "didn't happen to me." And do you want to, both sides, respond to this?

MR. HILLIER: Well, Your Honor, that's true. Judges made their decision and that was that, basically, unless they did something totally procedurally or something to be wrong but in my view, and I practiced a lot before the guidelines, the sentencing was way fairer before the guidelines came into effect. So whether we were talking more or less, my clients fared better pre-guidelines. The

guideline reign was a disaster for my clients. Forty percent of clients pre-guidelines, right around 40 percent, received probation.

And that classic case is asking you to reopen to the availability of probation, eight percent get it now. So basically a third of my clients are going to prison for just six months or whatever it might be during the timeframe, and I was talking about it a lot because I was upset by it and I was trying to convince the court to instill hope that there was some extraordinary circumstance in my client's life that might drive a sentence outside of the guidelines. Now we don't have to do that.

I think where we are now is better than we were in the pure discretion system and better than we were in the mandatory system.

ACTING CHAIR HINOJOSA: Wouldn't you say that's related to the Controlled Substances Act of 1986? In fact, I just had a staff get for me the information of the drug

cases that are being sentenced, and I think it's for fiscal year 2008. Seventy percent of those cases are not entitled to probation by law.

If you take out the noncitizens of the United States, 80 percent of those cases are not entitled to consideration of probation by law. And so it really is related more to the Controlled Substances Act of 1986 as opposed to the guidelines themselves, it would appear as to the availability of probation.

The other question I have, which I faced --

MR. HILLIER: I just say I disagree with you on that, Your Honor, but...

ACTING CHAIR HINOJOSA: Well, I'm just throwing out the number as to percentagewise, by law, and not by guidelines.

MR. HILLIER: But the guideline ranges for the other offenses where we're bound, you know, sort of tied to --

ACTING CHAIR HINOJOSA: Right, but

when you look at the statutes and the availability of probation in the drug case, those are the numbers that we come up with as far as on depending on the conviction, the statute conviction.

The other thing that I see on a regular basis, and I do sentence about 800 people a year and I have to say that I pay very close attention to every single one of my questions and read every single thing that comes across, any letter, including all the letters that come in Spanish. And I [am] often getting letters from defendants and family members saying -- although I don't know that I've ever received one from the government -- saying that I'm a fair sentencer and that's why they're writing these letters and they know I'll read them.

One thing that I see on a somewhat regular basis is a defender, for example, who's in front of me for several cases for sentencing on a particular day, will have

filed a basic canon brief with regards to a particular guideline to indicate to me why that particular guideline is not based on certain type of evidence and should not be followed.

And then in the next case with the same defense attorney, that brief has not been filed. And the strong argument is for me to stay within the guidelines in that particular case with the same guideline applicable in both cases. And so my question is: Doesn't that put people in a situation where a certain national policy that is being put out there affects individual defendants in different ways and how do I judge the credibility of an attorney who is telling me in one set of filings this guideline shouldn't mean anything to you, as opposed to in the next defendant on the same day arguing very strongly that I should stay within the guidelines when I raised issues that might indicate that I might consider this is a case that should go higher?

MR. HILLIER: Well, it's hard for me to put myself in that lawyer's mind because I'm not that lawyer, but I would guess that what that lawyer's doing is -- the lawyer believes based upon information that we sort of generated in analyzing how guidelines came about, that this particular range just sort of came from where, but there wasn't a reason for this particular range, so put this, deconstructed it, and made an argument why you shouldn't be tied to that region in this particular case and particularly since there are some mitigating circumstances that would allow for you to give a better sentence. In the other case, that lawyer's probably thinking there's some problems here with relevant conduct or with aggravators, and notwithstanding the bad science that may have gone into constructing this particular guideline, I think a fair sentence in this case would be this, and I don't want you to go up here.

I mean you're arguing for what you feel to be a good sentence, the best sentence that you can get for your client under all of the circumstances, hopefully taking your aggravators on one and extenuating mitigators on the other case. So I'm guessing that's [what] the lawyer did.

And I hope that you don't feel that detracts from the lawyer's credibility or the credibility of the argument about -- you know, the basis for the particular guideline range, but rather it's just a lawyer who's struggling to --

ACTING CHAIR HINOJOSA: Well, I don't know that I'd [not trust the] credibility of the lawyer, but I'd certainly [not trust] the credibility of the argument when you have in one sentence arguing that this guideline should just be thrown away, basically, and in the other one grabbing the book and basically saying these are the reasons why we should stay within the Manual.

And I guess I'm going to allow myself one more question, and Jonathan -- Commissioner Wroblewski actually has a question for you all.

COMMISSIONER HOWELL: I have one.

ACTING CHAIR HINOJOSA: And Commissioner Howell.

Your two-case example with regard to the two defendants that received the 5K1.1 motion, --

MR. HILLIER: Right.

ACTING CHAIR HINOJOSA: -- that was an ecstasy case; is that right?

MR. HILLIER: They were ecstasy cases, correct.

ACTING CHAIR HINOJOSA: And how much ecstasy was involved?

MR. HILLIER: They were level 32s before we began --

ACTING CHAIR HINOJOSA: So then they went to a 30 for parole adjustment?

MR. HILLIER: Went down to 22, 22.

COMMISSIONER WROBLEWSKI: The mitigating role.

ACTING CHAIR HINOJOSA: The mitigating role.

MR. HILLIER: You got -- you know, one of those cases where we got a [3B1.2], Avila Paul (phonetic), so safety valve, and beginning row, and et cetera --

ACTING CHAIR HINOJOSA: So is five kilos of cocaine

MR. HILLIER: Of ecstasy.

ACTING CHAIR HINOJOSA: But the reason that you went to the level that you did was because of the 5K1.1 motions?

MR. HILLIER: No, the -- no, the 22 --

ACTING CHAIR HINOJOSA: The judge granted the motion. I mean you others went to the 41, the 51, the 10 level --

MR. HILLIER: Right, right.

ACTING CHAIR HINOJOSA: -- based on all these other factors within the guidelines.

But this was a decision that was made by the court with regards to granting of the 5K1.1 motions, not a variance or departure based on the motion not being available?

MR. HILLIER: No. In my -- in both cases the motion was made.

ACTING CHAIR HINOJOSA: And granted?

MR. HILLIER: Yeah, well, in my case it was really a problem, and so -- both cases they were granted. In the other cases there was perhaps. But in my district, as we all know, we're fairly generous, and the judge screamed when I sa[id] that. You get about 50 percent from a long wind. You can accept that as a general rule.

So in both these cases my client[s] were then look[ing] at 18 to [inaudible] months in a typical case. So the judges went to the supervisor because of --

ACTING CHAIR HINOJOSA: Which, frankly, they put it under, under the

mandatory system, if they had the 5K1.1 motion?

MR. HILLIER: Well, yeah. I mean then the -- this was not a mandatory case --

ACTING CHAIR HINOJOSA: No, but let's say it was a mandatory guideline system. They could have done that under five --

MR. HILLIER: That's correct. That's correct.

MS. CHEN: But I think one of the things that Tom was saying is that 5K1.1 is not as generous in other dirks. And by a district you basically have to give them someone that they're going to prosecute before you get a 5K1.1, and even then it can be two or three levels. And so -- or no levels if they just -- if the information that the defendant had to give, the government already knew, for instance. Or for whatever reason they were choosing not to pursue it. And so --

ACTING CHAIR HINOJOSA: Right.

MS. CHEN: -- that it this be taken out of the hands of the prosecutors because in districts like mine you have to testify --

ACTING CHAIR HINOJOSA: And that depends --

MS. CHEN: -- before you --

ACTING CHAIR HINOJOSA: That depends on -- a different situation is to the U.S. Attorney decides to file motions for substantial assistance under the statute, under guidelines, and what the judges do with those motions --

MS. CHEN: Exactly.

ACTING CHAIR HINOJOSA: -- depending on where they're filed.

MR. HILLIER: 5K1.1 is real relevant. One thing that was important in this case and I think is worth emphasizing because of *Booker* and its progeny is that I really advocated with Probation and the U.S. Attorney before we got to the judge. And both of those entities came in with remarkable

recommendations in both cases, so I think that's a factor that's very important to us. When we can go to the U.S. attorney and say check this only, you know, my clients -- he's here because of these issues, personal characteristics. And in both our cases for my clients, the government and the probation have raised those concerns, and the information is meant to their recommendations.

ACTING CHAIR HINOJOSA: Commissioner Howell.

COMMISSIONER HOWELL: I just wanted to thank all the panelists but in particular federal public defenders, I must say that the submissions that you made to the Commission are complete, incredibly thorough, and hefty. And this one really, you know, shows the passion with which the Federal Public Defender is taking sensitive issues and so on behalf of myself and the Commission I want to thank you all for all of the work.

I did find more intriguing your

analysis of 28 USC 994(c), (d), and (e), and your analysis that -- if I understand it correctly and I wanted to make sure I was understanding it correctly, that the Commission's chapter, you know, 5H factors, saying that age, socioeconomic status, you know, family circumstances are not ordinarily relevant in the sentencing, are a misinterpretation of the purpose and intent of 994(d) and (e); is that the thrust or your argument, that for the past 20 years the Commission's guidelines --

MR. HILLIER: They may not --

COMMISSIONER HOWELL: -- misinterpret the plain language of those factors?

MR. HILLIER: They may not be. At the minimum what the Commission did and what I heard is that -- I've read the Atlanta testimony. I saw questions from the panel -- from the Commission indicating that it felt that these factors weren't relevant to the

sentencing, they're not generally going --

COMMISSIONER HOWELL: Ordinarily.

MR. HILLIER: -- what I'm saying at a minimum what the Commission did after deciding probations was over used, they said to (d), which charged the Commission with determination what relevance these factors have in the sentencing decision, the probation sentencing decision, they decided they're not ordinarily relevant. That was a -- they took the statute which clearly authorized these to have relevance to the sentencing decision, they made a decision that they're not going to be ordinarily relevant, so -- but this statute doesn't require that. That was a policy decision of the Sentencing Commission. The statute enabled the Commission to decide however it wanted what the relevance was. And of course now we know that the Supreme Court at least and circuit courts are saying that they are.

COMMISSIONER HOWELL: Well, it has

been a disconnect frankly in my own mind between 3553(a) and considering the history and characteristics of the defendant and the difficulty of reconciling that with 994(d) and (e). And I wouldn't say, you know, and I think that the original Commission struggled with that and read the plain language of 994(e) and determined that where it says the Commission shall assure that the guidelines and policy statements recommending a term of imprisonment or length of term of imprisonment reflect the general inappropriateness of considering education and vocational skills, et cetera. And that's almost exactly the words that they used --

MR. HILLIER: Right. And that exactly means if you're going to put --

COMMISSIONER HOWELL: -- we used in 5H.

MR. HILLIER: -- somebody in prison it's not because of these factors. But if you are -- but there's an alternative, and that's

probation. And that's what (d) relates to when decided what relevance these factors had now in the probation. If they can't be used prison but the Congress has asked you to determine the relevance otherwise, it has to be to the probationary decision. And in (d) it says: Determine what relevance, if any, they have to that decision, --

VICE CHAIR CARR: Mr. Hillier, can I --

MR. HILLIER: -- the same language that's used to decide how serious the offense is right up there in (c). I mean the qualifying language -- if you read that qualifying language to say they're not relevant, then the seriousness of the offense isn't relevant neither.

VICE CHAIR CARR: Are you saying the Commission could have gone either way and went an unfortunate way, or were you saying the Commission got it wrong and misinterpreted the statute?

MR. HILLIER: Well, --

MS. CHEN: I think what we're saying is the Commission could have gone either way, but what we've heard consistently is that the Commission understood the statute to mean that these factors could not be relevant. If the reason that the Commission promulgated the five -- the prohibitions is because they believed that (d) and (e) said that the Commission was sure that they would not be relevant, then we believe that they is a wrong interpretation. And I think it really helps to look at 994(c) first and (d) together. So (c) and (d) talk about what factors the Commission is supposed to consider, whether they're relevant or not.

(c) is if that's characteristics. (d) is the offender characteristics. But the preparatory language is identical. So clearly Congress didn't intend for (d) to mean you can't consider any of these and for (c) to mean you must consider all of these. Then how

do you reconcile and (d) and (e)? Because (d) says the Commission is supposed to [consider] whether and to what extent these factors are relevant. And then (e) takes a number of those and says the Commission shall assure that the guideline and policy statements in recommending a term of imprisonment or length of a term of imprisonment reflect the general inappropriateness.

So this is a much more specific guideline which talks about if you're to be recommending a term of imprisonment, it can't be based on somebody's vocational skills, a lack thereof, for instance. And the legislative history supported the sentencing format. One of the purposes was that these factors not be used to warehouse defendants who didn't have vocational skills or educational skills or socioeconomic status in prison.

So I think that we're saying, right, that the Commission took a wrong turn

at one point and said that these things are not ordinarily relevant. But to the extent that the Commission or Commissioners have said that Congress required that we take that fork in the road, that is where the misinterpretation comes.

ACTING CHAIR HINOJOSA: So you say when Congress -- let's say the 70 percent of the cases of the drug field that are not entitled production, you think Congress is saying that it's generally inappropriate in those cases, 70 percent of the cases, to consider the issue of age, or whatever, in determining what sort of imprisonment to impose?

MS. CHEN: I think what Congress was saying is that you shouldn't put someone in process because of their --

ACTING CHAIR HINOJOSA: Or a term of imprisonment as I think you read it --

MS. CHEN: Right. Well, you should have --

ACTING CHAIR HINOJOSA: So --

MS. CHEN: -- a longer term of imprisonment --

ACTING CHAIR HINOJOSA: -- in 70 percent of the drug cases where probation is not allowed by law, if you make the argument to the sentencing judge, myself for example, I can under their theory then go back to the statute and say well, that's just not generally appropriate for me to consider all or all these family ties and responsibilities, because I'm considering a term of imprisonment or imprisonment.

MR. HILLIER: You're required in that case to impose a sentence of imprisonment.

ACTING CHAIR HINOJOSA: Right. And so therefore is guidance to me that under the 3553(a) factors, I shouldn't consider those? That they're normally inappropriate?

MS. CHEN: In terms of not opposing probation? Because of course --

ACTING CHAIR HINOJOSA: No, in terms of the sentence length that I pick, that I -- those are generally inappropriate for 35 and (3)(a) factors, because that's the way you read the statute, that this is only for imprisonment or terms of imprisonment. And that, therefore, if I'm trying to put the statute as you read it with the 3553(a) factors, where Congress says probation's not a verb, that I normally take these factors out of my mind as far as considering them when you make the argument that I should consider them with regards [to] the length of imprisonment I impose in those cases.

MS. CHEN: If I were arguing to you as a judge at this point, I would say in that area that statute is more ambiguous. And then we would turn to the legislative history. And the legislative history does indicate -- or as far as I've read, the history does indicate that the language was intended to prevent the warehousing of poor, unemployed, et cetera,

defendants. And so then I would say you can't consider it to say, well, he's not going to get a job, he's never had a job, and he's not going to get a job. So therefore, we should just put him in prison so he can, you know, three squares and a cot.

I know you would never say that. I know you would never say that.

So what I'm saying is that I think Congress intended --

ACTING CHAIR HINOJOSA: No, I don't know any judge --

MS. CHEN: -- that's my reading of the --

ACTING CHAIR HINOJOSA: -- that would say that, really.

MS. CHEN: I don't know any judge --

ACTING CHAIR HINOJOSA: And so what I'm saying is you can't have it both ways. If you read the statute a certain way, well, then it has to apply under all circumstances, but

I've taken enough time here.

COMMISSIONER WROBLEWSKI: Thank you very much, Judge.

And thank you all for being here and for participating, and especially thank you for the time and effort that obviously went into all of your presentations.

The theme for me of the whole thing has been back to the future. And, Tom, what it seemed to me that you were arguing for and what you what you described in some of your submissions is your return to the therapeutic model of sentencing. A model that's focused on the offender and the value of particular punishments for the offender, the system that we largely had up in this country until the 1970s and the federal system till the 1980s.

And, as you know, in the 1980s with the Sentencing Reform Act we changed dramatically. We moved to very different model of sentencing, one that some people have described as just desserts. That regardless

of the offender's personal characteristics, if you committed a certain crime, you roughly served a certain amount of time, whether you were Martha Stewart and you knew for certain you were going -- we thought pretty certain that you weren't going to commit a new crime or somebody else, if you committed that obstruction offense, you were going to go to prison for some amount of time.

And of course what we have now, after *Booker*, is we allow individual judges to determine what model. You're advocating and I think the submission's advocating that the Commission should reach into the guideline system, the guideline system largely is a just desserts model and it should come closer to the therapeutic model.

And I'm not sure we should do that, and let me tell you why, and I'm curious what you think. If we go about -- and my question really is should the Commission spend its time trying to come up with a new balance between a

therapeutic model and a just desserts model. And the reason I'm a little skeptical about doing that is because under the *Booker* regime, the judges of course should consider the guidelines, but then ultimately have the only thing on their own and look to the 3553(a) factors.

So if we come up with a new balance between therapy and just desserts, defense attorneys are under no obligation to really argue the therapeutic model 100 percent. And so it seems to me that under the current system, as you know, and as we've heard over and over again, alternatives to incarceration are currently available. The two cases that you described, the judge gave an alternative to incarceration, regardless of what the guideline said. And if we just go about trying to expand that a little bit or expand it a lot, unless we expand it completely, there are still going to be arguments made, and the decision about whether it should be a

therapeutic model or a just desserts model is ultimately going to be left to the -- to the individual judge.

So my question to you is: Should we go down that road, am I right that it's largely a waste of time, should we try -- who should ultimately be the decider of whether we have a therapeutic model or a just desserts model, and doesn't that necessarily mean some sort of constraint on discretion for judges?

MR. HILLIER: Well, I was on -- I'm not just a strict judge-should-have-discretion kind of guy. I've been -- I was on the Constitution Project since the initiative and we actually came out with a recommendation that you have -- the guideline system has lots of advantages and lots to be said for it. So I think -- and that's true. I think the idea of some degree of certainty for different crimes and under particular circumstances is huge and important, not just for society but for the defendant.

In advocating -- what we're having to [do] now is the *Booker* decision and sort of the resistance to the *Booker* decision at the beginning by judges, sort of the threats, you know, about allowing this, you know, and the sky's going to fall. And then mandatory, the guidelines, and all that. So what we're -- what I'm advocating for right now -- I mean we're -- what we really want to see is to see this play out a little bit, to see what happens.

And I think as Judge Lasnik said and as all the judges said in Atlanta, this is working, give us some time here. What we would really like to see in the short run is some tweaking where there are signals to you that the guidelines aren't really operating fairly. And you see it in areas where there are these clusters of departures. That is a signal, as Judge Lasnik said, that these things might be too harsh.

So if we go there and we fix that a

little bit, then maybe judges will figure, you know, how to make these things make more sense, and you'll see a rearrange of sentencing within the guidelines that you've tweaked.

If you take five -- you know, the language of 5H out of the way so judges don't get confused or so that there's not this dissidence between what 5H says and what the cases say, then judges -- then, you know, I think you'll see greater consideration of, and as Davina said, discussion about factors that make some sense in a certain sense of discretion, so if you have --

COMMISSIONER WROBLEWSKI: Can I ask --

MR. HILLIER: -- an entirely therapeutic model, but it's just being more rational.

COMMISSIONER WROBLEWSKI: But let me take that example just a little bit. The Congress enacted the safety valve, said we

think there should be exceptions to these mandatory minimums. For first offenders, who cooperate, nonleaders, and all the rest. But they said there should still be some floor, 24 months. Okay, they were subject to a five-year mandatory, there should be exception, 24 months. If the Commission goes down the road that you're suggesting and we take out 5H1.1 and we say, "You know what, Judge, you consider age in these circumstances. But even if the person is young or old, or whatever the mitigating age is, you should still give some term of imprisonment for somebody who transports five kilos of ecstasy over the border."

What -- I mean we've done something, but you're still going to argue for a probationary sentence. We've changed the mix a little bit in the book, but we still have a somewhat incoherent system with each judge deciding the model. Am I right or wrong about that?

MR. HILLIER: Well, I think what you've done is you've given judges more direction on how they should sentence in these types of cases. And what you're going to see is more judges actually having -- making decisions consistent with what advice you gave. You are still going to see the -- you know, the lawyers of the persons that I represented advocating for more for the reasons that we articulated. And in both those cases the reasons were strong and so the judge said, "I'm going to make an exception to this policy for these reasons," and they articulate that.

And there's nothing wrong with that. You're not swinging the door open wide for everybody being able to get below that 24-month floor, if that's what it is you're say[ing] in your advice, but there might still be exception circumstances where that is going to occur.

I think sort of the unarticulated

concern there is that if you give judges that discretion they're going to use it widely, and I don't -- I think you should have more confidence in our judges.

I read Judge Hinkle's testimony, and what a measured person that judge is, and he basically says hey, look, untie our hands at least to the extent so that we -- you know, it's better to give five fair and five unfair [sentences] than ten unfair uniform [sentences], and we can be trusted with doing that.

So I don't think you're throwing open the barn door so [wide] by doing that. I think what you're going to see is that judges are going to respect what you're doing. And they're not going to go down to probation unless they can say this is appropriate in this case because the sentencing purposes are not furthered by putting this person in prison, and that penalty is really greater than is necessary.

COMMISSIONER WROBLEWSKI: But ultimately who should decide that? Should it be every --

COMMISSIONER HOWELL: Well, the judge --

COMMISSIONER WROBLEWSKI: Decide that, in every case the judge should decide that? And if Congress --

MR. HILLIER: Well, unless Congress has said it's a mandatory minimum.

COMMISSIONER WROBLEWSKI: Correct. That's the rule.

ACTING CHAIR HINOJOSA: I think that's the last question. It is. We appreciate it, on the part of the Commission, that you all have made your presentations. And I echo what Commissioner Carr has said, that you can provide information to the Commission, and it's appreciated very much. And thank you all for your taking your time from work on a regular basis.

(The hearing was recessed for the

day at 5:28 p.m.)

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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Thursday, May 28, 2009

The United States Sentencing Commission met at the University of Stanford Law School, Stanford, California, at 8:39 a.m., Ricardo H. Hinojosa, Acting Chair, presiding.

