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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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WEDNESDAY, SEPTEMBER 9, 2009

AND

THURSDAY, SEPTEMBER 10, 2009

\* \* \* \* \*

The public hearing convened in the Hon. James Benton Parsons Ceremonial Courtroom in the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, at 8:45 a.m. Wednesday, September 9, 2009, and 9:05 a.m. Thursday, September 10, 2009, the Hon. Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

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

STAFF PRESENT:

- JUDITH W. SHEON, Staff Director
- BRENT NEWTON, Deputy Staff Director

Court Reporter:

- KATHLEEN M. FENNELL, CSR, RPR, RMR, FCRR
- Official Court Reporter
- United States District Court
- 219 South Dearborn Street, Suite 2144-A
- Chicago, Illinois 60604
- Telephone: (312) 435-5569
- www.Kathyfennell.com

1 PANELISTS PRESENT:

2 HON. JAMES F. HOLDERMAN, JR., Chief District Judge, Northern  
District of Illinois

3 HON. JAMES G. CARR, Chief District Judge, Northern District  
4 of Ohio

5 HON. GERALD E. ROSEN, Chief District Judge, Eastern District  
of Michigan

6 HON. JON P. McCALLA, Chief District Judge, Western District of  
7 Tennessee

8 HON. KAREN K. CALDWELL, District Judge, Eastern District of  
Kentucky

9 HON. PHILIP PETER SIMON, District Judge, Northern District of  
10 Indiana

11 PHILIP MILLER, Chief Probation Officer, Eastern District of  
Michigan

12 RICHARD TRACY, Chief Probation Officer, Northern District of  
13 Illinois

14 HON. J. MICHAEL BROWN, Secretary of Justice and Public Safety,  
Commonwealth of Kentucky, Frankfort, Kentucky

15 DAVID M. KENNEDY, Director, Center for Crime Prevention and  
16 Control, John Jay College of Criminal Justice, New  
York, New York

17 HON. DANNY J. BOGGS, Circuit Judge, Sixth Circuit Court  
18 of Appeals

19 HON. FRANK H. EASTERBROOK, Chief Circuit Judge, Seventh  
Circuit Court of Appeals

20 HON. JEFFREY S. SUTTON, Circuit Judge, Sixth Circuit Court of  
21 Appeals

22 HON. PATRICK J. FITZGERALD, United States Attorney, Northern  
District of Illinois

23 HON. EDWARD M. YARBROUGH, United States Attorney, Middle  
24 District of Tennessee

25

1 PANELISTS PRESENT: (Continued)

2 CAROL BROOK, Federal Public Defender, Northern District of  
3 Illinois

4 JACQUELINE JOHNSON, First Assistant Federal Public Defender,  
5 Northern District of Ohio

6 THOMAS W. CRANMER, Principal, Miller, Canfield, Paddock and  
7 Stone, Troy, Michigan

8 JAMES VAN DYKE, Executive Director, Salvation Army  
9 Correctional Services Program, Chicago, Illinois

10 CARL WICKLUND, Executive Director, American Probation and  
11 Parole Association, Lexington, Kentucky

12 HON. ROGER K. WARREN, President Emeritus, National Center for  
13 State Courts, Williamsburg, Virginia

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Adjourn

08:43:00 1 OPENING REMARKS

08:43:00 2 ACTING CHAIR HINOJOSA: Good morning.

08:43:03 3 It's a special honor for me to welcome you on behalf  
08:43:06 4 of the United States Sentencing Commission to this public  
08:43:09 5 hearing, which is the fourth in a series of regional hearings  
08:43:13 6 that the Commission is holding across the country on the 25th  
08:43:16 7 anniversary of the passage of the Sentencing Reform Act of  
08:43:20 8 1984.

08:43:20 9 A special thanks on behalf of the Commission to every  
08:43:23 10 single member of the panels that will be addressing us during  
08:43:27 11 the next two days. We realize that every person that is on a  
08:43:31 12 panel has a busy schedule, and it is certainly appreciated  
08:43:36 13 that they have taken the time to be present here and share  
08:43:40 14 their thoughts with us and the work that they have put into  
08:43:43 15 their thoughts, and it is very much appreciated on behalf of  
08:43:46 16 all the members of the Commission.

08:43:47 17 A special thanks to Chief Judge James Holderman and  
08:43:51 18 all the judges of the Northern District of Illinois here in  
08:43:54 19 Chicago for their hospitality and for letting us use this  
08:43:58 20 courtroom. It is certainly appreciated also. And a special  
08:44:01 21 thanks also to, of course, the administrative assistant to the  
08:44:05 22 chief judge, Larry Collins, for letting the Commission, as I  
08:44:09 23 indicated, use this courtroom and all the help, logistical  
08:44:13 24 help, that has been given to us and the staff of the  
08:44:15 25 Commission.

08:44:15 1 I also want to, of course, thank Chief Judge Frank  
08:44:19 2 Easterbrook of the Seventh Circuit for his hospitality and his  
08:44:24 3 assistance with regard to this particular event.

08:44:27 4 As I indicated, this is the 25th anniversary of the  
08:44:29 5 passing of the Sentencing Reform Act of 1984, and I always  
08:44:33 6 refer to that Sentencing Reform Act with an adjective  
08:44:37 7 beforehand, I always call it the bipartisan Sentencing Reform  
08:44:42 8 Act of 1984, which is an adjective that sometimes we don't use  
08:44:45 9 as often these days with regards to any major piece of  
08:44:48 10 legislation, but it was the work of Senator Kennedy, Senator  
08:44:54 11 Thurmond, Senator Hatch, and actually the work of many others  
08:44:57 12 who, through the years, had had issues and comments with  
08:45:00 13 regards to the sentencing process in the federal criminal  
08:45:02 14 justice system.

08:45:03 15 Having been a judge at the time for about four years  
08:45:06 16 or had been on two years, more or less, by the time of the  
08:45:09 17 passage of the Act and then was on five years before the  
08:45:12 18 guidelines came into effect, I have to say that I shared some  
08:45:16 19 of the concerns that were expressed by those who were in favor  
08:45:20 20 of passage of the Act. And I also feel that 25 years later,  
08:45:24 21 it is safe to say whatever issues we might have or criticisms  
08:45:28 22 or whatever praise we might have for the system itself at the  
08:45:32 23 present day, that we are certainly in a better situation than  
08:45:35 24 we were before the passage of the Act.

08:45:38 25 It is clear that one of the things that the

08:45:41 1 Sentencing Reform Act did was create the bipartisan United  
08:45:46 2 States Sentencing Commission, which, through the years, has  
08:45:49 3 promulgated guidelines, amended guidelines, and not only  
08:45:54 4 worked on the guidelines system but actually worked very hard  
08:45:57 5 with regards to collection of information, reports to  
08:46:03 6 Congress, training programs, and all the other things that the  
08:46:06 7 Commission does with regards to working in the sentencing  
08:46:09 8 field.

08:46:10 9 Another thing that we all have witnessed, being on  
08:46:16 10 the bench as well as practitioners in the field, is that there  
08:46:21 11 have been some changes since 1987, not only with regards to  
08:46:26 12 the guideline system itself, but certainly with regards to the  
08:46:29 13 size of the federal docket when it comes to felony sentencings  
08:46:32 14 and the misdemeanor cases that are counted for purposes of the  
08:46:37 15 guideline determinations. The size of that docket has, it is  
08:46:42 16 safe to say, doubled since 1987.