MEMBERS PRESENT:

RICARDO H. HINOJOSA, Acting Chair
WILLIAM K. SESSIONS III, Vice Chair
WILLIAM B. CARR, JR., Vice Chair
BERYL A. HOWELL
DABNEY L. FRIEDRICH
JONATHAN J. WROBLEWSKI

ALSO PRESENT:

JUDITH W. SCHOEN, Staff Director
GLENN R. SCHMITT, Director, Office of Research and Data
LOUIS REEDT, Acting Deputy Director, Office of Research and Data

T A B L E O F C O N T E N T S

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

(8:39 a.m.)

ACTING CHAIR HINOJOSA: Good morning. This is the second day of our second regional public hearing with regards to the 25 years after the Sentencing Reform Act. And, as I indicated yesterday, we are very grateful for the individuals who have taken up their time to come share their thoughts with us this morning. And I can't say enough, on behalf of the Commission, how much we appreciate your presence here.

We do have three district judges, which is the second panel for district judges. This morning we have the Honorable Vaughn R. Walker who was appointed to the U.S. District Court for the Northern District of California in 1989. And he has served as the chief judge since the year 2004. He did clerk for the U.S. District Court's Central District of California, Judge Kelleher. After law school he was in private practice in San Francisco.

And he received his Bachelor's from the University of Michigan and his law degree from this very school here, the Stanford Law School.

We also have Judge Edward F. Shea who is a judge in the United States District Court for the Eastern District of Washington. And he's been on the bench since 1998. The judge is a graduate of Boston State College with both a Master's and a Bachelor's from there. And Georgetown University Law Center is where he received his J.D. The great thing is that as far as prior employment he was a police officer with the U.S. Capitol Police Force for three years in Washington, D.C. and was in private practice. And after law school he also clerked for a judge on the state court of appeals. And we're very fortunate to have Judge Shea with us this morning.

We also have the Honorable Lynn Winmill who was appointed as the district judge for the U.S. District Court for the

District of Idaho in 1995. And he also has served as chief judge from 1999 until the present. And he was in practice in Colorado and later in Idaho before being appointed to the bench. And he actually was a state judge before taking the Federal bench. And he is a graduate of Idaho State University and has received his law degree from Harvard Law School.

And we'll start with Judge Walker. And Judge Walker has a plane to catch, I believe, or has -- no, he had not a plane to catch because he's going to San Francisco.

JUDGE WALKER: No. I have criminal defendants to sentence.

(Laughter.)

ACTING CHAIR HINOJOSA: So he will be leaving us right after his statement and any questions we may have of him. We'll change the order a little bit. Normally we have the statements of all three of them and then questions then answers. But if anybody

has questions of Judge Walker we can go ahead and ask him before he has to leave.

Judge Walker.

JUDGE WALKER: Very well. Thank you, Judge Hinojosa, and thank you to you and to the members of the Commission for coming all the way out to the West to hear us on this part of the country about the important issues that are committed to your responsibility as members of the Sentencing Commission.

It's, I'm sure, helpful to have a point of view of those in areas outside of Washington. And we appreciate your willingness to come and to hear our views.

Now what I'm going to express, of course, are my personal views. And they are views that are shaped by some 20 years as a federal district judge in the Northern District of California [and] as Judge Hinojosa said, the last five years as chief judge.

Now I came to the bench with no prior judicial experience and with no

experience in criminal law and sentencing. I was a litigator, trial lawyer, but exclusively on the civil side. And so I came to the bench pretty much as a clean slate as far as criminal law was concerned and certainly as far as sentencing was concerned.

When I came to the bench, it was after the effective date of the Sentencing Reform Act but there were still at that time a good many offenders who had committed their wrongdoing before the guidelines became effective. Thus, at the outset of my judicial career I was called upon to frame and impose pre-guideline sentences, as well as sentences under the guidelines.

With respect to those pre-guideline offenders, I was unfettered by the guidelines although, of course, the presentence reports always calculated what the sentence would have been had the guidelines applied.

I found an important difference in the way that I approached sentences governed

by the guidelines and those not subject to the guidelines. With respect to nonguideline offenders I found that framing a sentence required me to drill down deeper into the facts of the offense and the characteristics of the offender in order to satisfy myself that the sentence I was about to impose was, in my view, fair and appropriate.

In short, I needed to work harder and for myself more fully because, although I have the guidance of the guidelines, I lacked its constraints. In the case of sentences governed by the guidelines, I found the baseline they provided diminished the felt need to delve as deeply into the facts of the offense and the characteristics of the offenders, and shifted the focus away from those factors to whether the guidelines were, in some way, inappropriate to the case at hand.

The gravitational pull of the guidelines becomes irresistible in all but the

most unusual cases. Although viewed abstractly, the judge's moral obligation to find an appropriate sentence is no less than a guidelines' case.

The mere presence of the guidelines diminishes the imperative to search the record for the facts relevant to an appropriate sentence. Imposing a sentence on another human being for criminal conduct is a purely awesome responsibility. It is easy to become blasé about the process when one is called upon to do this routinely.

By providing a cookbook with recipes for sentencing, the guidelines have a tendency to induce judges to approach sentencing as a working-out of a solution to a puzzle rather than assessing the human price to be paid by an offender for the harm that he has done to the victims of this criminal conduct.

Since the *Booker* decision and its progeny some of the moral imperatives of

seeking [an] appropriate sentence [] lost with the advent of the guidelines has returned. To move then to less flexible guideline standards would, I truly believe, be a grave mistake.

The Commission should be ever mindful that no matter how comprehensive, no matter how thoughtful, no matter how well intended, crafting and imposing a criminal sentence should always allow plenty of room for the manifold facts and circumstances that are relevant to fashioning an appropriate punishment. And these can never be adequately captured in a numerical grid.

For that reason I think the Commission should make every effort to urge Congress to widen the range of appropriate sentences under each of the various categories that the guidelines provide. I realize there is a statutory limitation that the Commission faces, but the Commission's experience, I think, should take account of the tremendous variation from offense to offense and offender

to offender and urge Congress to give the guidelines greater leeway than they presently have.

I wish further to address a particular concern I have with the guidelines in their current state. The guidelines very heavily rely on drug quantity as a proxy for culpability in drug cases. The use of drug quantity as a proxy originated in Congress, as you well know, with the Antidrug Abuse Act of 1986, known informally as the ADAA.

The ADAA codified mandatory minimums based on drug quantity as measured by weight. According to this Commission's 15-year report, Congress seems to have been motivated by the notion that all else being equal those apprehended in possession of greater quantities of drugs play a more serious role in drug offenses and, therefore, merit harsher sentences.

Following the ADAA's passage, the Commission linked drug amounts in the statutes

to guideline ranges and extended the quantity-based approach. In the 15-year report, the Commission noted that the historical record lacks evidence as to why the Commission extended the ADAA's quantity-based approach.

The report hypothesizes that the Commission believed that quantity was an acceptable proxy for the level of harm and that the Commission wished to avoid sentencing cliffs in which a small change in quantity triggered a substantially different sentence under the guidelines.

This post-hoc justification, combined with the Commission's admitted uncertainty as to that justification's basis in reality, hardly inspires confidence in the decision to extend the use of drug quantity beyond what is mandated by statutory minimums.

In Fourth Amendment jurisprudence, as we all know, an articulable justification is required for a legal search. Without one the search is unconstitutional. Criminal

defendants, similarly, deserve an articulable justification for the guidelines under which they are sentenced, particularly given the presumption of reasonableness to which the guidelines are held to be entitled.

The lack of an articulable justification for the Commission's use of drug quantity as a proxy for culpability is itself sufficient to call into question this particular approach to drug sentences. The hypothetical justification[s] speculated by the Commission in the 15-year report are themselves suspect, I would submit.

A few situations illustrate the point. Imagine a courier with little involvement in a drug transaction who perhaps does not even know what or how much he is carrying. If this courier happens to be transporting a large quantity of drugs he would, under the guidelines, receive a harsh sentence.

In contrast, an individual who

sells a small quantity near a schoolyard is given a lesser sentence. And yet I would submit that the latter may very well represent a far more serious social threat, but the guidelines would support a lesser sentence for such a person.

The Drug Quantity Table not only miscalibrates the social harm associated with drug offenses, lower quantity drug transactions are just as likely, in my view, perhaps even more likely to be accompanied by physical violence than transactions involving large quantities.

Street-level and hand-to-hand drug dealing degrade cities, neighborhoods, public housing, penal institutions, and society in general. Should we necessarily assume that two-bit drug dealers are less harmful than so-called drug kingpins?

In our courts such hypothetical scenarios become very real. Last year Judge Gertner in the District of Massachusetts faced

such a situation involving a defendant who had only a small role in the offense and had no previous criminal record. Nevertheless, because the quantity of drugs that the defendant was transporting he faced a substantial sentence under the guidelines.

Judge Gertner departed from the guidelines because she disagreed with the emphasis placed on quantity rather than on other more pertinent factors. She noted in her opinion that the deductions allowed by the guidelines for a defendant who has a minor role do not offset the base offense level, which is determined by the quantity of drugs involved.

As Judge Gertner also observed, criticism of the use of drug quantity as a proxy for culpability is not new. In 1994 the Drug Violence Task Force was created to report to the Sentencing Commission. The Task Force's specific recommendations included reexamining the role of drug quantity in the

calculation of offense levels in drug cases.

The Task force stated this is considered by many to be a misleading indicator of an individual's culpability for the offense and noted the particular unfairness for individuals with minor roles in offenses involving large quantities. Perhaps because the Task force was unable to reach a firm consensus and ultimately dissolved, this recommendation was not adopted.

Professor Albert Altschuler similarly criticizes the use of drug quantity in sentencing, claiming that it makes little sense with many offenders. He, too, notes the drug couriers may not know at all the quantity, value, or kind of drugs they carry, factors on which the length of their imprisonment turns.

I cite these sources to demonstrate that I'm not alone in my concern that the use of drug quantity as the chief determining factor in drug sentencing is, I think, highly

problematic. A proxy that is so imprecise does not merit the approbation of the Commission through the inclusion in the guidelines in its present form.

The issue of sentencing cliffs is no longer as significant a concern post-*Booker*. Since the guidelines are not mandatory judges will not be forced into arbitrarily distinguishing offenders based on small differences in quantity solely because of the guidelines. Statutory minimums, of course, inevitably create such cliffs. But the Commission should not aggravate the problematic character of these minimums by conforming sentences not subject to statutory minimums to these same features.

There is no reason, I submit, to follow Congress' questionable lead by extending the use of quantity in drug sentencing beyond what the statutes require.

The use of quantity as a proxy for culpability is not only imprecise, it also

rests on an unrealistic assumption about narcotics trafficking. I believe that the initial motivation for this policy decision rests basically on an illusion, the illusion of the drug kingpin.

The market for drugs is, indeed, a market and some players are bigger than others; some are more evil than others. But a Hollywood interpretation of the drug trade seems embodied in this Drug Quantity Table, specifically the idea that there are larger-than-life evildoers lurking at the heart of the system and if only we could capture and punish severely these villains the industry would unravel and illicit narcotics could be driven from the land.

Grand and despicable characters make for compelling narratives in films, television shows, and novels. But in my experience these are not the ones who are cast in court. These are not the characters cast in the real-life dramas that we see in our

courts.

We shouldn't predicate our rulemaking on an attempt to ensnare an illusory villain. The hypothetical drug kingpin may serve a political purpose for members of Congress who are attempting to pass legislation and appeal to their constituents. Screenwriters and novelists may also find them useful, but literary, fictional, or political demonization of imaginary individuals should not leave this Commission to create misdirected sentencing guidelines that serve rhetoric better than reality.

Finally, the Drug Quantity Table is really little more than rank pseudo-social science. The Drug Quantity Table assumes, for example, that one kilogram of marijuana represents the equivalent harm to society of one gram of heroin, but the one gram of cocaine is only as harmful as 200 grams of marijuana, while a gram of MDMA equates to 500 grams or a half-kilogram of marijuana.

Exactly where these numbers stack up with social harm associated with these drugs is never explained. And the Commission has been notably silent on the empirical justification for these distinctions. And, well, it should be silent because there simply is no justification.

To describe the offense levels associated with the various quantities in the Drug Quantity Table as irrational I think understates the matter. Arbitrary distinctions are an inevitable part of any legal regime. But those are the kinds of distinctions appropriate for the legislative branch but not for a judicial branch and not certainly for a Commission which guides a judicial branch in imposing sentences on offenders.

A claim that there is an inevitable connection between drug quantity and harm to society as the product of common sense I think is subject to serious question. The idea that

you can assess the seriousness of a drug offense by the quantity involved is simply an unexamined assumption that underlies the Drug Quantity Table.

And I would strongly urge the Commission to open the subject up to see if there is an empirical justification for linking quantity and the severity of sentences. I do not suggest for a moment that a judge in imposing a sentence in a drug case should not take into account the quantity involved. It may, indeed, have some measure -- it may reflect some measure of the seriousness of the offense, but is not the kind of lock-step, one-to-one relationship that the Drug Quantity Table suggests.

The interests of justice are ill served by recommending sentences based on an inaccurate and an imprecise proxy such as the Drug Quantity Table. This is a policy for which there is really no articulable justification. Like a police officer who

seeks a search warrant without an articulable justification, the Commission, I submit, lacks an articulable justification for the offense levels given by the Drug Quantity Table.

As a warrant should be denied to an officer who fails to provide an articulable justification for a search, so the Commission should reject sentences where it cannot provide an empirical basis and an articulable justification for the sentences that it recommends.

ACTING CHAIR HINOJOSA: Thank you, Judge Walker.

Are there any questions before Judge Walker has to leave?

Bill.

VICE CHAIR SESSIONS: Judge Walker, I appreciate your comments. When you translate your observations to the guideline structure, you are proposing, you know, fairly radical changes.

First, in regard to the 25-percent

rule, if you're talking about wider ranges, then you're eliminating that rule, talking about a totally different chart with much less than 43 offense levels and perhaps an adjustment to the criminal history score as well. You're obviously consolidating those.

And you're suggesting that the Commission break its tradition of linking drug guidelines to mandatory minimums and, as a result, creating the cliffs.

There has been a lot of discussion about drug quantities driving the sentence. And one of the ways that the Commission historically has tried to reduce the impact of drug quantities is to use other factors by way of enhancements to either increase or, in some cases, decrease the penalties. So, therefore, the focus of sentencing is only partly involved in the issue of drug quantity and, in fact, the judge spends much of his or her time dealing with questions of role in the offense, use of weapons, violence, injury, et cetera,

all of the other factors, which are quite significant. And in fact you just referred to the school yard as another significant factor.

I think you get, you know, universal support from the members of the Commission that those are factors which are extremely important in regard to sentencing, but when you talk about drug quantity being essentially irrelevant, I wonder if you are in fact going perhaps just a bit too far.

The drug defendant who is in possession of large quantities signifies something in regard to the seriousness of the offense in whether it's a leadership role or whether it's just this is a person who is engaged in significant drug distribution, that's a relevant factor.

And I wonder if rather than, say, eliminate the consideration of drug quantity, you are really saying that it is a factor but it should be among other factors in arriving at a just sentence?

JUDGE WALKER: That is exactly what I'm saying, that it is a factor to be considered, but it is not the factor that should drive the sentence. It should be weighed along with role in the offense and all of the other factors that you point out.

The trouble with the Drug Quantity Table is, first, it overwhelms in most cases all of these other factors. That the numbers -- the numbers --

VICE CHAIR SESSIONS: Isn't it a question of --

JUDGE WALKER: -- the numbers are such that the adjustments for role in the offense and the other factors only offset to a limited degree the import of drug quantity.

What drug quantity should be is simply one of numerous other factors that would be considered in determining the seriousness of the offense and the threat to society, which the offense represents. But it overwhelms these other factors, first.

And, number, two, it has what I submit is a false illusion of precision. The idea that certain quantities of drugs can be made equivalent in social harm to other quantities of drugs is simply an unexamined assumption on the part of the Commission and the Quantity Table -- Drug Quantity Table. And there simply isn't any evidence that the Commission in its reports has been able to point to that establishes that kind of precise relationship.

So I think because of the importance of drug quantity in determining sentences, that the Commission has a responsibility to look at the underlying justification. And I think when the Commission does it will reduce quantity to simply a factor among many others in determining what is an appropriate offense level.

VICE CHAIR CARR: Judge Walker, upgrade aside drugs and drug guidelines for a

moment, given that we're in the post-*Booker* world with what you've described is your increased requirement again to go back and search the record, why is it as important to you that we widen the bands?

JUDGE WALKER: It probably is not as imperative now as it was previously, but I think the 20-percent swing is simply too narrow to reflect the qualitative factors of the offense and the offender. And most judges I think would like very much to adhere to the guidelines. The guidelines are helpful in lots of ways to a judge and they're helpful because if your feeling about what the sentence is is far outside what the guidelines provide, it's a wake-up call to help you decide whether your assumptions are correct, whether you're viewing the matter properly, or whether you're driven by some misunderstanding or some other factor.

So I think we would like to adhere to the guidelines to the degree possible,

consistent with all of the other factors, and frankly a 20-percent swing is just too narrow to reflect the tremendous variation in the characteristics of the offense and the offender.

VICE CHAIR CARR: And now a drug question. Assuming that drug quantity is not a good proxy for culpability, I assume that you would agree that type of drug may well be a proper consideration as to what a starting point might be in terms of the severity? Marijuana versus heroin.

JUDGE WALKER: I don't know about that. Does the Commission have some empirical evidence to substantiate that assumption?

VICE CHAIR CARR: And that's what would determine the difference for you, whether we would have empirical evidence as to the social harms of marijuana versus heroin?

JUDGE WALKER: Correct.

COMMISSIONER HOWELL: Well, and that's a good lead-in to my question which is

how, in your view, should the Commission respect policy determinations made by Congress, because Congress of course in its statutes has indicated that quantity is an important consideration for Congress in establishing penalties for different drug offenses, and Congress has made the policy decision that, for example, heroin is to be punished more severely than marijuana? Is it your view that the Commission as an independent agency should just ignore those policy decisions that have been made by Congress?

JUDGE WALKER: No, of course not.

COMMISSIONER HOWELL: Well, what kind of deference and what level of deference do you think that the Commission is required by law to show to Congress?

JUDGE WALKER: Well, there's no question that we all have to apply [inaudible]. And we have to do more than pay deference, we have to obey those laws.

COMMISSIONER HOWELL: Right.

JUDGE WALKER: There's no question about that. But a regime that is put in place that the Commission has found reason to suspect is not a rational one, seems to me imposes two responsibilities on the Commission.

The first is to try to urge Congress to change the law and the second is where the Commission has discretion, as it does in vast areas of sentencing, not to follow what the Commission has determined is not an appropriate standard. So I'm not suggesting for a moment that we can do away with the minimum mandatories or with the congressional limitations that they place upon us, but that doesn't mean that we should march lemming-like into the sea where we are convinced that Congress' determinations are not appropriate.

ACTING CHAIR HINOJOSA: Judge Walker, you use the example of the courier who

may not know the controlled substance nor the amount of the controlled substance that they're either bringing across the border or possessing with the intent to distribute in a hidden compartment or otherwise in a vehicle or other -- you know, hidden someplace and that they're responsible for that.

Are you bothered by the fact that case law interprets the statutes, at least for mandatory minimum sentences, as holding that person responsible for that type of drug and the amount of drugs, at least for mandatory minimum purposes? It's case law that has determined that an interpretation of the statute means that you're responsible. If you knew you had a controlled substance and that you were possessing it and were intending to distribute it to someone else, that you're responsible for that controlled substance and the amount of weight of that controlled substance? Do you think the courts have misinterpreted the statutes or does that

bother you that perhaps the courts shouldn't have done that or...

JUDGE WALKER: Well, you're assuming that the courier knows of either the nature of the drugs that he's carrying or the quantity --

ACTING CHAIR HINOJOSA: Well, I'm not assuming it, --

JUDGE WALKER: -- and --

ACTING CHAIR HINOJOSA: -- the case law is that if the courier knows that there is a controlled substance, even though the courier may not know what the controlled substance is, that the courier, for purposes of this statute, is responsible for that controlled substance that it turns out to be and the weight of that controlled substance.

Do you think the courts in developing the case law have been interpreting the statutes that way?

JUDGE WALKER: Yes, I do. But we all sit in the Ninth Circuit and so we face

that situation frequently, where we think --

VICE CHAIR SESSIONS: Where the courts are wrong, is that --

JUDGE WALKER: That's exactly what --

VICE CHAIR SESSIONS: -- what you're suggesting?

ACTING CHAIR HINOJOSA: There is a record of this, okay.

VICE CHAIR SESSIONS: Is he still here? No, he's not here.

JUDGE WALKER: We all face that, don't we, Judge Sessions.

ACTING CHAIR HINOJOSA: And I guess --

JUDGE WALKER: Even in the first -- Second Circuit.

ACTING CHAIR HINOJOSA: I guess I want to share another personal view with you, because we've both been on the bench so long and we both have done sentencing before the guidelines, you know, since I've been on

the bench, I guess, six years longer than you have. But I have to say that the thousands of defendants that I have sentenced, I don't know that I've ever seen a defendant who has been surprised that I have indicated that this is a tougher sentence because of the type of drug and the weight of the drug that you were involved in.

I have -- and, you know, we develop a sense as to what the defendants are thinking without sometimes them even saying anything, but I don't know that I've ever had the look of 'Why are you making an issue of the weight.' And you mentioned that you think criminal defendants are confused about this and find it unfair, but I don't know that I've ever had a reaction from a defendant in court when I've used the weight, both under the old system and the mandatory guideline system and the advisory guideline system as an issue with them as to, you know, this was a large amount of drugs. It was going to cause a lot of

damage to society. I don't think that I've ever had the look of you're someplace from Mars here.

JUDGE WALKER: Well, I don't -- I don't know that the lack of surprise of defendants who, after all, by the time sentencing rolls around they've had an opportunity to learn the consequences of the sentence that they face, I'm not sure that is a very illuminating factor.

ACTING CHAIR HINOJOSA: I guess I brought it up because you had mentioned it, this certainly surprised criminal defendants that their sentence would be based on weight.

JUDGE WALKER: I don't believe that I -- I certainly did not intend to say that the defendants are surprised by that fact. I think by the time they face sentencing and they've read the presentence report or had it read to them, that they are aware of what the regime is, and so they realize what their exposure is.

My problem with this is in large measure the false impression of precision which the Drug Quantity Table gives, precision both in terms of measuring the social harm of particular narcotics and also quantity. Importing a ski bagful of marijuana by one person may have very limited social impact. Whereas in another case given certain circumstances it may represent a far more serious offense. And so I don't think quantity alone should be the driving factor in determining the offense level and that is exactly what it is under the Drug Quantity Table.

ACTING CHAIR HINOJOSA: Judge, do you think -- and I'm sure you've had these cases, whether they're money-laundering or exporting more than 10,000 -- the currency reporting requirement top cases where you export money or import money without declaring it, do you think the amount of money in those cases makes a difference as to what the

sentence should be?

JUDGE WALKER: It seems to me that's a far more rational basis upon which to predicate --

ACTING CHAIR HINOJOSA: The amount of money in those cases --

JUDGE WALKER: Well, you take the Embezzlement Table, the Theft Table, and so forth, it seems to me that it is easier to comprehend that the seriousness of those kinds of offenses relates to the amount involved, although, as you well know, with some of these cases that we confront now, the back-dating cases, some of the cases undoubtedly that we're going to increasingly see as a result of all that's going on in the economy, the numbers become so large that it's hard to --

ACTING CHAIR HINOJOSA: I --

JUDGE WALKER: -- hard to see a lock-step relationship between the numbers and the harm to society --

ACTING CHAIR HINOJOSA: I'm not so

much talking about fraud as opposed to the cases that involve money laundering, and it's maybe based on the amount with regards to the determination of the sentence as far as guideline determinations and/or exporting out of the country more than $10,000 or importing into the country more than $10,000 without declaring it. Do you think that in those cases we also should not rely on the amounts as to the sentence or...

JUDGE WALKER: I would suggest that all of these things should be open to discussion and consideration by the Commission. There's an awful lot of learning, that it seems to me the Commission is in a unique position to foster and develop and to encourage, and it should -- it should take advantage of that learning.

VICE CHAIR CARR: Would you suggest that the quantity of drugs in a drug case is more akin to the amount of money taken in a bank robbery, where other factors drive the

sentence much more and the amount of money that you attempted to get or got has a much smaller consequence in a robbery case, for example, than the quantities of drugs have in a drug case?

JUDGE WALKER: Well, if I understand it, in a bank robbery case the sentence is not driven to the same degree by the amount of money involved.

VICE CHAIR CARR: That's my point.

JUDGE WALKER: Yes, and I think that's absolutely correct, a correct assessment. Because an individual who comes into a bank could represent a threat to the individuals in the bank and to the community, wholly disproportionate to the amount of the money that he obtains in the course of the robbery, so --

VICE CHAIR CARR: And are you drawing the same analogy?

JUDGE WALKER: And I'm drawing exactly the same analogy with regard [to] the

drug quantities. That you could have somebody who is a two-bit drug dealer who might be a very serious threat to society, whereas somebody driving across the border with an automobile full of marijuana may be not a serious threat to society. And I don't think the guidelines take account of that distinction.

ACTING CHAIR HINOJOSA: [Mr.] Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you.

Judge Walker, first, thank you very much for being here and for the thought and effort that went into your testimony. I want to ask you a couple of questions about the first part of your testimony, --

JUDGE WALKER: Okay.

COMMISSIONER WROBLEWSKI: -- as opposed to the second part.

You indicated your clear preference for the guidelines is they are now advisory

and just one factor. And you described the process that you go through and the extra effort that has to be made now just as you sentenced before the guidelines.

The one part, though, that we didn't talk about was the fact that now we do still have mandatory minimums and those mandatory minimums are applicable for somewhere roughly half of the cases, most of the drug cases, child pornography, gun cases. And so it seems that we now have a hybrid system. We have an advisory system where you have to drill down and think pretty hard and then we also have this mandatory minimum system.

Do you think that -- I recognize your preferences for the former rather than the latter, but if we address the latter it means going to Congress. And if Congress says: you know, we'll do something about the mandatory minimums, but we also want to do something about the advisory system. And we

want to come out somewhere in between, and it might be your system of wider ranges, but maybe there is some force to those wider ranges. What do you think of that and do you think the Commission should attempt to try to reconcile these two systems, the advisory system and the mandatory minimums, which seem really at extremes?

JUDGE WALKER: Well, they are at extremes. And the minimum mandatory sentences of course are troubling for all of us in many cases because they don't necessarily adequately reflect the tremendous variations in the particular facts and circumstances of the case.

I think the Commission should make every effort to spread in Congress the learning that the Commission has obtained over the years. In the same way that all of the other agencies and commissions of government periodically go to Congress and lobby Congress, tell Congress what it is that they

have developed in the course of their work, and attempt to enlighten the Congress about many of these issues.

The minimum mandatories in drug cases, child pornography cases, and so forth were enacted in reaction to a perceived political need at the time. Over time the need diminishes, the political need diminishes. And I think perhaps it hasn't yet arrived in the child pornography area, but I think increasingly in the drug area my sense, but you're far better able to know this than I, but my sense is that going to Congress with a rational program to soften the minimum mandatories in drug cases would not be badly received.

I think there's an increasing understanding in the population as a whole that the general criminalization program that we've embarked upon is not really working, is not a great success, and that we ought to look at it somewhat differently. So I think the

Commission has a great opportunity to attempt to move Congress in the right direction away from the minimum mandatory system.

Now I suppose your question is: Is that going to foster some reaction on the part of Congress to take away the advisory guideline status and to lock us into minimum mandatory sentences across the board? That's a political judgment that you'll have to make, but my sense is that if you go to Congress and you make your case, you'll be listened to and you'll at least have a chance of getting some reform.

COMMISSIONER WROBLEWSKI: And then one last really follow-up question. You talked about also at the beginning of your testimony about the judge's role and how that's different under the advisory system than under the mandatory system and you talked about the need for, again, I think you said drilling down to try to really get at the heart of the offense, the victim, and the

defendant, and background.

A huge swath of the federal docket involved cases where there is no individual identified victim, that the harm to society is diffused. Drugs, for example, you catch someone with a hockey bagful of marijuana, we have no idea what that means in terms of harms.

Immigration cases, you find someone coming in, there's some harm to society when you have an immigration system that's somewhat lawless. How can you identify that? I'm not really clear.

Firearms trafficking. How do we identify if a victim isn't there? Even child pornography. Obviously there's a child in the picture, but that child might be in Yugoslavia. It might be, you know, somewhere very, very far away, and that person is not going to be coming into your courtroom.

So in those cases where the harm to society is very diffused, of course you have a

defendant in every single case and they're in front of you. Do you think in those kinds of cases that the role of the district judge should be different, that the role of a centralized body like the Commission or Congress should be different and whether there should be more mandates on district judges in those kinds of cases?

JUDGE WALKER: That's really a political question, isn't it? And Congress has given us those mandates in a number of areas. Congress has the legitimacy of being an elected body. And, therefore, it's in a position to lay down these arbitrary rules.

The Commission is really in a different situation, it seems to me. In a different -- its function, its role is different in character. I think it's much more akin to that of a judicial body, although it's not quite a judicial body. And a judicial body fails its fundamental purpose in our society, I think, when it fails to base

its actions upon evidence.

And the only way that evidence really can be taken into account is on an individual basis, and that requires the application of individual assessments of the facts and the circumstances involved and the application of the law to those.

COMMISSIONER WROBLEWSKI: And if the harm in an individual case is simply unknowable? It's simply unknowable. You don't know if a police officer, an undercover police officer is involved in a hand-to-hand two-rock crack case, you have no idea if the police officer had not been there if it would have gone to somebody who was an addict and was on the verge of doing some great harm to their family or not. If in that kind of case what's a judge to do?

JUDGE WALKER: The judge, it seems to me, needs to do the best that he or she can given the imponderables of that situation. And it is for that reason that I think the

more leeway judges have to make these individual assessments, the better will be the end results.

COMMISSIONER WROBLEWSKI: Thank you.

JUDGE SHEA: It's a little bit difficult, but Judge Winmill and I to listen to our colleague, this is typically where the three of us would exchange views, and he's done a great job of, I think, pointing out a number of things. And I know that Judge Winmill, I'm not sure whether you want to ask those questions now --

ACTING CHAIR HINOJOSA: We were going to go ahead and let you give your statements.

JUDGE SHEA: Okay. Well, I know Judge Walker's --

ACTING CHAIR HINOJOSA: And we appreciate your patience of sitting --

JUDGE SHEA: Not at all. I enjoyed listening to the judge and would like to have

had the opportunity to exchange with him.

ACTING CHAIR HINOJOSA: And, Judge Walker, I know that you have to leave, and we really appreciate your time.

JUDGE WALKER: Well, I appreciate being here. I appreciate the patience of my colleagues to the left. And you were very gracious last evening. And it was a pleasure to be with you and I look forward to seeing you in the future.

ACTING CHAIR HINOJOSA: Thank you, Judge.

COMMISSIONER WROBLEWSKI: Thank you for your time.

COMMISSIONER HOWELL: Thank you very much.

ACTING CHAIR HINOJOSA: And to Judge Shea and Judge Winmill, thank you for letting us take this out of order, and we appreciate it very much. And, Judge Shea, would you like to --

JUDGE SHEA: Gets us discussing our

views to each other about whether we agreed or disagreed with the judge on certain points.

ACTING CHAIR HINOJOSA: Judge Shea, if you'd like to make your presentation, and now we'll go back to -- then Judge Winmill would get to say something, and then we'll go to the questions and answers.

JUDGE SHEA: Well, thank you for allowing me to participate. Chief Judge Whaley asked me to substitute for him. He was prepared to come; he had a family emergency. His daughter became eligible for the state golf championships. He is a dutiful father, and I know well the feeling, and wanted to be there. I agreed under those circumstances to jump into his place and come on down here to speak with you folks.

A couple of things at the outset. One, I should observe that I was a United States Capitol Hill policeman. I took that job because I thought that it would enable me to put my feet up on a desk and curl up with a

tort treatise during the swing shift or night shift. As it turns out, Washington, D.C. between 1967 and 1970 was hardly the place where that was allowed, given the marches and riots that were almost a weekly occurrence there. So it was not the experience I had hoped for, but I made it through, and it was quite a challenge.

So that said, I welcome the opportunity to talk about -- every district judge has issues about sentencing and issues with the Sentencing Commission. Let me say at the outset that I share Judge Vaughn's (sic) views on a couple of points. And I admire his point that we don't accept, necessarily, what you tell us in gradations. And I share his views that we need to be questioning the Commission about whether there is empirical data to support some of those gradations in various parts of the sentencing guidelines.

I was going to add to his the increase -- depending upon the number of

videos or photographs in the child porn cases, how you reached the conclusion that each one of those levels merited that increase is beyond my understanding. But given the post-*Booker* rule, I'm able to overcome those sorts of things, and I've frequently said there is no rational basis for it and I decline to follow it. So even after I'd done what I'm required to do, my initial calculation of the guidelines is part of the first step in sentencing.

I will, in some instances, declare that conclusion unreasonable and move to the 3553(A), the remaining factors and determine whether the sentence was sufficient but not greater than necessary to carry those out.

Now there's two points that that brings me to. One is that if you look at the 3553(A) factors, you find nothing in there about the cost of imprisonment except in the subsection that deals with the imposition of fines. That does mention the cost of

imprisonment. So in every presentence report that we get in our district, you will find the cost of imprisonment, approximately $2,000 per month.

I look at that and I know it's under the fine provision, but I and at least two of my colleagues regularly consider that. That's with some difficulty, because it's not explicit in the factors. And it's the more difficult because of a case in the Ninth Circuit. And I share Judge Vaughn's views about the cases in the Ninth Circuit. I agree that there are cases that are simply wrongly decided, and I'll cite one to you in a few minutes.

But there is a national movement at the state level to deal with the problem of immigrants. In our district -- I don't know about Judge Winmill's -- but we are an agribusiness district, millions of acres of land blessed with 300 days of sunshine, three major rivers, and countless crops. So we have

an illegal-immigrant problem because of the agribusiness that exists there and the need for migrant laborers. That said, 31 percent of our docket is 1326 cases, reentry after a prior conviction. So for us that's a major concern.

When I look at those 1326 cases and I see the people, and I look at their histories and I am forever grateful that *Booker* was decided as it was and restored to us some discretion, because I was really restless and frequently the subject of appeals because I so disagreed with those guidelines. For me the way it was prior to *Booker* and even prior to the amendments that you made to the gradations in 1326 cases, where you mitigated some of the severity of those by adjusting the numbers that you would apply, even then I found myself very restless and struggled with the sentences and the Sentencing Commission in its guidelines.

So I welcomed *Booker*. And by

saying I welcome *Booker*, that doesn't mean that I in any way think the guidelines should be dispensed with or that you should go out of existence. I welcome the history and the precedent that it gives me, and I recognize that even as moderate as I think I am in my sentencing patterns that, as an individual, I find that there are times when the sentencing guidelines offer me some **guidance** in a case where I might have been impetuous or I may have had an initial thought that I moderated after reading the guidelines and looking at the cases. And it was helpful in that regard.

And I believe it is probably helpful to cure the problem that existed in the 1970s when I was a criminal defense lawyer, among other things, and tried any number of serious felony cases and was acquainted with the pre-reform sentencing provisions. There it was a bit like we have today in the post-*Booker* world.

So when I went to the bench in

1998, I hadn't done criminal law in approximately 15 years. I really found it difficult and confining to find out I had mandatory guidelines to cope with when I had been accustomed, during my years as a criminal defense practitioner, to somewhat the system we have now where you consider any number of factors, especially those factors that are more human and more social. And a lot of those factors became critical in the 1970s.

And then, because of the reasons that we all know, with the disparity in sentences reform was necessary. For me then the *Booker* case gave me or restored to me the discretion that I thought we needed.

But I welcome the continued existence of the guidelines, and I don't resent it at all doing the initial calculation. As I say, my staff and I go through it. I frequently find that I agree with the guidelines, though I would guess that my sentencing patterns are -- the majority of

my sentences are below guideline range. And I think that's probably true most places in the country, that sentences are below the guideline range.

When I consider that and I encounter my 1326 cases, and I look at the cost of imprisonment, which I think is a critical component of rational sentencing, and I look at the movement among the states to deal with the illegal immigrants who are in their prisons and the cost of them, I know that it's a matter of some national importance, and it seems to me that it has a place in the guidelines and ought to be in there.

The problem is that it's not, and we have two cases. One in the Ninth Circuit and one in the Eighth Circuit that have held that it is not a proper consideration in a sentencing. Now that's baffling to me. The *Tapia-Romero* case here in the Ninth Circuit decided in 2008 was a case that involved, I

think, the Southern District.

The defender's office, for reasons that remain best known to them, to that office, decided to appeal the case, where that very issue was before the district judge. They asked him to consider the cost of imprisonment as to two factors. One of those factors was not to protect the public.

The case went up, the Ninth Circuit issued a published opinion, therefore making it a precedent in the Ninth Circuit, saying that simply, "The district court properly concluded that the cost to society of a defendant's imprisonment is not a factor a sentencing judge can consider under 18 United States Code Section 3553(A) in determining the appropriate term of imprisonment under 18 United States Code Section 3553(a)(2)(A)." The Eighth Circuit recently agreed with that. I think that's wrong.

When I look at the states, in particular Washington, where the governor and

the legislature are coping with that and they are trying to pass legislation to get those illegal immigrants out of the state system, into our system, saving themselves $8 million over two years.

I know that in our system the cost of imprisonment should also be a rational factor in sentencing. And I think that if you went to any body and any group, any group that you wish to choose, the Chamber of Commerce, any speech you might give at a commencement and told them that that was not part of a rational sentencing, they would be appalled and stunned that it was not.

The rationale for the decision is that it was not explicitly mentioned by Congress, and Congress knows how to make things explicit when it wishes. It did allow it to be considered as part of the fine provision and, therefore, under rules of construction, if it knew how to do it there, it certainly knew -- it could have made it a

factor. It didn't. Therefore, it's not.

I think that it's -- to me, in the way we use it and have used it in my district, two of my colleagues and I, is that it's part of protecting the public. The cost-benefit analysis seems to be inherent in that.

And when you asked as part of your -- part of your topic list, Number 8, "What, if any, recommendations should the Commission make to Congress with respect to statutory changes regarding federal sentencing," I urge you to make that.

However, I recognize the risk of going to Congress and asking for any change that may produce the unwanted result of a return to mandatory sentencing or something much more strict and structured than we currently work under.

So I would ask you to take that into consideration. And if, in your political judgment, it's the right time and the right issue, then I'll ask you to do that and have

them amend 3553(A) to include in considering protection of the public, the cost of imprisonment is a factor.

And let me merge those two concepts, that is my comfort with the post-*Booker* world, the cost of imprisonment in a 1326 case. In the last year -- each judge could tell you a story, and I'm going to tell you one.

In the last year I sat on a case called *U.S. versus Ramirez-Paz*. Mr. Paz was an illegal immigrant. He had an eight-year-old boy who was in the school systems in my community. He was a Mexican national as well, born in Mexico.

Mr. Ramirez-Paz was before me in a 1326 case. But Mr. Ramirez-Paz some 10 or 12 years earlier had been convicted of murder. He was not the actor but he was there and was charged and pled to some form of murder. He received an exceptionally low sentence, but in the 1326 case he carried with it the heavy

baggage of that conviction and the points that came with it.

As a result, he was at 21, an adjusted defense level of 21-4, and that exposed him to 57 to 71 months. Well, he had an eight-year-old boy who was totally dependent on him. More than that, during the time he had been back in the country, after he had married in Mexico, the mother had left he and the child, and he returned to the country so the child could get the education that he hoped for. He had been a dutiful worker supporting his family and his mother with a heart condition.

He experienced severe injuries in an agribusiness accident. Both legs broken, needing multiple surgeries as well as lingering other health issues, and more surgeries planned. And yet the schoolteachers who appeared for [him] in written form spoke of how dutiful he was, in coming in his wheelchair to the school to support his child

and to the devastating effects on that eight-year-old boy of watching his dad be hauled off to jail without a word.

The teacher who wrote on his behalf explained the family circumstances. She and her principal both wrote. I had the boy in court with the mother, with the grandmother who had the heart condition. He, in fact, translated for her.

And under those circumstances he had been in prison seven months. Now I could have simply said, "The guidelines have a range, and that's important, but at what cost and to whom?" At $2,000 a month, society is keeping that man in prison instead of returning him to Mexico, is depriving a child of its father who was otherwise, after a serious felony offense, was otherwise relatively law-abiding.

He was getting workers' compensation. And, as a result of the workers' compensation, the family was able to

live. But as soon as he was sentenced, the workers' compensation ceased. And here is a woman who is not able to work, a grandmother with an eight-year-old boy who was a Mexican national, who will be thrust into the juvenile court system. Who knows what foster care would follow.

And none of those things were before me.

I can't say -- after the sentence it was not appealed, and I imposed a sentence of time served, though he had, under the guidelines, 57 to 71 months. And I found that the family circumstances' exception applied and granted a 14-level reduction.

One of my colleagues said if it wasn't post-*Booker* you wouldn't have been able to do that. And I think that may be an overstatement. That has certainly helped me to realize that I had more discretion post-*Booker* than I would have had pre-*Booker*.

So from my viewpoint on a 1326 case

it was a legitimate consideration to say, "What's the cost to the taxpaying public of keeping this man in prison with the potential for the child going into the system with additional costs to the public?" And I think that's a rational basis -- a rational factor to include in sentencing. And I would hope that you'd give that some consideration in what matters you take to Congress.

Let me say as to the judges in my district, I think we're all comfortable in a post-*Booker* world. I've had the usual sentencing discussions with my colleagues. Everybody is happy with post-*Booker*. They're grateful that the discretion that's been restored to them in part, and yet I think they also are not in any way advocating that the Sentencing Commission go out of business or that the guidelines stop. I think it's a body of law that's very helpful. And we've talked about the fact that it does aid us in our sentencing and gives us some structure as an

advisory guideline.

I believe that's all I have to say. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Shea.

Judge Winmill.

JUDGE WINMILL: Yes. Thank you. I want to thank the Sentencing Commission for allowing me to participate and offer testimony on this 25th anniversary of the Sentencing Reform Act.

I think the comments that have been made so far, particularly Judge Walker's comments, have included portraying how truly difficult a task it is that you face. But I take a somewhat different approach, and I want to really applaud your efforts.

And I would indicate that I have always been essentially an advocate of the sentencing guidelines, even pre-*Booker*. In fact, I would say that I stand as a freely and unabashed supporter of the guidelines even in

the pre-*Booker* years.

But I came by that opinion honestly through my own experience with both 14 years on the federal bench and eight years on the state court trial bench before that. It provided me with a unique opportunity to kind of compare two very different systems.

In the state court in Idaho we have what's called the "truth in sentencing law," which requires that a judge impose a fixed portion of the sentence during which time a defendant is not eligible for parole and then an indeterminate portion when they are parole eligible, but there's essentially completely unlimited discretion on the part of the sentencing judge. And, of course, we all know what I faced when I came on the federal bench in 1995.

But one particular experience that really occurred on the cusp of that transition from the state to the federal court bench [] clearly portrayed for me the value of the

sentencing guidelines pre- or post-*Booker*.

During the summer of 1995 I was a state court trial judge in Idaho awaiting confirmation from the Senate of my appointment. And I was scheduled on the morning of August 11th -- and I remember that day because it was the day the Senate approved my -- confirmed my nomination.

But that morning I had a sentencing scheduled in state court. Defense counsel had a crisis which necessitated that we move the sentencing back a week. However, I had worked through the presentence report and made my own preliminary determination of what I thought was an appropriate sentence. The case involved a very young individual, 19, 20 years old, who had been charged with dealing cocaine.

Given his age, the nature of his crime, the lack of any significant prior criminal history, I had determined that what made the most sense for him was a two-year

fixed sentence followed by a ten-year indeterminate sentence with the idea that he would be parole-eligible within two years and at least have some prospect of being able to restore his life and perhaps develop a normal life in the future.

However, fate intervened and that afternoon I received a call from my senator, who indicated that the Senate had confirmed my nomination. The following Monday I learned that President Clinton had signed my commission. The following Wednesday I was sworn in as a federal judge.