08:46:45 17 The makeup of the defendants has changed during the  
08:46:49 18 period of time that we've had the Sentencing Reform Act. It  
08:46:54 19 is true that 80 percent of the docket continues to be drug,  
08:46:58 20 firearms, fraud and immigration cases. However, the latest  
08:47:02 21 statistics for the fiscal year of 2009 do indicate that  
08:47:07 22 immigration cases have overtaken the drug cases as the number  
08:47:12 23 one, as far as the number of cases that are being sentenced in  
08:47:17 24 the federal system by about one or two percent, which is the first  
08:47:20 25 time that that has ever happened.



08:47:22 1           The ethnic and racial background of the defendants  
08:47:26 2 has changed. For fiscal year 2008, 42 percent of the  
08:47:31 3 defendants were Hispanic. So far for this fiscal year, it is  
08:47:36 4 up to about 45 percent. The non-citizens fiscal year 2008 was  
08:47:42 5 about 40 percent. That has grown to about 42 or 43 percent  
08:47:46 6 this fiscal year.

08:47:47 7           Some things have not changed. Obviously drug  
08:47:49 8 trafficking and immigration continue to be a big part of the  
08:47:52 9 docket, as I just indicated. Men continue to represent the  
08:47:57 10 great majority of the defendants. The age makeup has not  
08:48:01 11 changed. More than half of the federal defendants are between  
08:48:03 12 the ages of 21 and 35.

08:48:07 13           And I do want to say that part of the work of the  
08:48:11 14 Commission, as I indicated, is to work on amendments as well  
08:48:17 15 as new guidelines with regards to passage by Congress of new  
08:48:21 16 criminal violations. And one of the things that I have  
08:48:25 17 appreciated being on the Commission that I did not appreciate  
08:48:29 18 as much beforehand was how much the work of the Commission  
08:48:34 19 mirrors on a national level what each one of us as district  
08:48:39 20 judges do at a local level every time that we sentence  
08:48:43 21 somebody.

08:48:43 22           The 3553(a) factors are certainly considered by the  
08:48:46 23 Commission every time it promulgates a guideline or amends a  
08:48:55 24 guideline, and it is a process that is a long process over a  
08:48:58 25 cycle period that is usually about nine months, and it

08:49:00 1 includes input from defenders, prosecutors, the public,  
08:49:03 2 Congress obviously, and obviously, as I indicated, prosecutors  
08:49:08 3 representing the Executive Branch.

08:49:10 4           It is also important to note that after *Booker*, it is  
08:49:19 5 true that the guidelines continue to be the initial benchmark  
08:49:23 6 that every one of us operates from when we sentence somebody.  
08:49:27 7 It is true that we continue to have to determine the  
08:49:31 8 guidelines and start with them as the initial benchmark.

08:49:34 9           It is also true that on a personal observation that,  
08:49:38 10 as I have traveled across the country, judges have indicated  
08:49:41 11 to me, not necessarily in meetings but when I run into them in  
08:49:47 12 social situations, that I didn't really know how much I  
08:49:49 13 appreciated the guidelines 'til they became advisory.

08:49:52 14           Part of the purpose of this hearing, though, is for  
08:49:56 15 us as commissioners to hear what individuals think about the  
08:50:01 16 guidelines as well as what individuals think we should  
08:50:05 17 consider with regards to revision of the guidelines and  
08:50:08 18 changes in the system, as well as to the work of the  
08:50:10 19 Commission, and because of that, we thank each one of you.

08:50:14 20           Enough from me. I do want to introduce the other  
08:50:16 21 members of the Commission who work extremely hard. They also  
08:50:22 22 have other jobs that they do, and it has been a real joy for  
08:50:27 23 me to be able to work with each one of them and serve with  
08:50:30 24 each one of them.

08:50:31 25           To my right here is Chief Judge William Sessions.

08:50:34 1 He's probably wondering why I'm introducing him to my right,  
08:50:39 2 but he is seated to my right. He serves as vice chair of the  
08:50:43 3 Commission and has been on since 1999. He has been nominated  
08:50:47 4 as the next chair and is awaiting Senate confirmation. He has  
08:50:51 5 served as U.S. district judge for the District of Vermont  
08:50:56 6 since 1995, and he is presently, as I indicated, the Chief  
08:51:00 7 Judge. He has served as a professor at the Vermont Law  
08:51:03 8 School, and he received his B.A. degree from Middlebury  
08:51:07 9 College and a J.D. degree from the George Washington School of  
08:51:10 10 Law.

08:51:11 11 To my left here is Judge Ruben Castillo who probably  
08:51:16 12 does not need an introduction in Chicago. He has served as  
08:51:19 13 vice chair of the Commission since 1999, has served as a U.S.  
08:51:22 14 district judge for this district since 1994. From 1991 to  
08:51:27 15 '94, he was a partner with Kirkland & Ellis, and he has served  
08:51:31 16 in the past as regional counsel for the Mexican-American Legal  
08:51:33 17 Defense and Educational Fund from 1988 to '91. He also served  
08:51:38 18 as an assistant U.S. attorney in this district. He holds his  
08:51:42 19 B.A. degree from Loyola and a J.D. degree from Northwestern.

08:51:46 20 Also to my left here is Vice Chair William Carr who  
08:51:51 21 has been a member of the Commission. He's the baby member of  
08:51:54 22 the Commission since the year 2008. He served as an Assistant  
08:52:00 23 U.S. Attorney, and you don't want to run into anybody from the  
08:52:02 24 Eastern District of Pennsylvania because they always want to  
08:52:05 25 mention how they know Will Carr and how he was a great AUSA

08:52:09 1 and how knowledgeable he was with regards to the sentencing  
08:52:11 2 process, and he is.

08:52:14 3           So he served there from 1981 until his retirement in  
08:52:20 4 2004, and in 1987, he was actually designated as the Justice  
08:52:28 5 Department contact person for the U.S. Attorney's Office's  
08:52:31 6 sentencing guidelines training.

08:52:32 7           Commissioner Beryl Howell to my right here has been a  
08:52:35 8 member of the Commission since the year 2004. She was an  
08:52:38 9 executive managing director and general counsel to the  
08:52:42 10 Washington, D.C. office of Stroz Friedberg. Prior to that,  
08:52:46 11 she was the general counsel for the Senate Committee on the  
08:52:51 12 Judiciary serving under and working for Senator Patrick Leahy.  
08:52:59 13 She has also served as an assistant U.S. attorney in the  
08:53:03 14 Eastern District of New York. She's a graduate of Bryn Mawr  
08:53:06 15 and Columbia Law School.

08:53:08 16           Commissioner Dabney Friedrich to my left here has  
08:53:10 17 been a member of the Commission since the year 2006. She has  
08:53:13 18 previously served as an associate counsel at the White House  
08:53:20 19 Counsel's Office, and she has been a counsel to Chairman Hatch  
08:53:23 20 on the Senate Committee on the Judiciary, and she has also  
08:53:27 21 served as an assistant U.S. attorney in the Southern District  
08:53:30 22 of California and the Eastern District of Virginia. She is a  
08:53:33 23 graduate of Trinity University in Texas, as well as Yale Law  
08:53:37 24 School.