And, of course, because I was no longer on the state court bench I never had the opportunity to impose the sentence on that young man.

Two weeks later I read that the case had been reassigned to another judge who actually was older, but had only been on the bench one year at the time, and found that this young man whom I had intended to impose a

sentence of two years fixed with eight years indeterminate, instead received a ten-year fixed sentence followed by a five-year indeterminate sentence.

What that drove home to me in my life and something I've never forgotten is that by the sheer luck of the draw this young man's life was drastically altered from the two-year minimum sentence, with at least some hope for the future, he ended up with a ten-year minimum sentence with I think little hope for the future.

My own experience is that people who spend long terms in prison are forever changed and their opportunities of returning to society in a somewhat normal fashion, I think, are substantially impaired.

I cannot say that if the sentencing guidelines had been in place in the state courts of Idaho that the end result would have been any different. There is every possibility that given the quantity of drugs,

the ten-year sentence imposed by my less-experienced colleague is precisely what this individual would have received, but I'd like to think if that had been the result under the sentencing guidelines, that at least would have been based upon some empirically-based determination of a heartland sentence rather than based upon the blind luck of the draw and which judge happened to be assigned to this case following my being sworn in.

I think that is why I embrace the guidelines as I assumed the federal bench. I must admit that I think the guidelines pre-*Booker* may have been too much of a good thing in terms of the consistency and the strait jacket. The mandatory nature of the guidelines turned judges with I think years and years of experience in observing the human condition and determining a just sentence into glorified accountants and bookkeepers. During sentencings on many occasions I found myself apologizing to those in the audience observing

the proceedings over the seemingly impersonal process in which we were engaged. It seemed that we were arguing over levels, points, and categories, rather than about lives, families, and loss of both the defendants and the victims who were in our courtroom.

But I think with *Booker*, and I echo what has been said here, but I think *Booker* has perhaps provided us with the best of both worlds, and I think that's an important consideration. It leaves us with the stability and the consistency provided by the guidelines as they provide kind of a tethering or anchoring effect to all sentences. Even though we have that discretion I think the starting point of the guidelines still keeps the vast majority of cases within striking distance of that guideline range. But today we also have the justice and common sense again of judges with years of experience in their application of the other 3553(a) factors.

Now are the guidelines post-*Booker* perfect? Clearly not. And I want to identify at least three areas where I think there are issues and continuing concern.

The first and to me most troubling but unfortunately the one for which the Commission probably has little answer is the continued ability of the prosecutor to affect the application of the guidelines in ways that I think were not envisioned by either Congress or the Commission. This is I think the primary remaining impediment to consistency in sentencing. Let me give you some examples that I see routinely.

Primarily drug cases. For example, what I see very often is a decision by a prosecutor to withhold the finding of an 851 information to seek an enhancement in the mandatory minimums until very late in the game, and they simply hand that over the head in order to try to exact a plea of guilt. I think that creates a tremendous potential for

inconsistency which drives the guidelines and the mandatory minimums in a substantial way.

I think another problem is the way in Assistant U.S. Attorneys often agree to a drug quantity, often explicitly in a plea agreement but sometimes not. But it does come into play when the probation officer who prepares the presentence report feels that a much longer quantity is established by the evidence. But at least in the Ninth Circuit it is really not even an option for me if the U.S. Attorney is not willing to put on evidence to support the larger drug quantity. I'm pretty much left with whatever that lesser quantity is that the defense is arguing for, because I'm forced to essentially accept the facts as undisputed if the U.S. Attorney is not willing to put on evidence during the sentencing hearing that would support a larger drug quantity calculation.

I think the decision not to put on evidence, likewise in support of a firearm

enhancement, has a substantial affect upon sentencing and our goal of consistency.

Child pornography, which I know the Commission has heard a great deal about, but I think one aspect that's sometimes forgotten is the decision by the U.S. Attorney about whether to charge mere possession or whether to charge receipt and distribution. And often the difference between possession and receipt is a very ephemeral, almost-nonexistent distinction that has a huge impact, I think, in the mandatory minimum which I think to be a five-year mandatory minimum on receipt, no mandatory minimum, and I think a ten-year maximum on mere possession. It also has an effect on the base guideline range that is applied.

So I think that's another example where a decision by a prosecutor can really lead to inappropriate differences in what the sentence may be from district to district.

I think one other area where the

Commission might make a significant impact is the Fast Track Program, under 5K3.1, which districts are allowed to either opt in or opt out, in other words, develop a Fast Track Program or not. I think the ability in some districts to have up to a four-level decrease in your offense level because of your agreement to administrative deportation, whereas in other districts which have not adopted -- that inherently create[s] an inconsistency I think the Commission could well control by recommending a change which would either require all districts make it available or none.

Again, I don't know if the Sentencing Commission can respond to those problems. Some I think -- for example, the Fast Track Program, they probably can. Others they cannot. But I think you need to be mindful of it, the way in which prosecutors in charging decisions from district to district will affect our goal of consistency.

A second concern I had is that I think disparity in sentencing still exist in areas which I think we need to be cognizant of if -- again, I've read some of the testimony from Atlanta and I know some of the judges expressed a concern that a just sentence, that there's no necessary correlation between a just sentence and a consistent sentence. I really disagree. I think if we have sentences that are irrationally inconsistent, that cannot be a just system. And for that reason I think we need to strive for consistency in sentencing.

One example I think of disparity in sentencing again in the drug area is the availability of 5K1.1 departure motions, which I think create a race to the prosecutor's door in large-drug conspiracies. Now one might argue that that is the intended effect, that's exactly what Congress had in mind and perhaps what the Commission had in mind. But I think it can result in unjust results when

distributors and kingpins, further up the food chain in the drug-distribution organization, receive shorter sentences than defendants who are far less culpable. I think the effect of 121.8, which precludes consideration of evidence obtained post-plea can also, I think, lend some additional problem in this area.

I think an area -- and this really plays off of what Judge Walker was saying earlier, I think, is the differing views of relevant conduct in drug cases. I think there's a tremendous difference from district to district as to how you view what is or is not relevant conduct.

In some districts, such as ours, I adopt, and I think Judge Lodge in our district adopt[s] what we regard as a policy of lenity, that the defendant should only be held responsible for the drugs in which the evidence is essentially overwhelming. Either it's a hand-to-hand transaction or there's a tremendous volume of other evidence coming

from other persons involved in the drug conspiracy that establish the drug quantities. In others I think the concept of relevant conduct is viewed more broadly, which results in greater offense levels. And this may be at the heart of the problem I think Judge Walker was referring to. I think I would actually disagree, and I will then, I guess, on one of his comments in his criticism of our using drug quantities as a proxy for culpability.

I think the problem is really in how we get to that calculation and how accurate we are. I think if we know with some accuracy the exact amount of drugs that a person was involved in distributing, it is a very good proxy for culpability, because of the harms that this imposes upon society, somewhat diffused but nevertheless clear harms that are done to society. But the devil is in the detail and in the determination of the details, whether we review relevant conduct broadly or narrowly from district to district,

which I think create both elements of disparity in sentencing but also raise some questions I think about the mechanism that we adopted and calls into question, I think in some judges' minds, whether or not there should be a true proxy or a proxy used -- between using drug quantities as a proxy for culpability. But I think that is an area and it may be something the Commission can address by more clearly defining what is relevant conduct and not, and doing whatever it can to remove these differing views from district to district about how narrow their view will be as to what is or is not relevant conduct.

I think differing practices also -- and, again, this probably goes back more to what Assistant U.S. Attorneys do, but the extent of 5K1.1 downward departures for substantial assistance. I think there's a marked difference from Assistant U.S. Attorney to Assistant U.S. Attorney and from district to district as to how that cooperation is

valued and what recommendations are made to the judges based upon that.

And, again, the availability of Fast Track, the illegal reentry cases in some districts but not others I think also creates this built in disparity.

I think my final comment will be that I think that the guideline ranges are skewed somewhat towards longer-than-necessary sentences. I think most of my colleagues may feel that they're somewhat more out of touch with what the judges would do than perhaps I would view the problem. But I think if you look at it this way, if the guideline truly represents the heartland, then one would assume that actual sentences aren't affected by the guidelines, would cluster around the guideline range. But I think when we look at what happened post-*Booker*, and when judges were free to impose sentences with a greater amount of discretion, what we saw was that judges tended obviously to seek far more

downward -- or to impose far more downward sentences than sentences above the guideline range.

If I interpret the data correctly, the 2008 data indicates that about one percent of the sentences were imposed above the guideline range, about 10.2 percent below the guideline range. I guess I would disagree with Judge Shea. I was a little surprised by that. I feel that I give far more sentences below the guideline range than what my personal statistics actually show. Maybe there's a guilt factor. But every time I sentence below the guidelines, I feel somewhat guilty, and it takes on greater importance than it should.

But it does indicate that I think judges generally feel that perhaps the guidelines are skewed somewhat higher and toward longer sentences than perhaps they should.

If the guidelines, in Justice

Breyer's words, are to represent the appropriate sentence in the mine-run case, then I think the collective wisdom of 678 active district judges and hundreds of senior judges in the United States suggest that perhaps the guidelines are a bit high and that they've been skewed upwards.

Now of course there are reasons to explain that, some of which were touched upon by Judge Walker. And I again take a somewhat different view from him about our ability and your ability to affect Congress. But I think the reasons for the sentences being perhaps higher than perhaps they should is that trial judges' concern, real or imagined, that an appellate court is more likely to reverse a below-guideline -- excuse me -- an above-guideline sentence than they would a below-guideline sentence.

A second effect I think is the upward compression created by mandatory minimums. Third would be the effect of

Congress' role in exercising its effective veto power over the guidelines. And fourth, the effect of that veto power on this Commission's policies and decisionmaking.

Now these factors reflect political reality and there are structural issues in our system of governance that will not go away. In fact, I guess I disagree with Judge Walker in our ability and your ability to persuade Congress to -- again, I've watched what you've done in terms of the crack cocaine/powder cocaine disparity. And I know at least two of you reasonably well in other settings, that my sense is you might have liked to have done more, but I think there is a political reality that stands behind all of this that we all have to deal with.

I would not urge you to disregard that political reality, because I think that the guidelines are necessary and some real mischief could occur if Congress perceives too much pushback, either from judges or from the

Sentencing Commission.

But I do think that the Commission must seek to, wherever possible, and in whatever ways possible, to bring the guidelines as close as possible to what I call the cumulative wisdom of district judges throughout this country, who struggle to find justice every day with every defendant. I would urge you to continue to listen to us and to take into account as a primary factor in your decisionmaking what trial judges are doing and saying, how they are voting with their feet as they perhaps march away from the guideline range when getting the opportunity, and to perhaps listen to those voices of judges who are making hard decisions affecting the lives of individuals and health of society as a whole.

But again, having made these comments, it is intended only as very -- I hate to even use the word "constructive criticism." It's intended to be constructive

and really not criticism at all because I'm a real advocate of the guidelines, based in large part upon my unique ability to see the differences between a sentencing without guidelines and sentencing with guidelines. So thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Winmill.

Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Yes. Judge Shea, I was interested in exploring with you the way in which you consider the cost of imprisonment when you sentence defendants. Is that something you consider in every case, is there a certain threshold amount at which you reach in terms of cost of imprisonment that then kicks in and you reduce it down a certain amount consistently? Is it ad hoc?

JUDGE SHEA: Well, every case my staff knows that I want to know the cost of imprisonment. Do a quick calculation on the guidelines. If you know what the guideline

calculation is, you know the cost is $2,000 a month plus or minus, and so you know exactly what it's going to cost the American taxpayers to impose a guideline sentence and you were within the range.

And then I'll make a calculation as to -- I'll factor that in along with all the other considerations: History and characteristics, nature and circumstances, et cetera.

COMMISSIONER FRIEDRICH: And when you say you factor it in, does it -- in your own mind do you have a certain reduction you give for --

JUDGE SHEA: I look at a certain reduction. It is based on the case itself. I look at the facts of the case, the crime, the criminal history, what I'm dealt with by way of a social profile of the individual, support of family, work, pay taxes, as opposed to running up child support obligations and having obligations to the state or to the

federal government. So I look at all of those factors and that's one of the things I consider, the cost to protect the public from this individual charged with that crime, with that social record. And I factor that in.

COMMISSIONER FRIEDRICH: Because some would argue that it would be preferable to have that kind of calculus done by -- in a consistent manner -- by some body like Congress, and Congress, when it considered legislation considers increasing penalties, actually requests from the Commission the prison impact of new legislation. So that in a way, perhaps not in sort of the specificity you're dealing in a certain case is considered by the Congress.

And so I'm -- if, on the one hand, you have -- you're consider[ing] that in your courtroom, but another judge isn't, is that the sort of disparity that we should welcome in the system? Shouldn't that be something that's either considered by all judges in a

relatively uniform way or not?

JUDGE SHEA: Precisely. So go right up to the Hill and get Congress to change that. And then we'll have that uniformity that I think is appropriate.

If you think in terms of -- the current financial crisis has produced rethinking of a number of things. I don't think it's -- I know that people are questioning whether the patterns of severity produced by state legislatures and Congress in the last ten or 15 years, reacting to certain kinds of problems or perceived problems, and the mandatory minimums imposed have filled our prisons with more people than any country in the history of the world. Over two million people.

And so you have to ask yourself when you're talking generally about the justice system and we talk about people in prison, the cost of that seems to me is a rational factor to be considered.

COMMISSIONER FRIEDRICH: But you don't think that that is a factor Congress considers when it passes legislation?

JUDGE SHEA: If you tell me that they ask for your input on that, then they do, because I have to accept your word for that.

COMMISSIONER HOWELL: I actually was very intrigued by your comments about the costs of imprisonment and given our country's rate of incarceration, I think that it's something that Congress should pay a lot more attention to and they should ask for prison impact statements far more often than they generally do.

And one of the things that the Sentencing Commission is actually tasked with under its organic statute, and I'll just -- I'll just alert you to this in case you're interested -- under 28 USC 994, is to formulate the guidelines to minimize the likelihood that the federal prison population will exceed the capacity of the federal

prisons as determined by the Commission.

And it's something that in terms of our statistical analysis the Commission, when we consider retroactivity, for example, or even amended guidelines that we think -- we always ask, you know, how many more people will be affected by this, how much longer will they serve in prison, we basically get prison impact systems for everything that we consider. We don't necessarily share that information publicly when we -- when we promulgate amendments. And do you -- do you think that that kind of information, you know, would be something that would be helpful for the Commission when it is promulgating its amendments, to issue either amendments that are the result of directives from Congress or our own?

For example, the crack retroactivity amendment, where we most certainly looked and did a very detailed retroactivity analysis of how many

incarcerated defendants would be affected. And so we knew the number was going to be about 20,000 incarcerated defendants were going to be released earlier than before. And we did an analysis of the effect it was going to have on prison beds.

JUDGE SHEA: I'm respectful of the analysis that you did I --

COMMISSIONER FRIEDRICH: Right. And so that's one where we actually published the analysis, that we generally do for almost all of our amendments, particularly those that we want to apply retroactively.

Do you think that more information like that, even if you are, you know, barred from conserving -- infuse the court's view -- retail level at sentencing.

JUDGE SHEA: Right.

COMMISSIONER FRIEDRICH: Is that something that you think would be helpful generally if we published more information about that?

JUDGE SHEA: Yes, I would welcome that. And I -- while I'm barred, I make that observation at every sentencing and try to promote an appeal so we can get that reconsidered, but --

COMMISSIONER FRIEDRICH: Right.

JUDGE SHEA: -- we'll see how that turns out.

You know, if Judge Winmill has any thoughts on that.

JUDGE WINMILL: Well, one initial thought is similar to what was just expressed. It seems to me that it's a problem that cuts across every case type and it's not unique to a particular case. It's a systematic problem that needs to be addressed. And I think it appears to me the role of the Commission is to do what it can to ensure that we're controlling prison populations, which is an indirect way of doing exactly that.

I think it's on the background of every judge's mind along with a lot of other

factors, that it should play out in every case in roughly the same way because it is, I think as Judge Shea said, it truly is just the flipside of protecting society. It's the cost of protecting society, so we're deciding whether we need to protect society. In this particular case what we're really asking ourselves is it worth the cost of $2,000 per month for this individual to be locked away so that we can ensure they won't be dealing drugs, possessing firearms, illegally reentering this country, or doing all those kind of things.

So I think it is playing out in the background of every judge's mind when they impose sentence.

I guess my own view, I don't think I need to be able to explicitly tell, and maybe that's why my cases don't, on that issue at least, don't get reversed, as it's playing around, banging around in my mind, but it's not something that I've ever felt the need to

be explicit about, so -- I've never --

JUDGE SHEA: You're leading with your chin -- you're leading with your chin on the issue.

JUDGE WINMILL: The bristles don't bother me. It's a pattern of --

JUDGE SHEA: Well, I just like the extra work, of having to redo things, so.

JUDGE WINMILL: Well, I look at it as every time you make those decisions, you add to the body of law whether the Ninth Circuit adopts my views or whether it rejects them. We're all better informed as judges because I raise the issue as much as Judge Walker raised the issue of the quantity and quality of drugs. I think that's what those judges do, they question the criteria that the Commission sets out. And even they question the Ninth Circuit's rationale for their decisions, which is I think a healthy exercise.

COMMISSIONER HOWELL: I also was

very appreciative that you raised the relevant conduct issue. And I just wondered, you raised it in the context of the drug quantity, and I just wondered whether you --

JUDGE WINMILL: Well, it would have just obviously would apply inversely to everyone --

COMMISSIONER HOWELL: And that's what I wanted to clarify, whether you saw issues with both disparity, prosecutorial manipulation of the facts presented to the court, with the relevant conduct not just in the drug context, but also across the board, number one.

And, number two, -- which you just answered.

And, number two, do you have suggestion for the Commission of how we might review or modify our relevant conduct provision? And you say that you require overwhelming evidence which you've sort of built into your application of 1B1.3.

JUDGE WINMILL: Well, --

COMMISSIONER HOWELL: Is that something that you think that we should consider incorporating to apply across -- across the board?

JUDGE WINMILL: I don't know that my view is better, but I think a consistent view would be important across the board and that each district not employ a somewhat different view of what they're going to require in terms of relevant conduct.

I went back and forth on the issue until I finally -- and then apart, but I was driven by the concern that the guidelines in drug quantity -- in drug cases are so driven by drug quantities, --

COMMISSIONER HOWELL: Right.

JUDGE WINMILL: -- that's where it becomes, you know, critical. And so for that reason I adopted a fairly stringent view and instructed probation officers that they're to take a very conservative calculation -- make a

very conservative calculation of drug quantities.

The problem is, and I just thought of it actually as Judge Walker was speaking, that I may have created a potential for an unjust sentence. Because while that works appropriately for someone who's a low level drug dealer, they're not getting tagged with drug quantities involved in the drug conspiracy, but of which they had no personal knowledge. But, on the other hand, it may handcuff you when I'm dealing with a higher-level individual who never puts their hands on the drugs. And it creates sort of a -- it handcuffs me in terms of maybe finding the appropriate sentence for people further up the food chain, as I had described it, if I take that same approach.

So the bottom line is I'm still struggling with it myself. I'm just observing there's a problem of inconsistency in that area. You know, as President Obama said

during the debates about determining when concept- -- when life begins, it's above my pay grade, I'm going to kick it to you guys to figure that out, but it's just an observation that I think bears addressing to see if we could at least look at the definition of relevant conduct and see if indeed there is some variety of approaches in the different districts who perhaps define it more narrowly.

VICE CHAIR SESSIONS: I want to thank you both for coming. And I didn't know, we were confirmed on the same day.

JUDGE WINMILL: That's right. Yes.

VICE CHAIR SESSIONS: On the same exact day.

I have a couple of questions to ask. The first is what impact in a different kind of sense *Booker*'s had in your course. What I've observed about the criminal justice process is that when you make a change in regard to authority or power over sentencing, giving more or less power to one participant,

that oftentimes there's a kickback from the other participants in the system, a pullback in regard to their authority. It's almost a push-and-pull kind of situation.

And we've heard yesterday that in a number of jurisdictions in light of the fact that judges have more discretion post-*Booker* that there may be more filing of 851 charges, there may be more 11(c)(1)(C) pleas and mandatory minimums being pursued more rigorously. I'm interested to know whether you see in fact that happening in your jurisdiction as a result of the post-*Booker* world.

And the second sort of related question focuses in upon what we heard, what you and I heard the attorney general say about low-level drug defendants and how there should be alternatives to imprisonment in regard to low-level drug defendants.

And, you know, we asked questions: Are there low-level drug defendants within

the federal system. And, you know, some people have said to us that because it's the federal system, that these really aren't -- there are not many people who would be impacted by alternatives to imprisonment for low-level, nonviolent drug defendants. And I'm interested to know whether you -- what your observations are in regard to whether or not there are those persons in the system.

JUDGE SHEA: I don't think so. For me, when I think about the experience we have in our neighbors, Idaho and Washington and Eastern Washington and Idaho, I think probably have some comparative case statistics. So I don't see either any increase in the 11(c)(1)(C)s. I don't see the USAO or the DOJ taking the position to try to push back onto the increased discretion.

And of course that's all driven by the United States Attorney in that district as well as DOJ policy, so you have both the personality of the United States Attorney in

the district and then you have DOJ policy, and I've not seen that in Eastern Washington. And I'll...

JUDGE WINMILL: I would say the same. In fact, I was thinking about I feel I've seen a few more 851 informations. But, as I said earlier, they're almost more of a threat than a reality. It's a threat, 'We will file this if we can't get a plea agreement.' But I haven't seen a great deal of that.

I think part of it is that, frankly, the availability of the volume of 5K1s, the government I think has always been kind of invested in the resolution of these cases in a way that avoids going to trial. And I think giving the judges more discretion is not that problematic because they're making recommendations for lower sentences in a large percentage of the cases.

I mean I sometimes wonder when I've had like 25-defendant drug conspiracy cases

and I'm trying -- sometimes I'm not sure if anybody didn't get a 5K1. It's like everybody's just pointing fingers at each other in order to get some benefit. I'm assuming somebody must be at the top, again, of the food chain. And they presumably didn't get a 5K1, but the government's been so involved in that historically that I don't think they felt the need to have a tremendous amount of pushback against continued judicial discretion, because once they filed that 5K1 they essentially vest the judge with quite a bit of discretion about how far downward to the part.

VICE CHAIR SESSIONS: And do you see many low-level drug defendants in your court?

JUDGE WINMILL: That's a very good question. Both of our courts have what we call reentry programs, in which we treat it as an attempt to mainstream troubled individuals through supervised release and to keep them

from reoffending and then going back to prison on revocation petitions.

I don't see a lot of cases that I think would be appropriate for a true diversion program, which is the more classic drug court that you see in state court. Judge Aiken, from Oregon, who's been a super advocate of more aggressive, almost social-work type approach to this, feels that there are a lot of these cases. But, frankly, I think they're being handled primarily in state court.

I think the drug -- typically it's someone who is more of a drug user or a very, very low-level drug distributor that might profit from that, and we just don't see that. They tend to go to state court and get resolved there.

JUDGE SHEA: A number of drug offenders get swept up in the conspiracies.

JUDGE WINMILL: Yeah.

JUDGE SHEA: That's where you see

them. There's a 15- or 20-person indictment and 12 or 13 of them are just people who have been running around distributing low level, minor quantities of drugs as part of the overall conspiracy. So they're in a tough way because there are two counts. There's the distribution count and the conspiracy count. And that's what I see regularly.

JUDGE WINMILL: We don't -- you know, I think there's a real cooperative effort between the state and the federal authorities, so the low-level folks have been charged in state court coming out of the same conspiracy. We end up getting mostly just the high-level distributors, so it's a little different animal.

JUDGE SHEA: In our jurisdiction multiple-defendant cases, a dozen or more people, are increasing. So I'm handling a 30-person, statewide distribution case at the present time.

VICE CHAIR SESSIONS: So would many

of those be low-level, nonviolent drug offenders that could receive the benefit from --

JUDGE SHEA: They are low level. It would be in the sense that they are -- they're only a small cog in the overall machine of that distribution. And nowhere near the top. They're just making a few bucks delivering drugs or feeding their habit by cutting a little off the top.

JUDGE WINMILL: But I do -- I really would endorse the idea of changing those provisions that talk, you know, about zone A, B, C, and D, and giving us some more discretion, perhaps a little bit further up or down, I guess, the grid, to consider some alternatives, like probation, which I think is a critical part of any kind of a quasi-diversion program. If you're trying to keep someone from going to prison, obviously you better not send them to prison, so I think having probation as an option further down the

grid might be a real help in that regard.

I am a real advocate of alternatives not just in drug cases but I think people involved in embezzling, fairly small amounts, but involving federal institutions, so that -- here in federal court I think there is a lot of cases where I think some type of diversion and consideration, like weekends in jail, things of that sort, should be considered.

But in small districts, because we don't have any Federal Bureau of Prison facilities really for some distance, even in Washington it's a problem, the alternatives are just not available. And I've had communications with the Bureau of Prisons about that. And I think we'd all like to address that.

JUDGE SHEA: Yeah. Because when I was in the -- doing criminal defense work in the state system, Work Release was a program that really, I thought, worked well. And

there are some cases -- and, on the other hand, I don't how much you steal, if you steal you go to prison.

JUDGE WINMILL: My sense is that you can go to prison, but perhaps keep your job during the week so you can support a family, but -- with a work-release program.

JUDGE SHEA: It depends. And the -- my take is that white collar criminals go. If I send some poor addict, white collar criminals are going. If you steal $10,000 from the Post Office, you embezzle it, you're going. And I say that because I think it's only fair to treat all of them so that you're not having disparate sentences.

And the drug guidelines are so tough on the addicts and yet a person who embezzles from a credit union or from a labor union or from that sort of thing, everybody is very empathetic about it and they don't want to see him go to prison. It's remarkable. And I take the quite different view. I say,

"Don't -- you can come and make the recommendation, but they're going now." That said, I'd love to have in the federal system a work-release program where we could permit them to continue to work and at the same time punish them for their misdeeds.

But it's very difficult to get it because of the -- we're very large districts: The entire state for Idaho and we're Eastern Washington, which is sizable geographically. And we have three locations, but only have, I think, two locations with work-release programs. So if you live in Spokane and -- you're okay. If you live in Wenatchee or Walla Walla, you're not, so.

COMMISSIONER WROBLEWSKI: Thank you, Judge. And thank you both for being here.

I have two quick questions. Judge Winmill, you talked about and identified a problem that has been plaguing us in the sentencing system since the advent of the

Sentencing Reform Act, and that's the prosecutor's ability to -- I think your word was -- manipulate sentences.

JUDGE WINMILL: I call it gaming the system, is another way.

COMMISSIONER WROBLEWSKI: Right. And the way the Justice Department has tried to deal with that since the beginning of the Sentencing Reform Act was to require through internal policies that prosecutors charge the most serious readily-provable offense, and that policy is roughly the same, been the same throughout administrations, Republican and Democrat.

Obviously there are questions about how much it's followed all over the country. And now in the new administration we're reviewing that policy. First, do you think that is the right policy to deal with the problem that you've identified? And, if not, what is a better policy?

And then, Judge Shea, you talked

about of course the cost of imprisonment, and I think there has been a great desire to look at the cost and benefits of imprisonment. And this relates -- this question relates to the question I asked Judge Walker: How in some of these cases do you determine the benefits? Obviously it's easy to determine the costs, but in a case -- the case that you described where you have someone who has committed murder and has been deported and has been brought back, the idea behind the guidelines is that when someone like that is caught, there is a risk if they're just deported that they'll come back and they may commit some additional crime.

And, as I mentioned before with drug crimes, it's very, very difficult to identify, perhaps impossible to identify the harms that are associated or that might be associated with that crime. So my question to you is: How do you weigh the costs and benefits?

JUDGE WINMILL: Just quickly, as I said earlier, I'm not sure I have an answer for that problem either. You know, I'm aware of, I guess, the Ashcroft memo and before that. I mean every administration has the memo which says almost exactly the same thing as you've described. Not only that they must pursue -- only accept a plea to the greatest readily-provable offense, I think is the phrase, on a plea agreement.

The problem is the memo's there. I think it's followed to some extent, but it's -- and obviously I don't think the judges should be involved in policing that. I sometimes feel like I would like to because I get a case where it's pretty clear to me that someone just didn't want to take his to trial, and I think they are pleading to a fairly innocuous offense. And I'm seeing other defendants involved in the same drug conspiracy pleading to the conspiracy count as opposed to one substantive count and facing

much longer sentences.

But we're really at the mercy, I think, of the U.S. Attorney. And they're --

COMMISSIONER WROBLEWSKI: But do you think it's the right policy -- if we do a better --

JUDGE WINMILL: I don't -- I think --

COMMISSIONER WROBLEWSKI: -- job of enforcing it?

JUDGE WINMILL: Yeah. I can't come up with a better policy. I mean what you may be doing is just pushing back to kind of charge bargaining, you know, even before you decide what we're going to present to the grand jury, or looking forward to what you're going to try to negotiate. I don't have an answer. I wish I did, but I think that's probably as good as we can get. If I come up with a better solution, you'd be the first to know.

COMMISSIONER WROBLEWSKI: Thank

you.

JUDGE SHEA: You wanted to know -- remind me of your question again -- I was thinking through some --

COMMISSIONER WROBLEWSKI: The cost-benefit analysis, which I think is the right one, the costs are easily determined, $2,000 a month, if we send them to prison. But the benefits in terms of addressing the public safety risk in a case like an immigration case or a drug case or something like --

JUDGE SHEA: Yeah, that's the point. If you take a 1326 and you compare it to a violent felony, then it's self-evident. I mean if you have a violent bank robber who walks into a bank with a weapon, that's -- the cost-benefit analysis is that person is going to commit a violent crime, a high risk to injuring the public.

A 1326 who -- you can have any record you want. If that record reveals no prior and no subsequent criminal activity to

speak of, driving while intoxicated -- minor. And it's been several years and you have a taxpaying profile of a worker, et cetera, then what's the point of keeping that person under a 1526 severe sentence in our country when they should be deported to the country of their birth and save the taxpayers $2,000 a month?

On the other hand, if it's a violent felony, then it's worth the payment that you make, and that's the kind of judgments that district court judges make day in and day out. And that's what -- and I'm grateful for the opportunity to make that judgment.

JUDGE WINMILL: Could I make one comment? And I --

JUDGE SHEA: Only if you agree with me.

JUDGE WINMILL: No, I agree with what you said.

In the area of the illegal reentry

I think there are two really troublesome areas for me, and that's the two matters that are considered violent crimes and result in a 16-level enhancement. One is the statutory rape, which varies so much from state to state as to what is statutory rape. Now I know under that qualified -- what's the term -- qualified category -- -- no, quantifiable categorical approach, you know, where we're required to compare the state statute with kind of a generic statute, but I think there's real mischief there.

You can have situations where they're not even close to a violent crime and it's hard to even imagine why one would consider violent -- you have a 16-level enhancement that is just out of whack. I think burglary on a dwelling is another that's considered a violent crime under the guidelines. That just -- I really -- that can get to a pretty innocuous offense.

JUDGE SHEA: Statutory rape is very

-- can be a vexing issue. I had a person -- I sentenced a person who was married to the person who was the alleged victim of the statutory rape. And it's --

JUDGE WINMILL: And they get a 16-level enhancement.

JUDGE SHEA: And they did and it was a very troublesome case because they were then married. But there is some sound reasoning for the philosophy underlying why 13-, 14-, or 15-year-old girls ought not to be able to consent. There's very sensible social policies that underlie that law. And so -- on the other hand, when we find the person married with a couple of children, it's very difficult to rationalize this sentence. It's very difficult.

JUDGE SHEA: I --

JUDGE WINMILL: Is that what you mean, too, those policies?

JUDGE SHEA: Yeah, well, they're pinch points, and those are two that I've seen

on 1326 cases, but anyway.

ACTING CHAIR HINOJOSA: Well, thank you all very much and we certainly appreciate your patience having sat through the questions before and now your questions. Thank you very much.

We'll take a five-minute break.

(Recess taken from 10:19 a.m. to 10:35 a.m.)

ACTING CHAIR HINOJOSA: We're ready to start the next panel, who's been patiently waiting. First we have Dean Kevin Cole who was named Dean of the University of San Diego Law School in 2006. He did serve as interim dean prior that since July of 2005. He clerked for the U.S. Court of Appeals for the Sixth Circuit and he practiced law in Philadelphia before joining the faculty of the University of San Diego Law School in 1997. He is the coauthor of both the *Federal Sentencing Guidelines Handbook* and the *Federal Sentencing and Forfeiture Guide*.

We also have Professor Robert Weisberg who works primarily in the field of criminal justice and writing and teaching in the areas of criminal law, criminal procedure, white collar crime, and sentencing policy. He founded and now serves as Director of the Stanford Criminal Justice Center and was a consulting attorney for the NAACP Legal Defense Fund and the California Appellate Project. And he was a law clerk to Justice Potter Stewart of the Supreme Court and Judge James Skelly Wright of the U.S. Court of Appeals for the D. C. Circuit.

Then we have Professor Frank Zimring who joined the Boalt Hall School of Law faculty at U.C. Berkeley in 1985 as Director of their Earl Warren Legal Institute. His major fields of interest are criminal justice and family law with special emphasis on the use of empirical research to inform legal policy. Professor Zimring was a member of the University of Chicago Law faculty and a

Professor of Law there and was Director of the Center for Studies in Criminal Justice there.

We appreciate each one of you taking time out from your busy schedules to share your thoughts with us with regards to the federal sentencing process. And we will start with Dean Cole.

DEAN COLE: Thank you, Judge and Members of the Commission. I had hoped to get here yesterday to listen to the testimony and was detained and wasn't able to make it, but just from being here this morning I'm glad I wasn't here yesterday because it would have just driven home the point that I had nothing new to say. And I think that probably at this point if you have something new to say about the guidelines, you're wrong.

So let me just make a couple of observations, points of emphasis, perhaps, where I think future work might be justified, spend a few minutes this morning discussing the criticism that the guidelines are in some

respects calling for sentences that are overly severe. And it's a criticism, of course, that's been frequently directed at the drug offenses.

I begin by briefly describing what I see as the origins of the severity objection, and then I want to turn to a suggestion about how the experience of the judiciary might be enlisted to help the Commission in the work it's already begun to address and achieve an acceptable consensus on severity issues, with reference to a couple of instances that illustrate the severity concern that arise in the connection with drug offenses but some of which are also of a more general concern as well.

The first 25 years of the federal sentencing guidelines, I think, does not prove the adage that timing is everything, but the experience certainly illustrates that timing is something. As has often been noted, the guidelines came into being at about the same

time as statutory mandatory minimum drug sentences triggered by the quantity of drugs involved in the offense.

Many actors in the system, including many judges, regard these mandatory minimums as unduly harsh. The Commission calibrated sentences for drug offenses involving smaller drug quantities to the penalties in the mandatory minimum statutes. The Commission's decision in that regard I think was defensible, but it infected the guidelines with the same malady that so many perceived in the mandatory minimum offenses themselves.

At least some of the initial backlash against the guidelines arose from this sense that they were too harsh. And the judges who perceived the guidelines to be too harsh found a large group of academics who shared their viewpoint.

The attack was not confined to the claim of harshness. Indeed, those who

believed the guidelines to be overly harsh probably perceived that that argument would have limited appeal. After all, Congress must have thought that voters would have approved the mandatory minimums that they enacted. And arguments about what penalties are excessive for a particular crime are notoriously mushy. People can readily agree in the abstract that offenders should not get more punishment than they deserve, but when we attempt to translate and result to months in prison, that's where we find out where we disagree.

The criticism of the guidelines have taken many forms and once articulated these criticisms tend to take on a life of their own. It would be a mistake to think that each criticism of the guidelines is merely a roundabout attack on severity, but it seems advisable to consider that some of these criticisms might be moderated if severity considerations can be addressed in a satisfactory way.

It is tempting to hope after *Booker* that severity concerns will take care of themselves. Judges will vary from guidelines' sentences when they believe variance is warranted. The Commission can examine where the variances occur and adjust the guidelines as information flows in about the sentences that the judges on the front lines approve.

In getting a handle on this mushy question of what sentence falls within the range that society should regard is deserved, judges are a wonderful resource. But relying solely on individual sentencing decisions made by judges acting in isolation only partially taps the resource.

The Commission, I think, should consider augmenting the important work it does in analyzing individual sentencing decisions by facilitating meetings of federal judges at which their judicial instincts could be tapped in a more focused and systematic way, perhaps teeming with or mirroring the model employed

by the Federal Judicial Center for providing continuing education for judges.

I know that my own law school would be glad to assist the Commission in staging meetings of this type. I'm sure many other law schools throughout the country would likewise be willing to participate.

One advantage of this kind of format is that judges could be exposed to data that they might lack when making real sentencing decisions in isolation. They would also have the benefit of hearing the views of a set of colleagues. And the resulting recommendations could be made available to judges not in attendance, hastening progress toward a set of guidelines that the judges might more commonly find attractive.

The recommendations would also give the Commission a stronger basis than isolated sentencing decisions for supporting changes to the guidelines, increasing the odds of Congressional acquiescence and reducing the

risk that Congress will be tempted by some of the methods apparently available to return to a set of mandatory sentencing rules.

Several areas of possible reform might fruitfully be explored in this way, and I want to discuss two of them briefly today. I address a third regarding drug quantity and the relevant conduct provision in my written submission. Because of the significance of drug prosecutions to the Federal criminal docket and because drug cases have been an area in which severity concerns have been especially acute, case studies focusing on these issues as they arise in drug prosecutions might be particularly helpful.

So let me start with the criticism that the guidelines pay insufficient attention to characteristics of the offender that might traditionally have mitigated the offender's sentence.

Professor Doug Berman hypothesizes that the guidelines' formulaic structure may

work against the inclusion of offender characteristics that are "difficult to measure systematically and [can] not [be] easily plotted on a sentencing chart."

One might also add that many of the offender characteristics that one might take into account can apply in widely varying ways. For example, if an offender's disadvantaged background could mitigate punishment, then one might rightly wonder how disadvantaged a background would need to be to justify a sentence reduction. Trying to capture a level of disadvantage in a verbal formulation would be a difficult task, as would be attempting to grade levels of disadvantage that exceed the minimum.

Both questions of the typically sensible reduction for particular mitigating factors as well as the best verbal formulation to address those factors could be fruitfully developed and tested by presentation of sample cases to groups of judges. In response to a

sample case, these judges could be asked first whether they find the typical guideline sentence appropriate in the ordinary case; second, if not, what sentence they believe would be appropriate in the ordinary case; and, third, what sentence they would give if the offender possessed a particular potentially mitigating characteristic.

After answering these questions individually, the judges could then compare their answers and discuss their views, change their answers, perhaps, if they felt appropriate in light of the discussion.

In addition to the benefits of allowing quick collaboration among judges in reacting to common case files, these meetings could afford the added opportunity to educate a group of judges quickly and efficiently on facts that might enter their decisionmaking processes only haphazardly in the course of making individual sentencing decisions in real cases.

As to the issue of possibly mitigating offender characteristics, for example, federal judges at a sentencing meeting might benefit from sessions highlighting the approach of various state jurisdictions to a particular potentially mitigating factor, setting forth any diagnostic difficulties or uncertainties associated with the factor, and assessing how common the factor is among the criminal population generally, which might counsel in favor of setting normal sentences to capture the factor instead of having a separate mitigating defense recognized.

Another area that might fruitfully be explored in this format is the suitability of replacing prison sentences in some less serious cases with non-prison sentences, like fines, restitution orders, house arrest, probation, and the like.

Dean Nora Demleitner has thoughtfully explored the possibility that

further use of such sanctions could alleviate the resource problems caused by the extensive use of incarceration in this country. It is also at least possible that some of these sanctions, by disrupting less severely the offender's legitimate employment prospects, could have fewer of the negative long-term effects attributable to our heavy use of imprisonment.

The educational benefit of addressing these questions with a group of judges could be significant. Because of certain legal obstacles to use of some of the sanctions and certain kinds of cases, judges may not have a great deal of experience with some of the sanctions and may not have thought systematically about how all of the possible sanctions might be employed or combined.

Moreover, some non-prison sanctions might currently only be available in certain districts, further underscoring the benefits of education. Judges could be educated about

the sanctions, information about state systems could be useful, and if the sanctions were identified as being particularly attractive to judges, then the Commission might recommend that Congress mandate the availability of some of these sanctions or remove legal obstacles to their use.

One problem that can arise with increased use of nonprison sanctions is the perception that they simply aren't serious enough in comparison to a prison sanction. The collective judgment of experienced sentencing judges that particular sanctions are an apt substitute for imprisonment, either singly or in combination, could be extremely valuable in convincing Congress and the public that these sanctions deserve the same acceptance in our federal system that they receive in state systems and abroad.

And, in particular, a more aggressive use of fines might be a strategy that judges would find attractive and that

could be presented to Congress, not as a way of reducing sentences that are imposed on offenders but rather substituting one kind of sanction for another kind of sanction that has less cost for society.

So in conclusion I just would say that even in an era of advisory guidelines, the Commission can do much to promote sound sentencing policy widely embraced by actors within the system as meting out fair punishment. The judiciary can and should be among the Commission's greatest resources in that job.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Dean Cole.

Professor Weisberg.

PROFESSOR WEISBERG: Thank you, Judge. And may I just say on behalf of my home university here that we are honored that you came. And I'd like to note that Judge Sessions was our distinguished guest just a

couple of years ago in an event here on The Global Victim in the Criminal Justice Process. And, of course, we're looking forward to have our distinguished alumnus Mr. Wroblewski here.

I should also mention that the *Blakely* case, which led to *Booker* which led to the situation we're all in, was argued, as you probably recall, by then Seattle lawyer, Jeffrey Fisher, who is now my colleague here at Stanford Law School. So you might say that you have not returned to the scene of the crime, but at least the current home venue of the perpetrator.

(Laughter.)

PROFESSOR WEISBERG: The theme of my brief remarks, and I'm going to alter slightly the written remarks I submitted, is that a large if admittedly speculative and vague factor to keep in mind as the Commission moves forward is the possibility that Congress may act and the question of how the Commission might best prepare for the possibility of

Congress acting.

The guidelines are currently in a state of suspended animation. I stress both words in that cliché. They are suspended of course because in light of *Booker* they are merely advisory and always remain subject to the possibility of some congressional revision. But it's also in a state of animation in a good sense because the Commission remains active and productive, generating new research, new refinements of the guidelines in harmony with the original congressional mandate, and in accord with its mandated processes.

Now, as you've heard from many speakers here, there's a little dissent from this, but I think there is something like a consensus. The current situation is reasonably healthy, it's a kind of equilibrium that exhibits certain healthy characteristics, even though the equilibrium seems to have been come to rather [] accidentally.

There are varying degrees, and we've heard on the degree of federal district court compliance with the guidelines, but on the whole a very high level of generality. Faithfulness to the guidelines remains high and the predictions that *Booker* would wreak havoc have been largely disproved. A federal court guidance has provided a modest but fairly effective check on our reasonableness in connection with the guidelines.

And although concerns remain about disparity, it's not clear [] that that much new concern about disparity is really attributable to *Booker*. In some ways the concerns about disparity are the continuing concerns and not necessarily severe ones that have been with us for about 20 years now.

Now I thought about this equilibrium. There may be some clever deity up here who -- up there who decided some years ago that the pre-*Booker* guidelines needed to be revised in order to make them somewhat

advisory and therefore designed this scheme whereby somebody would discover or rediscover a Sixth Amendment principle that hadn't received much attention. That principle can be dramatically applied to guidelines. And the logical consequence of that application would be a kind of revised system we have now, a kind of second Sentencing Reform Act.

Well, if that was the divine plan then it was based on a theology which escapes me. In some ways this really is an accident. Obviously there were important constitutional principles underlying the application of the Sixth Amendment, but to borrow some language from Dean Cole's written remarks, there's a complicated relationship and a difference between the constitutional and the normative. It is not as if the motivating Sixth Amendment principle that led to *Booker* had to do with a desire to make the guidelines more advisory. The relationship between the Sixth Amendment and the remedial outcome we have is

kind of complicated and was not entirely foreseeable.