08:53:37 25           To my right is the ex-officio member of the

08:53:42 1 Commission representing the Attorney General, Commissioner  
08:53:44 2 Jonathan Wroblewski, who was recently designated as an  
08:53:49 3 ex-officio member of the Commission, as I indicated,  
08:53:52 4 representing the Office of the Attorney General. He serves as  
08:53:55 5 the director of the Office of Policy and Legislation in the  
08:53:57 6 Criminal Division of the department, and he is a Stanford  
08:54:02 7 alumnus, having received his J.D. from Stanford Law School.

08:54:05 8 I do want to at this point ask if any other member of  
08:54:08 9 the Commission would like to make any comments?

08:54:11 10 VICE CHAIR CASTILLO: I also would like to, and I  
08:54:14 11 don't want to take away from my chief judge who I'm sure will  
08:54:17 12 welcome everybody, but I do want to welcome everybody to my  
08:54:20 13 hometown. I want to thank the acting chair for bringing the  
08:54:25 14 Commission to Chicago, and I'm looking forward to two days of  
08:54:31 15 what I would call Midwestern common sense, and I think we need  
08:54:37 16 to hear that to make these guidelines better, to make them  
08:54:41 17 relevant to sentencing processes.

08:54:43 18 And I also want to extend a personal note of  
08:54:48 19 gratitude to Larry Collins for all the work he has done to  
08:54:52 20 make this hearing happen. His interaction with the members of  
08:54:56 21 the Sentencing Commission has been nothing short of  
08:55:00 22 remarkable. And I heard just this morning about four  
08:55:04 23 compliments about Larry, so I'm sure Chief Judge Holderman and  
08:55:10 24 I both are happy that he works for our district.

08:55:14 25 So I extend my welcome, and thank you, Larry.

08:55:21 1           ACTING CHAIR HINOJOSA: Now we'll go ahead and get  
08:55:23 2 started with our first panel. We're very honored this morning  
08:55:26 3 to have three distinguished district judges, the judges that  
08:55:30 4 actually do the sentencing, and our speakers -- our presenters  
08:55:38 5 on this panel are, of course, Chief Judge James Holderman who  
08:55:42 6 has been the chief judge of this district since 2006, having  
08:55:45 7 served on the court since 1985. He also serves as an adjunct  
08:55:50 8 professor at the John Marshall School of Law and at the  
08:55:53 9 University of Illinois College of Law. He received his  
08:55:56 10 bachelor from the University of Illinois and his law degree  
08:56:00 11 from the University of Illinois.

08:56:01 12           Next to him is the Honorable James G. Carr who has  
08:56:05 13 been chief judge of the United States District Court for the  
08:56:07 14 Northern District of Ohio since 2004, and has been a judge  
08:56:12 15 since 1994.

08:56:14 16           Previous to that, he did also serve as a U.S.  
08:56:18 17 magistrate judge for the district from '79 to '94. Judge Carr  
08:56:23 18 received his bachelor's degree from Kenyon College and his law  
08:56:26 19 degree from Harvard.

08:56:27 20           We also have the Honorable Gerald Ellis Rosen who  
08:56:32 21 became chief judge of the U.S. District Court for the Eastern  
08:56:36 22 District of Michigan this year, having served on that court  
08:56:40 23 since 1990. He also currently serves as an adjunct professor  
08:56:44 24 of law at Wayne State. He received his bachelor's degree from  
08:56:48 25 Kalamazoo and his law degree from the George Washington

08:56:51 1 University School of Law.

08:56:53 2 We'll start with Chief Judge Holderman.

08:56:57 3 PANEL I. VIEW FROM THE DISTRICT COURT BENCH

08:56:57 4 CHIEF JUDGE HOLDERMAN: Good morning, and thank you,  
08:57:01 5 your Honor.

08:57:02 6 Judge Castillo and I typically do agree with one  
08:57:06 7 another, and we certainly do agree on the virtues of Larry  
08:57:10 8 Collins. I've been working with him since I've become the  
08:57:14 9 chief judge, and he has done an excellent job.

08:57:16 10 I do want to welcome each of you for your spending  
08:57:23 11 your time here in the Northern District of Illinois. Welcome  
08:57:26 12 to the Everett McKinley Dirksen United States Courthouse.  
08:57:33 13 Welcome to the Judge James Benton Parsons Courtroom.

08:57:37 14 We are proud here in Chicago that the President of  
08:57:42 15 the United States calls our hometown his hometown. Both the  
08:57:47 16 President and the First Lady are members of our bar, as was  
08:57:53 17 the first President of the United States from Illinois,  
08:57:58 18 Abraham Lincoln. We're proud of our heritage here.

08:58:02 19 The next two days that you're going to be spending in  
08:58:04 20 this courtroom will be, I'm sure, informative to all of you,  
08:58:10 21 and I wanted to just somewhat set the scene.

08:58:13 22 The James Benton Parsons Courtroom was named that  
08:58:19 23 after James Benton Parsons, who I know the Commissioners can't  
08:58:25 24 see his photo, but his photo is second from the left in the  
08:58:28 25 upper row. He was the first African-American district court

08:58:38 1 Judge in the United States. So we, from Chicago, are  
08:58:42 2 especially important to have the first President of the United  
08:58:47 3 States from African descent, as well as the first United  
08:58:51 4 States district court judge of African descent come from  
08:58:56 5 our area.

08:58:57 6 I also want to just mention that we have a great  
08:59:03 7 tradition here, and all of the judges of the district court  
08:59:08 8 are pictured in this courtroom, the very first judge, Judge  
08:59:12 9 Thomas Drummond, over to my left, far left. The active  
08:59:18 10 judges' photographs are along the sides, and the photographs  
08:59:21 11 that you folks are primarily looking at on the back wall are  
08:59:26 12 people who have been district court judges who have been  
08:59:29 13 either elevated to the courts of appeal or have retired from  
08:59:35 14 the bench or have taken senior status.

08:59:38 15 We actually used to have the active judges' pictures  
08:59:43 16 across the front of the courtroom, and then when we started  
08:59:47 17 sharing the courtroom with the judges of our court of appeals  
08:59:52 18 here in the Seventh Circuit, they started to feel uncomfortable  
08:59:56 19 that our photographs were looking over their shoulders.

08:59:58 20 (Laughter.)

09:00:00 21 CHIEF JUDGE HOLDERMAN: And so what we did was have  
09:00:02 22 our predecessors, those who have passed on, look over their  
09:00:06 23 shoulders. And there's no truth to the rumor that Thomas  
09:00:10 24 Drummond's eyebrows on occasion have raised when the Court of  
09:00:16 25 Appeals has issued a particular opinion en banc.



09:00:19 1           But I want to move now to my prepared remarks, and we  
09:00:25 2 really appreciate the willingness of the Sentencing Commission  
09:00:32 3 to convene its set of public hearings throughout the country  
09:00:36 4 to provide a meaningful opportunity for members of the public  
09:00:38 5 across the country to give their views on the future of  
09:00:43 6 federal sentencing. It's important to our country.

09:00:45 7           I wish to emphasize that my views expressed today as  
09:00:49 8 the chief judge of the Northern District of Illinois may not  
09:00:52 9 fully reflect each and every view of each of the judges on our  
09:00:55 10 court, but I am privileged to know many of the views of the  
09:01:01 11 judges on our court, and I believe that the views that I will  
09:01:06 12 be expressing are shared by most of the 33 active and senior  
09:01:10 13 judges of our district.