Therefore, what has the manifestations of a pretty stable equilibrium in the system we have right now, it obviously rests on a rather odd and shaky legal foundation, and we have to allow for the possibility that Congress may act. Three years ago I think many of us were under the impression that Congress would act very, very quickly. And, other things being equal, we may all be relieved that it didn't on the theory that a quick reaction may not have been a very good one.

I have no inside information or any expertise as to whether Congress will act in whatever foreseeable future one imagines, but I think the possibility remains worth considering.

If Congress does act, it could end up *Booker*izing the guidelines in any one of the numerous ways the various lawyers and

academics have suggested. It could, on the other hand, change the guidelines in ways that have little to do with *Booker*, but simply take the occasion of *Booker*, you know, to implement. No one knows what the final product is going to look like.

To the extent that Congress does relegislate things, it may choose to render statutory many things which are now substatory, the guidelines. And in that regard I think the Commission might well just consider, at least as a kind of a side bet, as a kind of hedging strategy, how to think about future guidelines in such a way as to ease and optimize a possible congressional action or adoption.

In that regard one could speak of many virtues that the Commission might have in mind that it wants Congress to have in mind in terms of an ideal sentencing structure. But in the interests of simplicity I will focus on only one virtue and, speaking in a circle, as

I often do, the virtue I want to stress most of all is simplicity.

We can imagine Congress replacing the guidelines with statutory rules of sentencing that amount to subcalibrations of the current statutes defining federal crimes. One thing of course we always have to keep in mind is that the guidelines themselves have in many ways become a federal criminal code to supplement or to make up for the absence of a coherent federal criminal code. That's the big background to all this.

One reason for the complexity of the guidelines is that it is doing the work that Congress perhaps should have done over the last 30 or 40 years, for example, in refining, and just to focus on one very important aspect of criminal law, refining them, rationalizing in some way the mens rea requirements of federal crimes, which are a total mess in terms of actual statutory rules and Supreme Court interpretations thereof.

This wouldn't be the worst result, but regardless of whether the current complexity of the guidelines is justifying a general matter of jurisprudence, and there are many reasons to think it isn't, it's inconceivable that Congress could simply render statutory the current guidelines or anything approaching the current guidelines in their complexity if Congress decided that the solution was to basically move up guideline structures into actual legislation.

Therefore, to the extent that we -- and this is going to be a very circumloquacious sentence -- to the extent that we might consider the possibility that Congress might see the guideline structure and say, 'Hey, maybe we can kind of adopt a lot of that into legislation,' well, legislation will have to be simpler than the guidelines are now and therefore simplification of the guidelines is, I think, a virtue to keep in mind.

Therefore, again as a side bet to a

possible virtue, not necessarily of the major drug in force, as the Commission continues to revise the guidelines, keeping in mind the possibility of a leaner, cleaner system of guidelines, something much less complex than what we have now I think would be a good idea.

In that regard an interesting irony which has been the remarked on in the last few days at some points, has been that some of the complexity of structure of the current guidelines that arise from the old parole guideline structure. The great irony there of course is nothing regional about this remark, is that the guidelines of SRA rejected parole, but borrowed a lot of the structure of the parole guidelines, at least in terms of their complexity, into the guidelines we have now and yet again rejected the premises.

Now this irony is interesting because, as you've heard before and I think you'll hear again today, [we] really are not removed to a parole system in the future, we

may well choose to agree that the push in the guidelines and any SRA towards a much more attributive, best actus reus system is something of an over correction to the old pre-guidelines, pre-SRA law. And the talk we've heard about enhancing the role of evidence-based practices in federal criminal justice is part and parcel of the general idea that it's more utilitarian, it's not rehabilitation-focused practices, or to bring fraud in.

So, again, the irony that the parole guidelines' -- which we paid lip service to -- rehabilitative and utilitarian goals remain in some ways the historical source [of] more complexity.

To just briefly restate my concern about complexity and make one final point about evidence. If you look at the guidelines now, they are indeed one of the more interesting criminal codes in the United States. I know they're not a criminal code.

I'm using that term somewhat metaphorically. But, again, to emphasize that they are in some ways the replacement for the federal criminal code that never got written.

One reason for the complexity, and I'm putting aside, because you don't need to hear more about it, the whole matter of drug quantities, is that the originators of the guidelines, the driving forces, the people who drove the SRA, had in mind the highly attributable, again, actus reus based system, and conceived the idea that criminal actions could be described with great, great persuasion. And this goes way beyond the drug quantities. Because all the verbs and adverbs and adjectives that go into the descriptions of human conduct that underlie the guidelines. It's a very impressive achievement and yet in some ways it's an access of real human capacity to understand or, you know, discern the significance of the nuances of human conduct. Its complexity is sometimes beyond

what we could have expected of Shakespeare.

If we might imagine Congress acting in the future and maybe taking the occasion to think about the relationship between guidelines and the nonexistent federal criminal code, it may well be that the Commission could revise the guidelines to make them look a bit more like a criminal code but a somewhat simpler criminal code. And I think that's just a kind of broad generalization that the Commission might keep in mind.

I also want to pick up on one point that Mr. Mitchell, one of our speakers yesterday, mentioned. Because of the odd causation of the situation we are in now, in the remedial severability decision made in *Booker*, we have some perfectly sensible guidelines which have the effect of being advisory, but are still written or half written in mandatory terms. I'm putting aside the mandatory minimums. I'm talking about the guidelines themselves.

This would be a considerable literary challenge but one worth considering, and that is if we somewhat -- if the Commission somewhat conformed the language of the guidelines to the current equilibrium and tried to write them in such a way that they were cast more in terms of advisory guidance, because right now they are rhetorically a somewhat mixed model, and in that regard, once again, depending on the choice of alternatives that Congress settles on, the Commission might well be helping Congress in its future role.

I guess two final points. First, the irony about using evidence-based practices, as the Commission might consider, is that in some ways focusing on rehabilitative or other utilitarian concerns might be a better justification for complexity than the current actus reus based guidelines are.

On the other hand, the debate within the community of academics and

policymakers who focus on evidence-based practices has moved things more in the direction of simplification of evidence-based practices, simplification of predictive instruments, and therefore incorporation of these instruments is a very, very attractive prospect I think for the Commission.

My last, last point about this equilibrium. There are other jurisdictions which have approached the kind of equilibrium that the federal system has approach[ed], somewhat accidentally, but then so quite deliberately. It's the other states. This equilibrium looks remarkably like many of the state systems, give or take various parts and give or take versions of mandatoriness. In some ways it resembles Virginia's, which is largely regarded as a very, very successful Commission-guideline structure which is advisory and which is not proven to have greatly exacerbated disparity. There is resemblances to a number of others. And it

isn't that different what might be viewed as the kind of central consensus that's going on in state sentencing these days and that's the model penal code structure, which is presumptive and not voluntary, but again those differences may turn out to be less than meets the eye.

[Inaudible.]

I thank you.

ACTING CHAIR HINOJOSA: Thank you, Professor Weisberg.

Professor Zimring.

PROFESSOR ZIMRING: Well, the two characteristics that distinguish me from my two distinguished co-panelists are, one, I'm elderly. I'm old enough so that we were kicking around versions of a proposed federal criminal code in 1978, 1979, and 1980, and putting together Marvin Frankel and Hans Zeisel and Norval Morris, and saying, "Okay, fellows, you be the commission and show us how to make guidelines." So I have had a long and

disastrous career in criminal sentencing, which I bring to you.

The other reputation that I bring is as an empiricist. So one of the occupational hazards of inviting an elderly empiricist to make a statement here is that you're going to get empirical big pictures, and that's where I want to focus my few minutes with you, with only a brief introduction.

There's one other thing that separates me from the two people to my left here, and that is their characteristic good manners. If I was one of the Seven Dwarfs I would clearly be Grumpy, as central casting would be concerned, and one of the things that I would be grumpy about is the performance of the incarcerated sentencing in the federal criminal justice system over the 25 years since 1984.

It's part of a larger picture. The larger picture is the epic failure of American

law and practice to rationalize imprisonment over really the last 35 years of American life. In 1972 there were 205,000 people in prison. There are now 1.5 million in prison; 2.4 million is when you include jails and juvenile facilities. Okay.

What has been the contribution of this Sentencing Commission and of sentencing guidelines to the problematic proliferation of federal imprisonment, and how can the Commission help solve the larger morass that I see as criminal justice in the United States in 2009.

I organized in my written statements my own thoughts on the topic as a good news and bad news joke. And the good news is that the sentencing guidelines are not the major cause of the metastasis of imprisonment in the federal system. Nor were they singularly pernicious when compared with many state systems over the last 25 years.

If the 1984 legislation that

created this Commission had never passed Congress, much, maybe most of the unprincipled growth in federal imprisonment would have happened anyway. You have seen the performance of Congress independent and sometimes in conflict with the Commission over this period of time. There's plenty of empirical evidence that there's plenty of blame to go around.

The bad news in my good news and bad news joke is that the structure of the 1984 legislation and substantive decisions by the Commission have contributed to federal mass incarceration in regrettable fashion.

And the short list of the three problems that I want to focus on are: The undermining of other-than-prison federal sentencing alternatives, and I'm going to use that as my major point of emphasis; the abolition of routine, late-term consideration of altering release dates in long federal sentences; and, third, the proliferation of

boxes -- what my colleague Professor Weisberg was talking about gently as "complexity" -- in federal sentencing grids that both mischaracterizes the reality of sentencing decisionmaking and concerning the assumption of imprisonment.

Okay. Of those three it is the first which is the subject of my little empirical lecture. Nonprison sentences were a very common occurrence in federal criminal justice after felony convictions in the 1970s and early 1980s. They have since become an endangered species. And I would argue that the guidelines and the grids are one principal cause of this unfortunate shift. And I think that the emphasis on predictable equality of outcomes has also worked against parsimony in federal felony convictions at the lower end of the seriousness scale.

Now the empirical demonstration of all this is a one-page figure which was passed out, I hope, earlier. This compares sentences

delivered after felony conviction by federal district courts in 1979 with those which your Commission reported for fiscal 2008.

Prison is the dark bar in Figure 1. It goes from 44 percent of all felony conviction sentences to 90 percent by itself and 93.7 percent with probation of felony outcomes. That is to say, probation without confinement, and that is the lightest-colored bar in these two time periods, goes from four cases in every ten in 1979 to one case in every 16 in 2008.

Prison and probation were almost statistically equal partners in the federal landscape in 1979. By 2008, the dominant prevalence of prison was more than ten to one.

Now I'm going to get specific on how guidelines and grids might influence that, but let me pause for a minute and put these comparative statistics in some comparative context.

This is Guinness Book of World

Records stuff. Talking about a country that has not undergone a political revolution and a criminal justice system which is discretionary in its imprisonments but pretty consistent in terms of jurisdiction but not case mix, there has never been a 30-year movement from that kind of diversity to that kind of singularity in sentencing outcome that I can find anywhere in the statistically-reporting world. So that's a big change.

But, again, the good news is it's not all because of the Sentencing Act of 1984 and the guidelines. What's your piece of that responsibility?

In the first instance, a guideline grid in a very odd sense can't be neutral in its effect on the choice between incarceration and nonincarceration outcomes. That's something we've learned in the last 25 years. A grid structure is biased in favor of incarceration because it invites consequences that are palpable and quantifiable. The more

boxes you've got on the chart, the more you have to fill them with something that seems like something. And palpability is one of the great comparative advantages of incarceration.

So unless a grid draws a thick line through boundaries being incarcerative and nonincarcerative categories and expresses a strong bias against incarceration or does both. My text here would be Minnesota. The methodology of guidelines probably encourages the assumption of prison in marginal cases. I think that's true of sentencing commissions generally. But whether or not that's generally true, few who have observed the history of the impact of the federal Commission and its guidelines from its very start through at least the mid-1990s would come to any other conclusion.

So on that question, creating a system where whatever the questions are, no matter the diversity of cases, whatever the question is, prison is the answer in federal

sentencing in 2009.

Some aspects of that are particularly regrettable. Most developed countries regard short terms of imprisonment as suspiciously lacking any crime-preventive values and high in costs both to offenders and to the punishing agency. I think that general notion is correct and I think the fill-in-the-blanks, got to have something for the category, short imprisonment sentence should be one early target of correctional reform. But enough on short prison sentences.

One of the other major structural changes in the 1984 Act was the shift of sentencing time setting, time to release from the back end of the federal system, which was federal parole, to making those decisions at the front end, saying that when judges issue sentences, that also determines by and large release dates. Parole release decisionmaking was suspicious because it was supposed to be based on predictions of dangerousness or

judgments about retribution and rehabilitation. Oddly enough, some of the sentencing guidelines that you folks inherited were from the federal parole release guidelines and had some prediction of dangerousness components as well.

Okay. The new federal system did away with routine review of long sentences after an offender had served a large part of his term. And I don't think that that was rational or followed from doubts about rehabilitation or prediction of dangerousness. Because sentencing judges often use prison time as a symbolic currency and because people change and so do circumstances and governmental priorities over 15- and 20-year periods, it is rational to have power to review appropriate release dates for long-sentence prisoners and such a review need not be tied to theories of either rehabilitation or prediction of dangerousness.

Some of the prison terms issued in

the heights of the federal war on drugs were excessive by almost any civilized standard. To not have any safety valve, a release date reset for 15- and 30-year prison terms is an act of compound unreason, completely independent of one's feelings about parole as a theory of imprisonment.

To right this wrong Congress would have to act, but the Commission can and should show Congress the way. And can provide an institutional setting for reset and for doing so on a rational basis.

The third point in my written testimony overlaps but does so, I think, [] less politely with the concern that Professor Weisberg indicated. I think that one structural problem with the federal sentencing guideline is the impossible number of separate cells created in the sentencing grid. I think it's a problem in itself. I think it's symptomatic of deep dysfunction at the core of the current federal system.

The multiplication of boxes in the guideline grid was motivated again by a felt need to minimize sentencing disparity, but the emphasis on offender characteristics, which is necessary to create one of the two multi-section axes in the grid, is precisely what the critics of parole had most objected to in the parole system. So in a funny sense if you have all those record characteristics, you're getting the worst of both worlds. No reexamination times, but prediction of dangerousness as one important axis for sentence determination.

The price list of punishment outcomes on the other grid, the amount of money in the larceny crimes, the amount of drugs is more complex than in any other guideline system and fundamentally unprincipled. A smaller number of cells and a wide sentencing set of options within each category would improve the federal system whether it be done by legislation or

reexamination by the Sentencing Commission.

All of those changes cumulatively would only undo a very small part of the enormous overreach of federal and state mass imprisonment, but they would be, it seems to me, a responsible and balanced agenda for a sentencing commission that begins its second quarter century of existence.

End of sermon.

ACTING CHAIR HINOJOSA: Thank you, Professor Zimring.

Are there any questions?

COMMISSIONER WROBLEWSKI: Thank you, Judge.

And thank you all for being here. When I came to my place an hour or so ago and I saw the figure, the first thing I did was circle 1979 fiscal '08 and then wrote down "paradigm shift." And I think that you've testified, Professor Zimring and also Professor Weisberg, that the world really did change around then in sentencing and changed

dramatically. And we went from I think Professor Weisberg called it utilitarian, some people call it a therapeutic model, some people call it a rehabilitative model, to the retributist's model where we look to the actus reus and we have the price list, as you point out.

PROFESSOR ZIMRING: Well, no, I wouldn't characterize the federal guidelines like that. They would be if there was only one axis. You've got one axis which is retributive and one axis which is prediction of dangerousness, the criminal record one. So it's a paradigm shift, but it's a multiply-complex and internally-inconsistent current paradigm.

COMMISSIONER WROBLEWSKI: But you would agree, wouldn't you, that the paradigm shift towards the retributist model, which includes not just the guidelines but also mandatory minimum sentencing statutes, was a large contributing factor to all of the

increased use of imprisonment to actually some of this that's right here? A large measure was this?

PROFESSOR ZIMRING: I think yes, but I think that, for instance, short sentences don't have an obvious explanation in a retributive model. The long ones do. So at the deep end of the pool I think you've seen a shift from limited retributism to unlimited retributism --

COMMISSIONER WROBLEWSKI: And --

PROFESSOR ZIMRING: At the shallow end of the pool, I wouldn't characterize it as retributive. I would characterize it as saying whatever the question, prison is the answer.

COMMISSIONER WROBLEWSKI: I don't know if you heard any of the testimony earlier today or yesterday from the judges --

PROFESSOR ZIMRING: I did today, but not yesterday.

COMMISSIONER WROBLEWSKI: The

district judges I think, by and large, have said, and again as Professor Weisberg pointed out, that they're relatively pleased with where we are. And it was suggested by both Professor Weisberg and by you, Professor Zimring, that perhaps it's time for a really big change, whether that's moving back towards the utilitarian model or reforming the criminal code or addressing this enormous change that we've seen in terms of imprisonment policy. You're talking about a big, big change. And the judges don't seem to be, at least the district judges don't seem to be too excited about that.

So my question to -- and this is actually to all three of you -- should -- do you think the Commission should make it one of its priorities to promote another paradigm shift, whether that's back to the utilitarian model, to some sort of balance, to some sort of COBRA form, something like that?

Should we try to find -- if we do

go that way, should we try to find a balance between utilitarian and retributist model or should we move in an extreme, as we've moved over the past 30 years? And this really is to Professor -- to Dean Cole.

You talked about using district judges as a resource. And what I really want to ask you is Judge Kozinski suggested that district judges really aren't the right resource. He talked about trial judges being in some sense too close to the individual case. And of course part of that may be part of the reason why they think we're doing quite well exactly the way we are. So should we really be using trial judges as the resource in looking about whether we go to big change or small change?

DEAN COLE: Well, I think that with the court standards on appellate review of sentences, that that's where the action is going to be, in the district court. And getting the increasing buy-in from sentencers

is I think a very important thing.

I think that in terms of paradigm shifts, if the Commission could encourage sustained discussion that led to some emerging consensus, that there are some alternatives to imprisonment which can be sold to Congress as being real punishment but that have lower cost than sending people to prison, that that would be an enormous contribution. And this may be one of those situations in which, you know, you shouldn't let a good crisis pass.

The fact that the prison capacity issues are as they are, the economic situation in many jurisdictions -- in all jurisdictions, I think means there's an opportunity to maybe get people's attention to focus on things and say are there new technologies that make it feasible to restrain people's liberty in a way that's cheaper; is there a chance to calibrate fines for a wider range of offenders, so that those can be sold as adequate replacements for prison that make everybody better off. That

would be the paradigm shift I would look at.

I mean retributism, utilitarianism, the great thing about it is, you know, these things end up overlapping. People can be one or the other and argue for very similar results, but in terms of making a real change I think that would be something worth some consideration.

PROFESSOR WEISBERG: Can I just respond? I didn't think I had argued for a paradigm shift, but maybe it sounded that way. I thought I had suggested that -- well, call it a paradigm adjustment had occurred and that it might be possible to solidify whatever gains we associate with it, you know, if we kept in mind the possibility of congressional reaction and, again, try to take advantage of -- and take ownership of an equilibrium that might have happened accidentally.

In that regard I actually would like to kind of throw a question back to my colleague, Professor Zimring, and let me just

phrase it this way. If there is, as there clearly is, some greater discretion being exercised, if it is tilted in the direction of downward departures as opposed to upward departures or variances, one of the terms, if the Commission were to consider developing a stronger, clearer guideline on an in-out decision, to the extent that it could do so, you know, under current statutory law, so that we might tilt somewhat back in the direction of lesser imprisonment.

If we took up a question which occupied the panel just before us here, namely, the question of what exactly is a low-level offender by definition, and once we determine that definition, what's the empirical data on that, if we did some of these things, I ask the Professor, is it possible that if we have two or three or four or five years of experience, you've see the 90 move somewhat closer to the direction of 44?

PROFESSOR ZIMRING: Well, to the

general direction of 44, but the question is how far would it go. How far. Let's -- let me begin by changing the subject briefly and saying that rather than holding a meeting to suggest paradigm shifts with the district judges, who I did hear earlier this morning, the first thing that you should do [with] district judges is exactly what the Federal Judicial Center has been doing for a hundred years, which is getting them together for the sentencing sessions. But part of the new curriculum should be empirical stuff.

I mean the point about Figure 1 is that rather than your getting a seal of approval from that from the testimony, they didn't know what the outcomes looked like because everybody's forgotten -- it's not that there was a paradigm shift -- they've forgotten that 1979 existed. Nobody knew. That's one of the wonderful things about having historical statistics, how large this gap was. I would venture to guess that the

members of the Commission who are here this morning didn't know the shift had been quite that big. I was surprised to find that you had a one-to-one relationship. I thought what you would find is 20 or 30 percent probation.

But probation and fines were the majority share of felony outcomes. And that suggests that the first thing that you should do with actors in the system is start a conversation and do some research. When you read the Commission's research, it's pretty ahistorical to begin with. It's Commission versus earlier Commission, not versus anything else. And it is also subdivided in ways so that you don't get the entire big picture. You get instead zones.

I kept wondering, my God, how did the 11 circuits become zones A, B, C, and D in the federal system. I also then wondered how come zone D is 81 percent of all the zones. That seems like a funny way of doing mapping.

So that there is an educational and

conversational process that one can start.

Then I can go to answer Bob Weisberg's question, how far could a system with more flexibility and more data-centrism really go. How much of this is a political shift which simply reflects how people think and how much of these are systematic biases which have exacerbated that? My guess is a little less than half the change we've seen has been piling on, to use the football penalty, and that a little more than half the change has been a shift in sediment that would express itself in any systematic organization of sentencing power, so that I would be delighted if the best case of these discussions were to get us back to a situation that was 68 percent incarcerative outcomes instead of the 44 percent of back when the lion was laying down with the lamb.

ACTING CHAIR HINOJOSA: Professor Zimring, I do want to thank you for mentioning the Federal Judicial Center's Sentencing

Institutes. And the Commission has always participated with them as well as the Criminal Law Committee in setting those up. And we work jointly with them.

The one thing that is not shown on this chart, for example, in fiscal year 2008 versus 1979, I hate to say it, but I almost go back to 1979 as a judge since I came on in 1983, what it doesn't show is the complete change of the make-up of the defendants. In fiscal year 2008, 40 -- at least 40 percent and maybe as high as 41 percent of the defendants that were sentenced for these statistics were noncitizens of the United States, which therefore means that they were unlikely to have been bonded out and, therefore, means that many of them may have received substances of time served, which therefore puts them in the prison situation versus probation, since most of them cannot be put on probation because in all likelihood they will be deported. And so there would be

no way to place them on probation.