09:01:12 14           The judges of the Northern District of Illinois  
09:01:15 15 continue to recognize and agree that the sentencing guidelines  
09:01:19 16 are an important initial benchmark and important starting  
09:01:24 17 point in sentencing, even under an advisory system. For the  
09:01:29 18 most part, a great number of sentences in our district fall  
09:01:33 19 within the advisory sentencing guidelines range, even after  
09:01:41 20 extensive argument by very competent defense counsel,  
09:01:44 21 sometimes both oral argument and written presentations because  
09:01:52 22 our federal defense bar here in the Northern District of  
09:01:55 23 Illinois, like most big cities, is very conscientious, very  
09:02:01 24 zealous and very active during the sentencing phase of  
09:02:04 25 criminal cases. Extensive sentencing memorandums and factual

09:02:09 1 affidavits are not unusual in this district.

09:02:12 2           Later, you will hear from the executive director of  
09:02:17 3 the Federal Defender Panel, as well as our United States  
09:02:22 4 Attorney, as well as our Chief Probation Officer, who sits in  
09:02:26 5 the back of the courtroom this morning, and you will hear  
09:02:30 6 their positions with regard to the strong advocacy efforts  
09:02:34 7 that are made in this district.

09:02:36 8           And so because of those strong advocacy efforts, it's  
09:02:39 9 not surprising that our district has a robust variance rate.  
09:02:44 10 Yet, I believe the Commission's data will show that the  
09:02:49 11 sentences of our district have not dramatically dropped over  
09:02:52 12 the years since the *Booker* opinion and the sentencing  
09:02:57 13 guidelines became advisory. We do commend the Commission for  
09:03:00 14 providing accurate and timely data on the actual sentences  
09:03:03 15 imposed. It is helpful.

09:03:05 16           In the end, I, along with many of our judges, may on  
09:03:10 17 occasion vary downward in a modest fashion from the low end of  
09:03:14 18 the guidelines, as is reasonable under the circumstances of  
09:03:17 19 the particular defendant and the particular case. I believe,  
09:03:21 20 though, that it will be important for the Sentencing  
09:03:24 21 Commission to continue to use its best efforts to improve and  
09:03:27 22 clarify the sentencing guidelines and the provisions of those  
09:03:31 23 guidelines so that they retain credibility with judges  
09:03:35 24 throughout the United States as the years go on.

09:03:38 25           We are well aware that the Commission has continually

09:03:43 1 tried to provide better guidance to us judges through the  
09:03:47 2 guidelines so as to reflect current thinking as to appropriate  
09:03:51 3 sentencing policy in our society as we go along. In  
09:03:56 4 particular, we did welcome the reduction in the crack cocaine  
09:04:00 5 penalties and believe that it has restored greater credibility  
09:04:05 6 and fairness to drug sentencing.

09:04:09 7 Certainly more work can be done in this area, and I  
09:04:12 8 am aware that the Commission continues to work with Congress  
09:04:15 9 in this area and with various pieces of legislation that are  
09:04:19 10 pending now in Congress, to relieve the tension regarding the  
09:04:24 11 still existing disparity between crack and powder penalties.

09:04:29 12 We here in the Northern District of Illinois were  
09:04:32 13 able to rule on over 400 sentencing reduction motions during  
09:04:37 14 this last year, thanks to the leadership of the Commission, as  
09:04:41 15 well as our own Judge Ruben Castillo chairing our district  
09:04:48 16 court committee, the retroactivity committee with regard to  
09:04:51 17 the new crack cocaine penalties. And it has, in essence  
09:04:55 18 because of Judge Castillo's leadership, been a relatively  
09:04:58 19 pain-free process because it has resulted in greater fairness  
09:05:06 20 to many of the defendants convicted in this district.

09:05:10 21 Most of the judges of our district, however, believe  
09:05:13 22 that the Commission should continue to take a hard look at  
09:05:17 23 lowering penalties for low end, nonviolent drug offenders. In  
09:05:24 24 particular, the mandatory minimum penalties that apply to drug  
09:05:27 25 offenses have been a continuing concern for most of the judges

09:05:32 1 of this district -- and as I said, you will hear from our  
09:05:36 2 Chief Probation Officer, Richard Tracy, on those points --  
09:05:41 3 because some of the offenders sentenced under the mandatory  
09:05:45 4 minimum guidelines are now completing their prison sentences,  
09:05:49 5 and he will talk about the ramifications. In that regard, I  
09:05:55 6 would also ask the Commission to consider updating its prior  
09:05:58 7 work in educating the members of Congress on the  
09:06:00 8 appropriateness of eliminating the mandatory minimum penalties  
09:06:06 9 in that area.

09:06:08 10 We appreciate the Commission's prior work in trying  
09:06:11 11 to refine the computation of relevant criminal history for  
09:06:17 12 defendants. We encourage the Commission to continue its  
09:06:21 13 efforts to refine the use of criminal history and eliminate  
09:06:25 14 the counting of older, minor offenses that the chair referred  
09:06:29 15 to earlier, which are really poor predictors of recidivism.

09:06:35 16 I would also like to talk about two continuing  
09:06:40 17 sources of sentencing issues that plague our particular  
09:06:46 18 circuit. The first is the use of downward departures in  
09:06:50 19 sentencing. We, on the district court, believe that they  
09:06:53 20 continue to play a major role in evaluating sentencings, in  
09:07:00 21 evaluating the sentencing guidelines and evaluating an  
09:07:03 22 appropriate reasonable sentence.

09:07:05 23 Our circuit, however, has not seen fit to deem  
09:07:11 24 departures to have continuing viability. In fact, our circuit  
09:07:15 25 has deemed departures obsolete under the advisory sentencing

09:07:22 1 guidelines system, and I believe that it would be helpful if  
09:07:29 2 the Sentencing Commission could provide further guidance on  
09:07:36 3 this point because I believe that the position our circuit  
09:07:39 4 court has taken is shortsighted and is case law that's not  
09:07:43 5 followed by other circuits. I believe it does detract from  
09:07:46 6 the uniformity that is the goal that we are seeking to obtain.

09:07:54 7           Also, we would ask the Commission to consider  
09:07:59 8 revising the *Sentencing Guidelines Manual* to express its  
09:08:06 9 position on this point. In that respect, the inclusion of  
09:08:11 10 fresher, pertinent examples in the application notes to the  
09:08:15 11 downward departure language could benefit the sentencing  
09:08:19 12 process. It's common knowledge among judges throughout the  
09:08:24 13 country that we downwardly depart because of an overstatement  
09:08:30 14 of criminal history points. Perhaps some clarifying examples  
09:08:34 15 in that area would provide greater transparency in sentencing  
09:08:41 16 and in the application of the guidelines.

09:08:45 17           Secondly in our circuit, the relevant *Sentencing*  
09:08:53 18 *Guidelines Manual* that should be used in sentencing is a source  
09:08:57 19 of frustration for many of our judges. We realize that under  
09:09:03 20 the statute, we must consider the guideline manual in effect,  
09:09:08 21 but the Seventh Circuit has decided in a case called *United*  
09:09:13 22 *States v. Demaree* at 459 F.3d 791, jump cite to 795, (Seventh  
09:09:26 23 Circuit, 2006), cert. was denied on it, that there is no *ex post*  
09:09:33 24 *facto* violation in using and applying a newer version of the  
09:09:38 25 guidelines even if the offense has occurred many years before

09:09:42 1 when the guidelines were not as harsh with regard to a  
09:09:46 2 particular sentence for the offense.

09:09:49 3 Other circuits disagree with this approach, and it is  
09:09:51 4 my belief that this has led to disparity within our circuit,  
09:09:56 5 as judges are asked to use guideline manuals that perhaps they  
09:10:02 6 feel uncomfortable using. Any clarifying language in the  
09:10:08 7 sentencing manual on this important issue would be helpful.

09:10:12 8 I also recommend that the Commission take a close  
09:10:16 9 look at the career offender provisions of the guidelines. It  
09:10:21 10 is the feeling of many of our judges that the use of certain  
09:10:24 11 drug offenses as sentencing enhancers is unnecessarily too  
09:10:30 12 broad, and we could benefit from a further refinement by the  
09:10:36 13 Commission on this point.

09:10:39 14 Finally, we here in Chicago appreciate the  
09:10:42 15 Commission's continuing work on alternatives to incarceration  
09:10:46 16 and re-entry programs. Our district is currently working on a  
09:10:51 17 proposed structure for a formal re-entry assistance program  
09:10:54 18 with the cooperation of the pertinent other governmental  
09:10:58 19 bodies, such as the United States Attorney's Office, the  
09:11:02 20 Federal Defender and our court's Probation Department. Any  
09:11:06 21 general directives, training programs or guidance in this area  
09:11:11 22 by the Commission would be extremely helpful to courts across  
09:11:14 23 the country.

09:11:16 24 I am well aware that the Commission's upcoming  
09:11:21 25 priorities include many of the areas that I have suggested be

09:11:24 1 evaluated, and I urge you to continue those efforts. In that  
09:11:30 2 regard, please know that we judges here in the Northern  
09:11:35 3 District of Illinois will continue to provide our full support  
09:11:39 4 in continuing your important work.

09:11:41 5           And I thank you on behalf of our judges for this  
09:11:44 6 opportunity to speak with you this morning. Thank you.

09:11:47 7           ACTING CHAIR HINOJOSA: Thank you, Chief Judge  
09:11:48 8 Holderman.

09:11:49 9           Chief Judge Carr.

09:11:52 10           CHIEF JUDGE CARR: Thank you for permitting me to  
09:11:57 11 appear before you this morning. This is the first time I've  
09:12:02 12 been in a courtroom in this courthouse for more than 40 years.  
09:12:07 13 For four years after graduating from law school in 1966, I  
09:12:11 14 practiced in this court. I remember fondly and well Chief  
09:12:15 15 Judge Parsons before whom I appeared, Judge Hubert Will, Judge  
09:12:20 16 Abraham Lincoln Marovitz, and Judge Hoffman, and it's a  
09:12:24 17 pleasure to be back here under rather different circumstances.

09:12:27 18           I will let the article that I understand is in your  
09:12:31 19 materials stand as my prepared remarks, and I will undertake  
09:12:35 20 to try to respond to some of the questions that were asked in  
09:12:39 21 the letter that was presented, sent to us some time ago.

09:12:44 22           I think one of the results that has followed decision  
09:12:52 23 in *Booker*, what, five years ago now this coming January, is I  
09:12:56 24 think that the guidelines acquired, and the work of the  
09:13:00 25 Commission has also acquired, an enhanced measure of judicial

09:13:06 1 respect and response on this. I think to the extent that  
09:13:08 2 there's any residual reluctance or hostility to respond to the  
09:13:14 3 guidelines has nearly completely vanished, and I think  
09:13:19 4 *Booker's* played its role in that regard by giving us a sense  
09:13:22 5 of opportunity, in giving us the ability to be and to act as  
09:13:27 6 judges, in our view, ought to.

09:13:31 7           And certainly most but not all active judges have  
09:13:35 8 only known the guidelines system and even many senior judges  
09:13:38 9 now, and that, too, I think has contributed to the fairly  
09:13:42 10 widespread willingness on the part of most judges to apply the  
09:13:46 11 guidelines, particularly following *Booker*.

09:13:49 12           As Chief Judge Holderman has already mentioned, the  
09:13:57 13 guidelines serve in the nature of guideposts rather than  
09:14:01 14 marching orders. They point out a route that we normally  
09:14:04 15 should follow, but also one that we don't necessarily have to  
09:14:07 16 follow to reach the outcome that we think is correct and  
09:14:11 17 appropriate. Perhaps if not greatest, but certainly a very  
09:14:18 18 significant consequence of *Booker* is to restore the judicial  
09:14:23 19 counterweight to the prosecutorial discretion that still plays  
09:14:27 20 a great role in the ultimate outcome and the ultimate  
09:14:30 21 sentence.

09:14:30 22           I know it was an oft-disputed contention, but  
09:14:34 23 certainly speaking on my own part during my experience the  
09:14:38 24 first ten years as a district judge, the prosecutors ran the  
09:14:41 25 show. It wasn't just the charging decisions, the plea



09:14:45 1 bargaining decisions, but how cases were constructed and then  
09:14:50 2 the feeling of being confined within the guidelines to  
09:14:52 3 essentially what they, as they were accomplishing what they  
09:14:56 4 wanted to accomplish at the end of the case. And under  
09:15:00 5 *Booker*, of course, the prosecutor's influence and control has  
09:15:04 6 been diminished and moderated. It is far from insignificant,  
09:15:08 7 and it's entirely appropriate because it is up to the  
09:15:11 8 prosecutor to decide what charges fit the particular case and  
09:15:16 9 crime and criminal, or criminals, and what plea arrangements  
09:15:20 10 are in the best interests of the overall prosecution of the  
09:15:23 11 case.

09:15:25 12           But *Booker* certainly has diminished the control and  
09:15:28 13 influence of the prosecutor, and I think that is a most  
09:15:33 14 welcome change and has really restored a measure of -- it's  
09:15:42 15 restored the proper relationship and balance between the court  
09:15:45 16 and the prosecution because keep in mind in the effort that  
09:15:53 17 motivated the Sentencing Reform Act and the purpose of the  
09:15:57 18 guidelines to reduce disparity in the treatment of like  
09:16:02 19 offenders and offenses, whether on a local region or national  
09:16:07 20 level, the prosecutor's never constrained by that. That's not  
09:16:13 21 a concern or consideration that they have, though one that  
09:16:15 22 this Commission and Congress have had and continue to have,  
09:16:21 23 and one which I think we judges feel constrained to try to  
09:16:24 24 implement certainly within our own courthouses and our own  
09:16:29 25 districts. But that's a matter of complete indifference and

09:16:32 1 concern to prosecutors, it seems to me, and it may be proper  
09:16:35 2 that it should be because they're dealing with local  
09:16:37 3 circumstances, an effort to eliminate and respond to local  
09:16:41 4 crime, and the national kind of concerns for uniformity or  
09:16:50 5 equivalence are not something that motivate and perhaps not  
09:16:54 6 even should motivate prosecutors in the performance of their  
09:16:57 7 duties.