And I think when you look at these figures, and as interested as you are in empirical work, it's very important to note some of these factors that go into these figures as 1979 and the make-up of the defendants in that point.

As a matter of, for fiscal year 2009, the first quarter shows that the noncitizens of the United States have gone up to, I think, about 44 percent. And the Hispanics are now 45 point some percent, all driven by the fact that immigration cases have gone up a lot from when we started in 1979.

The other thing that doesn't show here, and I think you articulated it, it isn't necessarily the guidelines that have caused this, drugs have always been the highest percentage of the four types of drugs -- cases that make 80 percent of the docket. Immigration being second. In this fiscal year it was 32 percent for drugs and 28 percent for

immigration. I have to say that the first quarter of fiscal year 2009 is now immigration, 34 percent, and drugs, 32 percent.

What we also show for this fiscal year 2008 that of the drug cases, which made 32 percent of the cases, 70 percent of those by statute were not entitled to probation because of the type of statutes that they were convicted under.

If you take out the noncitizens from that group, 80 percent of the defendants in the drug-trafficking cases were not entitled to probation because of the statutes that they were convicted under. So there is an interesting change from 1979 to 2008. The only thing that I caution is that when you put out this information, then you realize that there has been a complete shift with regards to the type of person that is being charged in the federal system and their availability for sentence is being time served. And, you know,

so there are differences, but I think you acknowledge that, that there's been a lot of changes with regards to the type of cases that have been brought up in the statutory framework.

And I guess to Dean Cole, you mentioned, and it's shown here, the fines. Well, the time that I've been on the bench, the number of defendants that hire their own lawyers as opposed to getting court-appointed defense counsel has become a very small number of the defendants in the federal system actually hire their own lawyers. And so using fines as an alternative to incarceration would benefit perhaps certain type of defendants, which would make a very small part of the criminal docket, and would definitely lead to the discussion of you're treating some people with money different as opposed to the vast, vast majority of the defendants who can't even afford to hire their own lawyer.

And so that perhaps -- I think

that's one of the reasons why the fines have gone down, because by statute we are required to impose a fine in every federal case unless we find that they would not be able to pay for it.

PROFESSOR ZIMRING: Yeah. I know, but the 15 percent in Figure 1 were people where the fine, and no incarceration, was the most serious outcome there. So what it was is 41 percent probation plus 15 percent fines and other, and this is fines and other.

Let me go back and say, sure, there has been changes in the character of cases in federal criminal justice, but one thing --

ACTING CHAIR HINOJOSA: Type of defendants.

PROFESSOR ZIMRING: Yeah. But now hold it. The one thing that distinguishes the federal criminal justice system in 1979 and 2009, from us poor slumps in the state systems, is that the federal system is totally discretionary. The cases you get are the

cases that U.S. Attorneys want to pursue. And in my prior life, at the University of Chicago, one of the happier things that I sponsored was Richard Fraze's research on declination in the federal system that was published in 1980 and will show you the system of selection that existed for the time that is at the beginning of this Figure 1.

There had been shifts in that, but again you're getting the cases that the U.S. Attorneys want you to get. And, again, if there had been a shift from 44 percent to 62 percent imprisonment, then I think the changes in the mix and the question of how much of this is policy and how much of this is -- but what you have here is a change from one to one to ten to one. And it will be heroic beyond my capacity to believe that you've had a change in the mix of defendants that could explain even half of that. I think you've had a choice in philosophy that explains a little bit more than half of that, but I also think

that you have now a system which almost guarantees that no matter what the case is the modal outcome, the assumption that begins the sentencing process is incarceration. And that I find both disturbing and potentially reversible.

VICE CHAIR CARR: Professors Zimring and Weisberg, following up on what Commissioner Wroblewski was asking, as I look at the legislative history of the Sentencing Reform Act, it appears to me that the old parole system was scraped in part because it was deemed a coercive rehabilitation system and that Congress was finding that we don't know how to rehabilitate people and we don't know how to measure whether or not we've rehabilitated people, so rehabilitation went to the bottom of the heap and it became a more retributive system.

Twenty-five years later, do you think that with some evidence-based outcomes, we're starting to see that we maybe do know

how to rehabilitate people and that we might do better going forward with alternatives to incarceration or perhaps shorter terms of incarceration with more intensive reentry provisions because the science has changed as to whether or not we know how to lessen recidivism?

PROFESSOR WEISBERG: Focusing in particular on your second point about the reentry after some incarceration. I think a lot of the problem is the word "rehabilitation," which perhaps quite deservedly received a very tainted reputation some years back.

I -- I'm not sure if any kind of incarceration rehabilitates. If the definition of rehabilitation is making the person less crime prone than he or she was going in. In some ways because of the perfectly legitimate retributive foundation to our criminal justice system and perhaps equally legitimate incarcerative and deterrent

concerns, not rehabilitative concerns, we have to put people and a lot of people in prison, the question isn't whether prison rehabilitates them, it doesn't. The question is whether we can mitigate the antirehabilitative effects of imprisonment. And by that I mean not just the bad things that happen to them in prison, but the bad things that happen to them by virtue of them not being out of prison and, you know, benefitting from family life and jobs, whatever.

So in some ways it's damage reduction. In that sense, sure, the theme of the movement towards evidence-based practice has certainly been the efficacy at the margin of reentry programs, not focused on rehabilitation in the old discredited romantic sense, but certainly focused on the feasibility of some programs, drug rehab and some vocational training to some extent, and also the behavioral incentive and

disincentives of holding that out as a carrot, at least at the margins towards the end.

PROFESSOR ZIMRING: Yeah. And I would just want to emphasize sort of the double nonsequitur that was involved. I think that you've accurately described the history, and that is the coercive rehabilitation as a criterion for release from prison was a particular worry in the mid-1970s, California determined that sentencing is one byproduct of that; the Sentencing Act of 1984 is another.

The problem there was not even a rejection of rehabilitation, not by the inmates, the problem was that it turned prisons into acting schools. And the sort of Damocles of not knowing a release date was something that -- And they said, besides, you can't predict dangerousness that well from in-custodial requirements.

Having said that, the first non sequitur that you get is that that's precisely what federal sentencing is doing if you look

at the right-hand axis of the term being sentences that occurred, and all the background characteristics are what the parole guidelines were using when Peter Hoffman drafted them to predict release behavior, they're now predicting initial sentence.

The other non sequitur that I would want to underline is just because you want to go out of the business of doing that, you're not going to look to either rehabilitation programs or to static predictions of dangerousness in determining how long time should be served, doesn't mean that you shouldn't reexamine prison sentences 15 or 20 years into their service. There are lots of other reasons you might want to do that. And the fact that as you were taking out the rehabilitate trash you also got rid of the safety valve that is necessary to rationalize a system, is a little detail that it seems to me we've waited about 25 years too long to notice.

ACTING CHAIR HINOJOSA: On that note I guess we'll thank you all very much, and really appreciate your candid conversation with us. And thank you for taking your time from your schedules, because I know you're busy, for sharing these thoughts with us.

PROFESSOR ZIMRING: Thank you for having us.

ACTING CHAIR HINOJOSA: And we'll have a very short break. We'll start at a quarter till 12:00.

(Recess taken from 11:45 a.m. to 11:54 a.m.)

ACTING CHAIR HINOJOSA: The next panel is "Community Impact." And the next speaker will be Larry Fehr who is the Senior Vice President for Corrections and Reentry services at Pioneer Human Services, a nonprofit organization in Washington State, and that serves individuals released from prison. Prior to his position there, [he] was the executive director of the Washington

Council on Crime and Delinquency for 16 years, and during which time Washington State adopted its Sentencing Reform Act. He is the current Chair of the American Correctional Association's Community Corrections Committee.

We also have Dr. Michael Finigan, who is the Founder and firm President of the Northwest Professional Consortium Incorporated NCP Research, an Oregon-based research and evaluation firm. He has been involved in research and in evaluation in the criminal justice area since 1986. And his work has focused on substance abuse treatment and prevention. And he currently serves as principal and investigator on a cost-benefit evaluation of California drug courts.

In addition we have Caroline Fredrickson, who is the Director of the ACLU's Washington Legislative Office. As Director she leads all federal lobbying for the national ACLU, the nation's oldest and largest civil liberties organization. And prior to

joining the ACLU, Ms. Fredrickson was the general counsel and director for NARAL, Prochoice America. And she has years of experience as a senior staff run on Capitol Hill.

And so we appreciate all of you taking your time to be here with us and to share your thoughts. And we'll [start] right with Mr. Fehr.

PROFESSOR FEHR: Thank you very much. I will begin by noting that I am keenly aware that this is the final panel of the public hearing and the one between you and your lunch and perhaps flights back home, so I'm going try to be extremely brief in my comments. I did provide written comments in advance.

I want to thank you for including this Community Impact perspective in the public hearings. I want to begin by noting that in terms of my community credentials, the reason perhaps I was asked out [to] join you,

is that I helped manage a large nonprofit organization in the other Washington, Washington State. We have 61 locations in Washington State, helping people overcome the challenges of criminal history, chemical dependency, homelessness, and unemployment. Now we provide services and only those and I believe the outcomes bear this out, that by address[ing] the needs of our clients in a more holistic fashion we'll achieve improved outcomes.

But prior to that, as was noted, I also spent part of my life and career as a policy advocate at the state level, the hallmark of which was the adoption in 1981 of the Washington State sentencing format. It was implemented July 1 in 1984. I've also been a criminal justice and corrections adjunct professor for 20 years.

And so what I would like to do in my brief comments is to talk generally about sentencing-related issues, because I am

concerned about that. A lot of my life has been focused on trying to better understand those issues. But then specifically make some suggestions in regard to community corrections and reentry, which is of course my passion.

The Council of State Governments, for example, in their report on reentry identified Pioneer as the largest local offender reentry program in the country. So we do have some expertise in this arena that I do hope to share.

Well, to get on with it, first of all, after 25 years, the major objectives and goals of the Sentencing Reform Act treated those things that I cared so much about, as I went to begin my career, trying to improve the justice system, of fairness and proportionality and reducing disparity, and improving transparency, certain predictability, those goals I think the evidence clearly shows that the Federal Sentencing Reform Act has largely achieved

those very important goals. And so I begin by acknowledging that and applauding them.

I do think, however, and in the interests of time, that I will focus on the areas I think could benefit from additional attention and revisions.

First of all, in terms of general sentencing-related issues, I'll have three. I believe that we should continue to urge Congress to repeal mandatory minimum sentences in order to expand the so-called safety value. I know this has been an issue for this Commission for some time. The Former President of the American Society of Criminology, Michael Tonry, stated it succinctly, mandatory penalties do not work.

If Congress does have the political will to eliminate or reduce the number of mandatory minimums, certainly the options available to expand the safety valve by revising criminal history criteria and clarifying acceptance of responsibility

standards and applying it to the mandatory minimums offenses, I think worthy objectives.

Speaking of drug offenses, the second idea I would like to suggest to you is that we continue to urge reform of sentences regarding crack cocaine. I am very pleased that the acting chair of the Commission testified [at] the end of April to Congress very directly on this issue, that the Commission continues to believe that there is no justification for the current statutory penalty skew for powder cocaine and crack cocaine offenses. I couldn't agree more.

Like some of you perhaps, I spent part of my career trying to research and illuminate racial and ethnic disparities in the justice system. Remember that our state supreme court, the Justice Commission -- for example, I chair the Research Committee, and there is no more blatant example in the justice system than this disparity as it disproportionately impacts racial and ethnic

minorities. It clearly is an example of reform that is needed and needed soon.

The third and final general area that I would urge your consideration of is the examination of the role of prosecutorial discretion in sentencing outcomes. In the consideration this is -- and I think it's something that's been suggested previously, consideration of advisory guidelines for U.S. Attorneys. So we know that charging and pleading decisions made by the U.S. Attorneys result in 96 percent of the time in convictions that are obtained by a guilty plea. Many commentators have been concerned by this displacement or hydraulic effect of discretion by structuring discretion of judges flowing, therefore, more to the U.S. Attorneys.

And you had previous testimony, [Rodney Engen] I know was at the Atlanta hearings talking about this. One thing I think was mentioned and it may be something

worth looking at, when we adopted sentencing guidelines in Washington State, we also adopted prosecutorial guidelines that were voluntary. And some of the primary prosecuting offices in the state, like in Seattle, King County, had fairly rigorous guidelines already. We use that as an example and adopted it statewide for all prosecutor offices on charging and negotiation practices. And it's been operating since 1983, I believe.

And some research on it, for example, by researchers at the University of Washington that are Minority and Justice Commission funded to analyze disparate prosecutorial decisionmaking, found that few disparities by race of offender in various recommendations of deputy prosecuting attorneys existed. It might be worth taking a look at.

I am going to now focus on the three suggestions or areas that I believe are

warranted for further consideration as it relates to community-based corrections and the reentry programming of offenders.

When I started working in this field there were fewer than 200,000 people in state and federal prisons in the country. As you have heard repeatedly today, there are close to two million. Adult incarceration rates have either quadrupled or quintupled during that period of time, depending on who you talk to.

It's not surprising that the costs of incarceration have skyrocketed as well. One of the best research, unfortunately it's a little dated now, 2002, found that in the 20-year period beginning in 1982, the total costs of correctional budgets totaled $9 billion, by 2002 they had escalated to $60 billion -- now seven years ago. We know it's much more now. So one thing is dramatically increasing.

One thing that hasn't changed a whit is the return-to-prison rate, the

recidivism rate. Based on the best research that's been done, by the Bureau of Justice Statistics, over a fairly lengthy period of time, we now know that 67 percent, two-thirds will be rearrested within a two- -- excuse me -- a three-year period of time and that 51 percent will be sent back to prison. And that hasn't changed over this period of time that Professor Zimring referred to as mass incarceration.

So regardless of whether you believe that this increased reliance on incarceration is a good thing or bad, one thing is certain, to paraphrase Jeremy Travis' book title, they all come back; 95 to 97 percent, at least of all federal offenders, for example, come back. And the vast majority come back in a relatively short period of time.

And yet this issue of reentry is one that is only now becoming -- well, *Newsweek* magazine called it an international

movement, and certainly [*Time*] before that, given the statistics that we had presented.

So I include some information here that I think is very startling about the Federal Bureau of Prisons. They do an extraordinarily excellent job in many, many aspects, but the statistics that are startling to me was that over a 40-year period, from 1940 -- talk about a historical perspective -- from 1940 to 1980, you had the same number of federal inmates who were in prison, about 24,500. That didn't change. Then in the 1980s it was doubled, then in the 1990s it more than doubled. So today we have over 202,000 inmates in the federal system alone. That's more than was in all state and federal prisons when I began my career.

So the federal system is overcrowded. Director Lappin reports 36 percent overcrowding in their system. And then if that isn't a significant issue, we need to, therefore, I believe, one, expand

alternatives to incarceration in the federal sentencing guidelines. This is what Professor Zimring referred to as the endangered species, of alternatives to incarceration.

And I would like to thank the Commission for bringing attention to this issue by hosting a symposium on the topic last year and, I believe, for proposing alternatives to incarceration as a policy issue in the amendment current cycle. Let me give you one example.

In our residential reentry centers, which used to be called halfway houses in the old days, community correctional centers. These are federal programs. We used to have judges have the ability to make a direct commitment to our residential reentry centers, a very structured, accountable program in the community as an alternative to prison.

It's my understanding that as of December 2002, I think the year was, because of a memo from the Office of General Counsel,

the Department of Justice, it was argued at least that judges lack that authority to make a comment to a community-based residential program. So, essentially, -- and this is an interesting debate that Professor Zimring had with you about probation or prison. And I make a hyperbolic statement in my written testimony, that giving judges the choice between probation and total confinement is like giving the doctor a choice between an aspirin and a frontal lobotomy.

There has to be a continuum of correctional sanctions and services that are provided that make sense for people beyond those two extremes. And increasingly of course the currency of sentencing is incarceration. So expanding alternatives I think is a very worthwhile goal.

And, by the way, the assertion that it is somehow an easier time in the community as compared to prison time lacks a perspective of someone who's familiar with those two types

of correctional environments.

In prison everything is decided for you. When to wake up, what you have to eat, where you're going to be during that day. Very little individual responsibility involved. Once you get out into a community-correction environment there's all kinds of supervision and structure that is imposed upon you to make your own decisions. To find a job in our Federal Residential Reentry Centers within two weeks -- that's our guideline. If they don't make a movement and are successful, not everyone is sent back to prison, but they can if they're not making progress toward finding employment within a two-week period of time.

I had two daughters graduate from college in recent years and I wouldn't have wanted to impose that standard on them. But we do it and we do it in the vast majority of cases that come before us.

Dealing with recovery is hard, it's

not easy work. Reuniting with family that has been estranged is not easy. So community correctional time, the inmates will tell you, is harder time than prison time, so for what it's worth.

The second recommendation I suggest is to expand federal drug treatment courts and to create a diversionary option. Again, according to Director Lappin's testimony in Congress last month, 53 percent of all inmates in federal prisons are serving sentences for drugs. It's a little bit different figure in terms of the number of court findings, but the number of people who are actually in federal prison are 53 percent currently. Over half of those federal drug offenders have no or very minimal criminal history, yet 95 percent of all the prisons convicted of federal drug offenses are sentenced to incarceration -- 95 percent. Again, according to Director Lappin's testimony in Congress.

The current approach as I

understand it, at least, of prison first and drug courts or reentry courts later, I believe is insufficient and overly restrictive. There are 22,100 drug courts around this country now operating. I know my friend Michael will talk about his research more in that regard. They have proven to be very effective alternatives to incarceration, where you reduce recidivism and not just postpone it for a period of time while in prison.

Fifth, I believe, similarly speaking, that we should expand the Residential Drug Abuse Program, RDAP, which is the voluntary six- to 12-month program for selected federal prisoners with substance abuse problems. And, again, Dr. Lappin reported that there's a waiting list of 7,000 inmates to get into that drug treatment program.

I think we should encourage Congress to more fully fund that program, which has been proven to reduce recidivism,

and that the Bureau should be encouraged to make the program available to all qualifying, nonviolent prisoners. That would be certainly addressing again this overwhelming issue of the reason for the growth of incarceration at the federal and state level, and that is drug offenders.

Finally, I wanted to focus more squarely on increasing the capacity of Residential Reentry Centers. This is the phrase that the federal government came up with in terms of the Bureau of Prisons to refer to a community correctional facility. Residential Reentry Centers is what the current jargon is.

In the average length of stay in those centers right now, we operate three in Washington State, actually, of those we offer ten in the state of those, is 101 days in FY08. Yet we know that those people who do transition through the halfway houses are less likely to recidivate than those who are

released directly to the street.

And with the advent of evidence-based practices, with great research being done, I am very proud that within our own state, Washington State Institute for Public Policy, has been a real leader on the cost-benefit analysis associated with evidence-based practices, showing policymakers how they can save money and reduce recidivism at the same time. With the advent of the Second Chance Act, passed last year, one provision of which didn't get a lot of notoriety, it allows the Federal Bureau of Prisons to send a person to a Residential Reentry Center for up to one year. It used to be a maximum of six months.

I mentioned that the average length of stay is about three months. Now I can't imagine that there are very many, if any, federal inmates who need to be there for a year. But where are they instead? They're in prison. And we know that we can do a better job of reintegrating that individual back into

the community if we have a chance for him being in a very structured -- or her -- to be in a very structured environment, a very accountable environment, but also one that has access to services that they need.

So in order to accommodate that increase of average length of stay, Congress is going to need to appropriate additional funds to provide more opportunities for certain of these offenders in the community. Believe me, it's not easy to site and get zoning approval for such programs in neighborhoods, but we do it all the time. And it can be done. It needs to be done more in this country.

So that's my final comments. I do think that the Sentencing Reform Act has largely achieved its goals of more certain and proportional punishment, less disparate and inequitable sentencing. Those are important goals. I don't diminish them. However, we can and should do more.

In addition to focusing on consistency and exceptions, which we inordinately do, I think, we focus on how consistent we are to the guidelines and what are the exceptions and reasons for it, we need to start focusing more on costs and effectiveness of those sentences.

And something I don't have in my written comments, -- maybe a paradigm clarification. I think that we should consider having as a specific goal of the SRA reducing recidivism. I don't believe it currently is there. And yet the public is overwhelmingly in support of reducing the likelihood of criminal victimization in the future, which is what reducing recidivism is all about.

So I know I've taken up too much time as it is. I do hope you'll consider those recommendations based on a person who has spent part of his life in planning and advocacy and public education around justice

issues and, in part, providing direct services to people, who are coming out of our prisons. So thank you very much.

ACTING CHAIR HINOJOSA: Thank you, Mr. Fehr.

Dr. Finigan.

DR. FINIGAN: Thank you. Mike Finigan. I am the President and Founder of NPC Research. We've been going about 20 years now, I think.

We have become known -- I think I was asked to this kind of because we've become known around the country for our research on drug courts. We do other things, but we've done a lot of drug court research or problem-solving courts, as the more general idea is.

Now we have done studies under the auspices of the Bureau of Justice Assistance, National Institute of Justice, SMSA, foundations such as Robert Wood Johnson, and many statewide administrative office of the courts have hired us: Maryland, California,

Michigan, Missouri, Indiana, New York, Nevada, Oregon, Vermont, and Guam. There was a period of time there when I thought we were just doing M states, just Oregon, Michigan, and apparently we do other things, too.

And what I'm -- I'm going to focus on the studies we have done, particularly, although I do want to mention some other folks that I think have done good work. Because at this point in time we are up to having either completed or are in the middle of completing a hundred different drug court evaluations over the last six years. So we have kind of a critical mass of looking across the country, using pretty much the same methodology. We developed a methodology that was -- and I'll describe it quickly in a second -- was focused not only on the outcomes but also on the processes and procedures that go on in a particular court at the local level.

And, again, at the other side on costs and cost benefit. So we integrate sort

of processed outcome cost-benefit all in one model. And if you're familiar with a search, doing something in a hundred different locations the same way has advantages in terms of understanding and doing some analysis for public policy.