09:16:58 8 I think it's important to keep in mind particularly,  
09:17:05 9 although we're now in a somewhat quiescent period, it seems to  
09:17:10 10 me, where Congress does not seem to be concerned about or at  
09:17:15 11 least responding to *Booker* and happily has not done so in the  
09:17:18 12 past five years, but to the extent that there are questions or  
09:17:22 13 challenges that may be made about *Booker* and its impact and  
09:17:27 14 the return to us of the discretion and the opportunity to  
09:17:30 15 serve as judges at time of sentencing, *Booker* was one-half of  
09:17:35 16 the reforms that the Sentencing Reform Act introduced. The  
09:17:39 17 other half, of course, is appellate review.

09:17:42 18 And speaking for myself, and I think most district  
09:17:44 19 judges, every time we sentence and certainly every time we  
09:17:47 20 depart, every time we vary from the guideline range, we are  
09:17:51 21 fully conscious of the possibility of appellate review and,  
09:17:56 22 taking cognizance of that, respond, I think, accordingly.

09:17:59 23 So when people talk about *Booker* and what it has  
09:18:03 24 done, what it has done in giving us -- returning to us  
09:18:07 25 discretion is not totally unconstrained or unconfined. That,

09:18:13 1 in fact, the Act, as a result of the Act, our court of appeals  
09:18:19 2 judges are looking over our shoulders, and we are well aware  
09:18:22 3 of that circumstance and situation.

09:18:25 4 *Booker* likewise has restored individualization to  
09:18:30 5 sentencing. The guidelines are the first way station and  
09:18:36 6 often the end point for our deliberations. But our ability to  
09:18:41 7 go further and to vary and to do so openly and honestly gives  
09:18:45 8 us a sense of options that is most welcome, and I think this,  
09:18:50 9 in turn, leads to more carefully crafted sentences. We no  
09:18:55 10 longer feel that we're simply a cog, and I certainly felt  
09:18:58 11 often I was simply a cog in a mechanistic process. And we  
09:19:01 12 don't feel that way anymore, and we're able to look at the  
09:19:04 13 particular defendant and the offenses with which he stands  
09:19:08 14 charged and convicted and, as I say, respond on an  
09:19:13 15 individualized basis. And that response, much more often than  
09:19:17 16 not, is a sentence within the guideline range; but nonetheless  
09:19:20 17 the sense of opportunity as we step upon the bench, as we pick  
09:19:25 18 up the presentence report, as we talk to the probation officer  
09:19:28 19 and to the lawyers and hear the defendant out, has been a  
09:19:32 20 great and good consequence of the *Booker* decision.

09:19:37 21 On the other hand, *Booker* has made our job much more  
09:19:42 22 difficult, and properly so. It makes us pay closer attention  
09:19:46 23 to who's before us and what we should do. The fact that we  
09:19:50 24 have the discretion means that we have to be careful and  
09:19:52 25 attentive in exercising it.

09:19:56 1           The guidelines generally I think made us more honest  
09:20:00 2 in sentencing because of how we had to go through and compute  
09:20:03 3 the base offense level, the criminal history, but I think  
09:20:08 4 *Booker* has made us even more honest. I will acknowledge, and  
09:20:12 5 I don't think I'm alone in having done so, prior to *Booker*,  
09:20:22 6 one would look at the criminal history as an opportunity to be  
09:20:26 7 more lenient and to moderate what seemed to be a harsher  
09:20:29 8 sentence. Acceptance of responsibility, role in the offense.  
09:20:33 9 There were little pressure points where a judge could, in a  
09:20:41 10 sense to speak bluntly, get away with getting away from the  
09:20:46 11 guidelines, and we don't have to do that anymore.

09:20:49 12           And I agree with Judge Holderman that departures are  
09:20:53 13 still an important aspect of our work. That's where we begin  
09:20:56 14 is to figure out what is the guideline range, and you can only  
09:20:59 15 do that if you remain within, work within the guideline  
09:21:04 16 structure, which includes departures, be they up or down.

09:21:08 17           But once we reach that range, and hopefully and quite  
09:21:15 18 often gain the concurrence of counsel in the computations,  
09:21:18 19 then we can decide whether to vary, and we can do so honestly  
09:21:23 20 and necessarily we have to do so transparently because we have  
09:21:28 21 to set forth our reasons in light of the factors of 3553(a),  
09:21:34 22 the Sentencing Reform Act, and the guidelines themselves.

09:21:38 23           Another point which I tried to make in the article  
09:21:41 24 and I think that it's very important and I recommend that the  
09:21:45 25 Commission consider doing so if it does not do so already,

09:21:47 1 what matters, I don't think, is -- I don't think the frequency  
09:21:51 2 with which we either depart or in today's more common parlance  
09:21:56 3 vary in the guideline range really matters a whole lot. Of  
09:22:01 4 course, the frequency has gone up by rather modest amount, but  
09:22:06 5 nonetheless, I think what really matters is the extent or  
09:22:08 6 degree of departure. It's one thing -- or, excuse me, to  
09:22:13 7 vary. It's one thing to vary six months, twelve months or  
09:22:17 8 whatever. It's another to vary 120 months. And if the  
09:22:21 9 Commission does not do so already, I would encourage, again  
09:22:25 10 somewhat in anticipation that someday Congress may be less  
09:22:29 11 tolerant of how we are implementing *Booker* and the guidelines.  
09:22:34 12 The pendulum seems to be immobile at this moment, but it may  
09:22:38 13 start swinging back in a direction I think all of us would not  
09:22:42 14 welcome at all.

09:22:42 15           And I think to be able to tell Congress, look, sure,  
09:22:48 16 judges vary or depart in this number of cases, but let's look  
09:22:53 17 at the effect of that. Really how far afield from the  
09:22:55 18 guidelines are most judges doing in most instances when they  
09:22:58 19 do so? I think that's an extremely important consideration,  
09:23:01 20 and I would recommend that you try to start capturing that  
09:23:05 21 data if you don't do so already. I don't think you do, but if  
09:23:08 22 you do, then I endorse that effort.

09:23:11 23           You asked the question what type of analysis should  
09:23:16 24 courts use for imposing sentences within or outside the  
09:23:20 25 guideline sentencing range. And again, speaking simply for

09:23:23 1 myself in describing to you how I go about sentencing  
09:23:28 2 post-Booker and how I consider whether to vary, first I try to  
09:23:33 3 come to a determination of whether the offense conduct, the  
09:23:37 4 base offense level, whether that gives a true picture of the  
09:23:41 5 criminality that was involved in this case by this defendant.  
09:23:45 6 Among the considerations when I try to look into further: Was  
09:23:53 7 this defendant particularly devious, if it's a fraud kind of  
09:23:57 8 case, in how he went about bilking his victims? Was there  
09:24:02 9 something particularly aggravating, even beyond the  
09:24:05 10 aggravating factors in the guidelines, about his violence or  
09:24:09 11 how he committed the crime?

09:24:11 12           And then secondly, and this is something that I would  
09:24:14 13 do but in a different sort of way, how much crime really is  
09:24:18 14 there in the criminal history? I agree with Chief Judge  
09:24:21 15 Holderman that quite often, points are accumulated that really  
09:24:27 16 are pretty insignificant and that don't tell you a whole lot  
09:24:32 17 either because of their age or the nature of what happened.