So I assume that one of the reasons I was asked to talk as a researcher is the question of whether problem-solving courts, the more general buzzword right now, and drug courts, specifically, might be a good, alternate model that would reduce recidivism, reduce drug dependency, drug and alcohol dependency, and might be an alternate model just to being put in jail or prison.

And I'm going to provide you with more or less some answers on that in just a second.

Actually I want to focus -- and I'm going to do this real quickly because I understand that we're on short time here -- but on four major policy questions related to

drug courts and problem-solving courts.

The first is do they reduce rearrest reconviction, the recidivism question. Particularly whether that's a universal finding, because you probably heard the drug courts have researched this pretty well, the GAO report in 2005 basically said yeah, they do, but is that a universal finding, is it the model everywhere that always shows that it reduces rearrest? And you can guess by the way I'm phrasing that the answer will be no. But is a universal model always effective?

And, the second part of that of recidivism is that does recidivism last, is it longer term or is it just a short-term phenomena? Okay? So that's recidivism.

I also might want to talk about what is maybe the core often of the logic model of drug court, is its effect on treatment, the folks who use treatment. That was the second major policy thing I wanted to

suggest to you: The question of whether a drug court and problem-solving courts generally are a way of more efficiently providing treatment to an offender population, or not.

The third thing that I want to quickly talk about, I'm going to do this stuff quickly, is the cost-benefit stuff that we have, as Washington State Institute of Public Policy, that we specialized in. The question is does it cost the taxpayers more money. Do they save money? And I'll talk -- based on a 100 studies, I'll talk about that.

And then finally in the last but not at all least, the one I think is the most important right at the moment research is under what conditions does this model work. Under what kinds of procedures, under what kinds of policies, under what kinds of practices, is it effective, more or less effective, or ineffective? And with what populations, is it your more serious

offenders, is it your lightweights, is it your most seriously addicted, and so forth? That's a lot of issues to try to cover, and we don't have all the answers at this point in terms of the research.

But let me -- just let me quickly suggest. As I said, I think I'll give you a quick understanding of our approach which is common in all these studies I'm going to talking about, which is we do a very strong process. We go into the local court, we understand that court, we understand its practices. It's the way it handles clients. And we have to do that in order to understand the question of what works under what conditions. You see what I mean? You have to know what they're doing. And we don't just go in and look at a bunch of data and walk away and not know much about the courts. Some studies do that. We don't.

We look at outcomes, not only recidivism issues, but other outcomes as well.

And then, finally, from the beginning are doing all of this in order to price it, to come up with a cost estimate that we can use. And there are many ways economists approach cost in the public policy arena, and in some ways, one said, that if you get three economists in a room, you come up with 12 different opinions. And I think that's partly true. But we take a specific approach which is a cost-to-the-taxpayer approach.

In other words, we're not trying to measure some more general social costs, which gets you big numbers, but it's hard to relate to specific budgets. So we try to ground them in the local budget, in the local taxpaying situation, only taxpayer money. Taxpayer money not spent on it, then we're not interested in it, okay? So just that caveat with what we're talking about.

We look at both what we call investment costs and outcome costs. Investment costs are how much does the

taxpayer put into. And then income costs are obviously are there any benefits down the road that are cost offsets, where might mitigating some of those initial costs.

We do something that's unusual, and I think it's important to understand, that remark I'll make in just a minute. Is that we follow -- we have a comparison group and the treatment group. It's rare to do random assignment. There are some random assignments, but it's rare. Because there are a lot of issues that you probably are aware of.

But we do a propensity-matching approach that matches people based upon their likelihood of having been chosen to be in drug court based upon their profile. And that's a pretty good matching quasi-experimental design-and-matching technique.

But then not only do we follow the clients who went through drug court, we follow the comparison group through the criminal

justice system with just as much rigor, so we wind up coming [up] with something that's interesting.

Now I'm going to talk about what our drug court clients are doing within the system, we get a window really how cost-effective or not cost-effective the business as usual is in probation [] in handling those cases. So it's sort of a two for one, in a sense, you kind of see both sides.

Well, let me go quickly back to those four things that I suggested here. One, the first question is does it reduce recidivism, the GAO study, Wilson's meta analysis, a number of other people including our own data that say, yeah, it does. The model seems to reduce or less[en] incarceration.

It doesn't make them free of the arrest. I mean let's not kid ourselves. You know, they do go back, a certain proportion go back into the system. But it reduces that

amount or delays it in something significant way.

Is it universal? No. Over a hundred studies, I can tell you there are some drug courts that have spectacular success in doing that. There are drug courts that have a statistically significant effect, but it's what we call small effect science. It's modest. But it's still there. Nothing to say no about.

There are some that are in that right direction, but it's not significantly different. And over -- right now we have about 60 completed studies. We have found four drug courts that in the medical world would be called doing harm. Let's say they're making things worse, you know. And I know the drug court don't want me to say that, but wouldn't you expect that? I mean it depends on how a model is implemented whether it's going to be effective or not. And so you're going to find some implementations of the drug

court model that just were wrong, you know, just really did worse.

So we always have issues when we go back to clients -- of course we're often looking at either the state or the feds, which helps. But then say, you know, your drug court stinks. There haven't been a lot, but we have had that experience.

So are they universal? No. Are they long term? Well, we don't have a lot of long-term studies. We did a study of actually Multnomah County, Oregon, the longest lasting drug courts that we've got. We looked over -- actually it was a 14-year period, but for a variety of reasons it was compressed into a 10-, 11-year period. We looked at the whole population. It wasn't a sample. We said, you know, whoever is eligible for drug courts, for all those years, we're going to see -- we're going to follow them. The ones who did the drug courts, the ones who didn't. We're going to see what happened. So, you know, it was

actually a first attempt to look at the whole impact on a system over a period of time.

And it seemed to suggest that the drug court effect on recidivism persisted. So that would be good news.

So, yeah, it's not universal. It depends on how things are implemented, but it does seem to be a real effect over the long term.

The second major question: How does it affect treatment? Is it an efficient way of handling the treatment of an offending population -- substance abuse treatment I'm talking about here? And that's probably the core of the logic model.

There is some evidence, by the way, that we have that it isn't just treatment that's doing this, that there are some other effects of that whole model that are having an effect on recidivism. But the question is is it treatment.

Well, again, the studies that we've

done mostly suggest that -- all these different courts -- mostly suggest that people get into treatment quicker, they spend more time, more days in treatment than the comparison group, which usually stay in probation, they complete treatment at higher rates. So it does seem -- we particularly -- we just published a study on the family drug courts, which is a SMSA cross-site evaluation, and that's one of their clear conclusions under those conditions, is the treatment was vastly more efficient and more proven than even the drug court model. So on the whole that does seem to be -- I mean like most researchers, we think more studies need to be done, but that on the whole seems to be true.

Third, cost benefit. Are these drug courts to the taxpayer, and here that's what we're saying, cost beneficial to the taxpayer. And the answer is that they mostly are. Clearly if you have some drug courts that are doing harm, that's not cost

beneficial. You already know the answer that not every condition do they save the taxpayer money, but mostly they seem to. And we have a range that we publish. And you will see again, once again, it's like the look at recidivism, some of them do very well, some of them do modestly well, and there are handful that don't do well at all.

One of the things that was interested about our following of both the comparison group with the treatment group through the criminal justice system and assessing costs on that basis is that on some cases we found that the investment cost, that is what is the cost that you put into that case to put them through the drug court route versus probation, that the investment cost was actually less going through drug court. That was a surprising finding. We never expected -- you know, we expected the offsets might balance it out, but the -- and this is not true universal. Understand I'm talking over

what is a -- you know, a substantial minority where it costs less.

In part, and I don't know if this makes sense to you or not, in part because the standard probation in that particular local jurisdiction's criminal justice system is expensive. That's really what the cause was, is that they -- these cases flowed -- standard supervision, without the drug court -- flowed in and out of the system. They had bench warrants and they had continuances. I mean when you look at that case, it was a pretty costly case at the time. You see what I'm saying? So that was probably a testimony to the cost of that particular justice system locally.

Finally, under what conditions, and this is I guess the one that interests me most right now after all these years of doing drug court researches. You know, I'm sort of tired of, well, do they work or not, you know, I mean that's -- I think we've pretty much

answered that. But under what conditions do they work?

And because we have so many studies done the same way, we're in a position now to begin to really look, and we did a study for the National Institute of Justice on 18 sites. That was our first study, and now we're working on a 50-site study, which is going to have much more power. In 18 sites you can't really have much -- you can't have very sophisticated statistics, but you can once you get up to 50 or 60.

But what we're beginning to see are patterns of when, what procedures, what practices are effective, cost-effective, and are associated with more effective drug courts. And I gave you some information. I can give you more information on what those are. I don't have time to go into the details of that, but I think that's the most exciting part to researchers right now, is to be able to go back to the field and say: Here are the

practices that are actually effective. Here is how a drug court model ought to be organized.

So the question -- let me go back to the original question and I'll end with that, which is -- are problemsolving courts a model, drug courts in particular -- by the way, I say it that way because drug courts have been researched fairly well. A few of those modestly well, and we have had the nut house. So, you know, it's hard to talk about the model in a general way.

But the question is is it an effective alternative to the sentencing, is it an effective alternative for people coming out of jail or prison, or being arrested for the first time. The answer is probably so, but it needs to somehow develop standards, that the field needs to have standard practices based on best practices and research, that standardize the model to a certain degree across the country. In other words, not in

every case does a drug court work as effectively as it should, but in most cases.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Dr. Finigan.

Ms. Fredrickson.

MS. FREDRICKSON: Thank you very much for having me here to testify for the American Civil Liberties Union.

I am very proud to be here on behalf of the ACLU's 53 affiliates nationwide and on more than 500,000 members. I'm going to talk about a couple of issues that you've heard much about, not just in the past several days but over the course of your existence, the disparity between crack and powder cocaine in sentencing and mandatory minimum sentences for drug offenders.

And on these issues current federal sentencing law threatens basic constitutional guaranties of due process, equal protection, and freedom from disproportionate punishment.

The injustice that the current federal sentencing laws exact is disproportionately felt by people of color, violating basic principles of fairness upon which our criminal justice system must be based and undermining public trust and the legitimacy of government.

We bring the crack/powder disparity to your attention, fully aware that you have previously examined it and recommended that Congress reform this unfair and destructive law, and we do indeed commend you for advocating that correction.

Today we urge you to recommend change to Congress yet again. The ranks of those opposed to the current federal sentencing law are rapidly swelling. There are increasing numbers of voices in favor of eliminating the disparity and mandatory minimums on the federal bench, on Capitol Hill, in the Oval Office, and most recently in the Department of Justice.

We are encouraged by this growing support for reform, but we are also certain that this body, the definitive authority on federal sentencing, must raise its voice once again before Congress will act.

In the written testimony we submitted for this hearing the ACLU raised four arguments for abandoning the current cocaine sentencing scheme. One, it has led to unjustifiable racial disparities and harmed primarily African American communities. Despite Congress' rational for establishing drastically differential sentencing for the two forms of the same substance, there is no connection between crack use and violence. And, third, myths about crack's unique chemical effects have been fully debunked. And, fourth, the sentencing scheme fails to implement Congress' intent because it does not focus on high-level drug traffickers.

In addition, we identified increasing political support for reforming our

cocaine sentencing laws, including the recent testimony of Assistant Attorney General Lanny Breuer, who testified of the Department of Justice's support for eliminating the crack powder disparity.

And, finally, we urged in our submitted testimony that this body should support Representative Jackson Lee's Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009.

We traced the progress of the United States Supreme Court decisions of the past two years and concluded that the executive and judicial branches have joined in this call for change. And now we urge the Commission to join the President and the judiciary once again and assist Congress by pointing the way to needed reform.

Today the ACLU asks you to urge Congress to eliminate mandatory minimum sentences for all drug offenders. Mandatory minimums hinder this Commission's work. They

establish inappropriate, artificial floors, below which this body cannot set narcotics penalties. You are thus prevented from using empirical bases to determine the true harms of criminal offenses, which undermines your ability to fulfill the Commission's mandate.

Crack cocaine mandatory minimum sentences developed in the wake of a flood of misinformation, illustrate the need for the Commission and Congress to base sentences on facts, not fear. Only when sentences reflect a review of the best pharmacological and social science evidence will the perception and reality of racial bias be eliminated. As long as mandatory minimums exist and the sentencing guidelines are keyed to the mandatory minimums, Congress will be dictating a result that is not based on your expertise and your comprehensive analysis.

The elimination of mandatory minimums will further strengthen this Commission's work by increasing the discretion

of sentencing courts to apply the advisory guidelines freed from the restrictions of congressionally-mandated minimums.

We ask you to include a request for Congress to do away with mandatory minimum sentences for drug offenses along with your recommendation to eliminate the unjust crack powder disparity.

In support of this recommendation I'd like to briefly tell you about the impact of these policies on an African American woman named Eugenia Jennings. Sometimes only the narratives of those who have suffered the brunt of these policies can really bring the point home. And many of you, and particularly the Acting Chair, may have heard Ms. Jennings' brother, Cedric Parker, testify before the Senate Judiciary Crime Subcommittee on April 28th of this year

Ms. Jennings has been in jail since 2000. And absent commutation, will remain in jail until 2019. Her life story and the

circumstances leading to her 21-year sentence epitomize the damage that the crack powder disparity and mandatory minimums inflict on individuals and on our society's most basic commitment to fairness.

As the Obama Administration's new Drug Czar Gil Kerlikowske -- must be a friend of yours, I imagine -- stated regardless of how you try to explain to people it's a war on drugs or a war on a product, people see a war as a war on them.

Ms. Jennings first found herself around illegal drugs early in her childhood. Because her own mother was unable to care for her, she lived with a surrogate family whose other children all abused drugs and alcohol. In addition to the substance abuse that surrounded her as a child, Ms. Jennings was physically abused by her surrogate mother. She was also sexually abused by one of her half-brothers, by her step-father, by a neighbor, and by a prostitute with whom she

was left alone at age seven.

Seeking refuge at age 13, Ms. Jennings moved in with her boyfriend, [who] also lived in a house soaked with alcohol and drugs. She was addicted to crack by the time she was 15 and incarcerated for the first time at 18. Ms. Jennings sought treatment while in prison and got clean, but relapsed into addiction after her release which resulted in the 21-year sentence she is currently serving.

Ms. Jennings is serving 21 years for two counts of distributing crack cocaine. She had two priors for the same offense and was charged as a career offender, receiving a sentence intended for major drug kingpins. Her first two offenses involved less than two and a half total grams of crack. Her second two offenses involved 1.3 and 12.6 grams, respectively.

Ms. Jennings was a 23-year-old mother of three when she received her 21-year sentence. If it had been powder cocaine

instead of crack cocaine, Ms. Jennings would have completed her sentence and could be here today to tell you her story. [She] is currently sober. [She's] an avid student and a model employee in prison. Were she out of prison today she could be building a new life for herself and her three children. She has paid a nine-year debt to society for her crimes and she has turned herself around, defying the harrowing conditions of her life. But because of the crack powder disparity and the harsh mandatory minimums, she cannot start building her new life and she cannot be present in her children's lives for another decade.

Now under the disparity and mandatory minimums tied the federal judge's hands when he sentenced her, but when the Honorable G. Patrick Murphy announced her sentence, he articulated far more eloquently than I can the injustice of Ms. Jennings' 21-year sentence.

"Ms. Jennings," he said, "I'm not mad at you. The fact of the matter is nobody has ever been there for you when you needed it, never. You never had anybody who stood up for you. All the government's ever done is just kick your behind. When you were a child and you had been abused, the government wasn't there. When your step-father abused you, the government wasn't there. When your step-brother abused you, the government wasn't there. But when you got a lot of crack, the government's there. At every turn in the road, we failed you and we didn't come to you until it was time to kick your butt." That's what the government has done for Eugenia Jennings.

We at the ACLU were encouraged by Gil Kerlikowske's statement that the administration is not at war with people in this country, but this drug policy we're talking about today that regularly and systematically punishes African Americans more

severely than Caucasians and that usurps this body's ability to implement its expertise has been in place for over 20 years. It has failed and reform is long, long overdue.

Therefore we call on the Commission to urge Congress to eliminate the unjust crack powder disparity and do away with the baseless mandatory minimums for narcotics.

We recognize that this will be an incremental process to correct these failed policies, but we do believe that the first step should be the passage of Representative Jackson Lee's Drug Sentencing Reform and Cocaine Kingpin Drug Trafficking Act of 2009.

We hope that in recommending its passage to Congress the Commission will emphasize that the Jackson Lee bill is only the very first step towards an end that will only be achieved when mandatory minimums are also eliminated.

Thank you very much for convening this hearing and for have the ACLU here.

Thank you.

ACTING CHAIR HINOJOSA: Thank you very much.

Any questions?

COMMISSIONER HOWELL: I have a couple. Dr. Finigan, I was just curious about the extent -- I mean I know you've been studying a hundred different drug courts, and I'm just curious about the extent you're finding any drug courts at the federal level versus the state level. And are there many drug courts at the federal level?

DR. FINIGAN: There are not many, no. And, in fact, we --

COMMISSIONER HOWELL: And are there federal -- are any of the hundred drug courts that you're saying, any at the federal level?

DR. FINIGAN: I'm sorry?

COMMISSIONER HOWELL: Are any of them at the federal level?

DR. FINIGAN: No. They're all at the state or local level. I mean they're --

usually we've been hired by state administrative office of the courts to look within their state, the drug courts that are developed. Usually they have a statewide drug court administer. But no, we have -- we have been approached by them a couple for one times, by the feds, but we have not done that.

COMMISSIONER HOWELL: And so none of the -- you haven't actually studied any of the reentry programs that some courts around -- federal courts around the country are implementing?

DR. FINIGAN: No, we have not. Again, I think it's similar to the whole problem-solving court model. So that's -- but I'm just testifying on what is essentially the adult drug court model as been implemented.

COMMISSIONER HOWELL: Ms. Fredrickson, thank you very much for being here. You know, our Chairman has now testified before the Senate and the House talking about the Commission's positions and

statistics underlying our positions on the crack powder disparity and urging a change in the statutory mandatory minimum. Is there more that you'd like us to do or that you're requesting in your urging us to recommend to change than the testimony we've already given?

MS. FREDRICKSON: Well, I think I think that the continued reiteration is important. The Commission really has done a huge amount, and we are -- really want to commend you for all you have done in moving this issue forward, keeping it on the congressional agenda, but until there's an actual change I think this commission will need to continue in increasing urgency, to ask for the legislation to be passed.

There are more and more people who are coming to the realization that this policy is extremely flawed, but again I think the Commission itself is really where expertise resides. Your voice is critical. And even though I'm sure you feel like you're getting

hoarse from saying over and over that this policy needs to be changed, I think we all need to continue to fight this battle, and the Commission is really our leader in this, so thank you for that.

COMMISSIONER WROBLEWSKI: One quick question. First of all, let me thank you all for being here. We appreciate you traveling all this way and giving over your time.

One quick question for Mr. Fehr relating to halfway houses. You indicated that the average time that clients in your -- that offenders in your program stay is about a hundred days. And the head of the Bureau of Prisons has testified that their research shows that the optimum stay is between 90 and 120 days and then to go and serve a period in home confinement before they're ultimately released. And he's testified that it's ineffective and sometimes actually counterproductive to stay much more than 120 days. Do you agree with that, disagree, and

why?

DR. FINIGAN: Well, just to clarify, to begin with, it's not -- in my programs, I operate in Washington State, that they average 101 days in fiscal year 2008. It is nationally, that is the national average.

And to come up with that measure is simply -- there's a whole variety of outlying lengths of stay. And we were receiving people who would come in for 30 days and 45 days in numbers. It's really important to begin the process of renegotiating in that period of time, to get them employed; to have them access substance abuse treatment, if that's appropriate; mental health services, if that's appropriate; reunification with family; and other kinds of beneficial activities within a short period of time.

So the average now is, as I said, 101 days. Congress in its wisdom believed that maximum amount of time was insufficient at six months. And they argued that this

should be increased up to a year, knowing full well that by do the average length of stay would be somewhat less than that.

I think this is where evidence-based practices in terms of validated and numeralized risk and needs assessments can be very useful to determine who needs a longer period of time and who could benefit from it than others. So I mention that. I can't imagine that there are very many, if any, federal inmates who need a year in a community residential placement. But I do argue that there are many who would benefit by having more than having 101 days in such a placement. Thank you.

ACTING CHAIR HINOJOSA: Thank you all very much. And we realize that you all are performing work for other groups and it's really nice of you take the time and effort to be here with us today and share your thoughts. And we certainly appreciate the written comments that you all have submitted also.

Thank you all very much.

MS. FREDRICKSON: Thank you.

PROFESSOR FEHR: Thank you.

DR. FINIGAN: Thank you.

ACTING CHAIR HINOJOSA: We're also very fortunate to have in the room today Dean Larry Kramer, who's the Dean of the Stanford Law School. He and Kara Dansky, who is the Executive Director of the Stanford Law Criminal Justice Center, have been extremely helpful with regards to having these hearings here. And we could not have had a better venue than this for these hearings. And we certainly appreciate your openness and your willingness to work with us and your desire from the very start to have us here. And so on behalf of the entire Commission we want to say thank you very much and we hope to some day come back because it has been a great place to have this hearing.

And, Dean Kramer, if you'd like to say something.

DEAN KRAMER: I just wanted to say thank you for coming. Thank you all for coming. I'm glad the hearings went well. We would absolutely be delighted to host you again any time you want to come, hopefully next time while we're in session because I think a lot of students would like to have come. I'd love for them to have the chance to see how the Commission actually works, because it's such an important part of the criminal justice system. And, again, we're just really, really happy you came and look forward to seeing you again soon

ACTING CHAIR HINOJOSA: Dean Kramer and Ms. Dansky, thank you so much for putting up with us and we hope we haven't been too much of a bother.

(Cell phone ringing.)

ACTING CHAIR HINOJOSA: And I don't know where the marshals are, but they usually jump whenever this happens in the courtroom.

(Laughter.)

ACTING CHAIR HINOJOSA: Thank you all very much. And on behalf of the Commission I want to thank every single person who has participated as a presenter with regards to our hearings and certainly everyone who has been here and has been interested, and we appreciate the comments, the suggestions, the direction that you all have presented. And it has been extremely helpful and will continue to be so. Thank you all very much.

(The hearing was adjourned at 12:52 p.m.)

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