09:24:36 18           There are other occasions where you read the  
09:24:38 19 presentence report and you come to a conclusion that this guy  
09:24:42 20 has had a lot of breaks with a lot of plea bargains on a lot  
09:24:46 21 of occasions and maybe the criminal history category doesn't  
09:24:49 22 really present the true nature of this particular offender's  
09:24:55 23 criminal character and background.

09:24:59 24           Is there something that suggests leniency? Quite  
09:25:04 25 candidly, if there's a courtroom full of family members, that

09:25:08 1 counts with me because all too often the defendant stands  
09:25:10 2 there alone. But the letters that I receive, presence of  
09:25:16 3 family members, that kind of support within the community  
09:25:19 4 makes a difference.

09:25:20 5           Age is a consideration that I take into account when  
09:25:24 6 deciding whether to vary or to abide by the guidelines. I  
09:25:30 7 don't think I could ever prove scientifically, or I doubt  
09:25:33 8 whether science could prove empirically, that the flame goes  
09:25:37 9 out; but my sense is that by the time 35 or 40, many  
09:25:44 10 defendants are tired. The kind of impulse to the kind of  
09:25:51 11 serious violent crime has diminished if it hasn't gone out  
09:25:56 12 entirely, but for many, I think it has gone out entirely. I  
09:26:00 13 think that age is a very important factor. Is the flame going  
09:26:03 14 out, or at the other end of the spectrum, is it likely to heat  
09:26:07 15 up unless we take whatever steps we can to quench it or  
09:26:11 16 control it?

09:26:12 17           In this regard, we, too, are undertaking a re-entry  
09:26:18 18 court in my court in the Toledo courthouse, the Western  
09:26:22 19 Division of the Northern District of Ohio. As an experiment,  
09:26:24 20 there was a terrific program put on last fall at Durham and  
09:26:28 21 really opened the eyes, I think, of many of us to the  
09:26:32 22 possibilities that that program may offer. And I, like Chief  
09:26:35 23 Judge Holderman, I would encourage the Commission to be  
09:26:38 24 attentive to what we are trying, what Chief Judge Aiken in the  
09:26:41 25 District of Oregon and the District of Massachusetts, several

09:26:45 1 districts have been real pathfinders in this regard, if not  
09:26:47 2 necessarily directly for the impact upon the guidelines, but  
09:26:50 3 just generally to give the Commission and its staff and  
09:26:53 4 ultimately Congress an understanding of whether or not these  
09:26:59 5 initiatives and the efforts and resources that we are making  
09:27:04 6 pay off.

09:27:05 7           My view is that, and the only reasons our judges  
09:27:08 8 support this initiative so thoroughly, is that, you know, if  
09:27:12 9 we save three or four people through these efforts who  
09:27:14 10 otherwise would wind up going back to prison probably for long  
09:27:18 11 periods of time, those efforts will have been worthwhile.

09:27:24 12           And then, finally, *Booker* enables me to pay a lot  
09:27:29 13 closer attention, as I properly should and always should have,  
09:27:34 14 but I don't think we really could under *Booker*, the statements  
09:27:38 15 in aggravation and mitigation. In other words, it would  
09:27:40 16 simply be, as often as it was in *Booker*, a formalistic  
09:27:43 17 exercise. Defense attorney would stand up, put his or her arm  
09:27:48 18 on the defendant's shoulder, go through the drill, and we all  
09:27:51 19 knew it didn't make a difference, that the very best I could  
09:27:56 20 do was look to the low end of the guidelines, and that was the  
09:27:58 21 way it was going to be.

09:27:59 22           I realize that in theory, the law gave me discretion;  
09:28:02 23 but as a practical matter, particularly in view of the view  
09:28:06 24 taken then pre-*Booker* by our circuit, I could do so only in  
09:28:12 25 those cases where I really felt that the sentence would be



09:28:17 1 upheld if it were appealed. But today I can pay attention. I  
09:28:22 2 can pay attention to the letters that are written and the  
09:28:24 3 things that are said, and they make a difference.

09:28:28 4 Rarely do I impose the sentence from the bench that I  
09:28:32 5 talk about imposing in the hearing that I have with the  
09:28:36 6 probation officer and the lawyers in chambers. I very often  
09:28:41 7 come to and suggest a tentative result; but much more often  
09:28:46 8 than not, that is not the result I reach once the defendant  
09:28:50 9 and his lawyer have spoken to me.

09:28:52 10 As I say, *Booker* has breathed life into the process  
09:28:56 11 of mitigation and makes meaningful the opportunity the  
09:29:03 12 defendant has constitutionally, much more meaningful, to speak  
09:29:08 13 to us and speak on his own behalf and to persuade us of why we  
09:29:12 14 should impose or not impose a particular sentence.

09:29:16 15 And, finally, in trying to decide whether to vary, I  
09:29:22 16 try to take cognizance of what I've done with other defendants  
09:29:26 17 in the same case. And that's sometimes really difficult  
09:29:28 18 because, as all judges know, that you have these  
09:29:34 19 multi-defendant conspiracies and at least in our court, they  
09:29:38 20 don't all come in on the same day or set of days. They're  
09:29:42 21 spread out. And trying to keep track, well, what did I do  
09:29:45 22 here? Tell me again what that guy was like, and why did I do  
09:29:49 23 this? That's a process that which I engage in with the  
09:29:58 24 prosecutor and, most importantly, of course, with the  
09:30:02 25 probation officer in the course of getting ready to go into

09:30:05 1 the courtroom.

09:30:07 2           In response to your Question No. 3 about the  
09:30:15 3 sentencing system striking the appropriate balance between  
09:30:18 4 judicial discretion and uniformity and certainty, I may take a  
09:30:23 5 few moments to talk about some views that I have about the  
09:30:26 6 underlying premises about how I don't think that disparity is  
09:30:30 7 necessarily bad, and I don't think uniformity is necessarily  
09:30:34 8 good. And I realize if I take those moments to talk about  
09:30:36 9 that, I'm talking about something that probably will have no  
09:30:39 10 effect or impact, but I feel I want to express those, get them  
09:30:45 11 off my chest.

09:30:47 12           But anyway, I think as presently operating and if  
09:30:51 13 left alone by Congress, this system as it now exists presents  
09:30:57 14 the appropriate opportunities for judges to exercise  
09:30:59 15 discretion but to do so within the constraints of appellate  
09:31:04 16 review, and I think Judge Breyer, some 20 years after the  
09:31:11 17 fact, Justice Breyer, got it right: Give us a guideline  
09:31:16 18 system, give us some handholds, particularly as new judges,  
09:31:20 19 give us some sense of how we should be thinking about  
09:31:23 20 sentencing and what we should be doing; but on the other hand,  
09:31:27 21 also give us the opportunity to evolve as judges. I mean one  
09:31:31 22 of the questions I have about disparity, well, if you look at  
09:31:34 23 the sentences that I've given in 15 years, you're going to see  
09:31:38 24 disparity. I don't know what direction it might be, but I  
09:31:41 25 know I treat the same person and the same offender or the same

09:31:45 1 offense, I probably in some instances treat that differently  
09:31:48 2 today than 10 or 15 years ago. I've evolved. And it's not  
09:31:53 3 just because of *Booker*. *Booker* gives me the opportunity to do  
09:31:55 4 so, but judges evolve. And the system of rigid, confining,  
09:32:01 5 constraining, mandatory guidelines didn't make that possible.  
09:32:06 6 We weren't able to evolve as judges and to become better and  
09:32:10 7 more just in what we were doing and as we were doing it.

09:32:13 8           Finally, let me conclude with a couple of other  
09:32:17 9 comments about some of the things that you will be hearing  
09:32:20 10 and, as I understand, may be in your materials. As I believe  
09:32:24 11 you are aware, my colleague, District Judge James Gwin, has  
09:32:30 12 for the past couple of years undertaken an extremely  
09:32:34 13 interesting and I think very important project. He has the  
09:32:39 14 jurors give questionnaires. At the end of a jury trial, the  
09:32:45 15 jurors are each asked very simply what sentence is  
09:32:48 16 appropriate?

09:32:48 17           Now, keep in mind, the jurors, unlike most of us and  
09:32:52 18 most of the sentences that we give because so many are plea  
09:32:55 19 bargained, the jurors have sat there for days or weeks in the  
09:32:59 20 room and in the company of this defendant. They've heard  
09:33:01 21 firsthand from victims, from FBI agents, from the defendant's  
09:33:06 22 witnesses. They probably formulate a far better impression of  
09:33:12 23 who this person is and what he did than we get unless we  
09:33:17 24 ourselves have sat there.

09:33:18 25           And as Judge Gwin's study, which is about to be

09:33:22 1 published in a Harvard law review, the journal of policy -- I  
09:33:26 2 can't remember the exact name -- shows that consistently and  
09:33:31 3 invariably, the sentence, even in cases of child pornography,  
09:33:36 4 that the jurors would give are by factors less than what the  
09:33:42 5 guidelines would propose, a truly remarkable study.

09:33:47 6 Now, it's a scientifically invalid sample. There are  
09:33:51 7 probably flaws in how he does it. He doesn't look at them  
09:33:54 8 until afterwards, so he has no idea what's on the jurors'  
09:33:58 9 minds. And he sentences, I think like most of us, well within  
09:34:01 10 the guideline range in most cases most of the time.

09:34:04 11 I would encourage the Commission to have, if not  
09:34:07 12 every district and every judge, select some pilot districts.  
09:34:11 13 Let's find out. Because once again, as Judge Gwin is very  
09:34:15 14 careful to point out, he's not proposing, and we shouldn't  
09:34:19 15 propose, a system of juror sentencing or even juror  
09:34:22 16 involvement.

09:34:24 17 Nonetheless, the jurors probably are the best  
09:34:27 18 qualified citizens to speak not just to us or to you but to  
09:34:32 19 Congress about sentencing policy because they've lived it,  
09:34:38 20 they've experienced it, they've seen it firsthand, unlike most  
09:34:42 21 of the citizens and probably all of the legislators who make  
09:34:45 22 that policy. And I think that were the Commission to  
09:34:50 23 undertake a study of that sort and not just once but repeat  
09:34:55 24 it, make it a part of its work, I think that ultimately, we  
09:34:59 25 all would benefit.

09:35:00 1           Like I'm sure just about most, not every speaker, I'm  
09:35:05 2 of the view that in many instances the sentences are simply  
09:35:09 3 too long, and that's why I welcome *Booker* and so many of my  
09:35:12 4 colleagues welcome *Booker* because we can craft and fashion  
09:35:15 5 sentences that we think are appropriate, and that means much  
09:35:19 6 more often than not but certainly in my case not always  
09:35:22 7 because I have varied upward on a handful of cases, but it  
09:35:27 8 means sentences that are going to be outside the guideline  
09:35:31 9 range and below the guideline range.

09:35:33 10           Obviously, the whole drug sentencing is just -- it's  
09:35:37 11 out of hand. The same is true with the felon in possession  
09:35:42 12 sentences. I gave a 57-month sentence to a man who's almost  
09:35:46 13 60 because a gun was found -- he found a gun in a used car  
09:35:48 14 that he bought. He called the seller of the car. The seller  
09:35:53 15 never picked it up. To keep it for the seller, he locked it  
09:35:56 16 in a TV cabinet.

09:35:59 17           He must have been up to something because there was a  
09:36:01 18 search warrant. In the execution of the search warrant, they  
09:36:04 19 found the gun. He had had a clean record for several years,  
09:36:08 20 and even despite *Booker* I felt constrained to impose that  
09:36:12 21 sentence, and I regret it. And I think that you should look  
09:36:15 22 at the sentences to the extent that you can for gun possession  
09:36:19 23 and the circumstances [in] which the gun has been possessed.

09:36:23 24           I'm not alone. You'll hear from others who say that  
09:36:26 25 the sentences for child pornography are simply far too severe

09:36:31 1 and simply do not fit the offender or the actuality of the  
09:36:35 2 offender's offense.

09:36:37 3           Clearly people who look at, download, enjoy that  
09:36:41 4 stuff for whatever vile purpose, are providing a market for  
09:36:45 5 venality that is incomprehensible and totally unjustifiable;  
09:36:50 6 but I have yet to see a child pornography defendant who, first  
09:36:57 7 of all, lives within the mainstream, has what we would call an  
09:37:01 8 ordinary and normal life, and second, and I think more  
09:37:03 9 importantly, who is a danger to anybody.

09:37:05 10           And yet the sentences that we impose, and I know at  
09:37:09 11 least one of my colleagues has said no way, has actually  
09:37:12 12 probated on at least one occasion somebody who should have  
09:37:17 13 served many, many, many months.

09:37:19 14           I think that the Commission has to continue to look  
09:37:22 15 candidly and carefully at the impact, at the at least apparent  
09:37:31 16 disparity between Caucasian defendants and racial minority  
09:37:36 17 defendants at least in terms of numbers, and what does that  
09:37:39 18 tell us and are we in the -- at least ask the question -- are  
09:37:45 19 we, in the kinds of sentences we're imposing, particularly in  
09:37:49 20 drug cases, particularly in felon in possession cases because  
09:37:53 21 if they're if not linked, at least there's a relationship  
09:37:57 22 there, in doing so and in implementing the mandatory minimums,  
09:38:02 23 are we not in fact -- are we not at least creating the  
09:38:06 24 impression of disparate -- of a penal system that treats the  
09:38:12 25 races differently?

09:38:14 1           And I encourage the Commission to continue at least  
09:38:16 2 asking that question and trying to come to an answer that it  
09:38:24 3 finds and that we as a society can find satisfactory.

09:38:27 4           And I will take a moment to talk about two other  
09:38:31 5 matters. May I? How am I doing in terms of time?

09:38:33 6           CHIEF JUDGE HOLDERMAN: This clock to the right  
09:38:35 7 doesn't work at all, so --

09:38:37 8           (Laughter.)

09:38:40 9           CHIEF JUDGE ROSEN: This clock is on judge time.

09:38:44 10           CHIEF JUDGE CARR: I don't have my cell phone on  
09:38:49 11 because I don't want it seized by the marshals, which is a  
09:38:49 12 practice in some courts.

09:38:50 13           But let me conclude. You know, my question about the  
09:38:54 14 premise, premises upon which the Sentencing Reform Act and the  
09:38:59 15 guidelines rest is, you know, is disparity really bad and is  
09:39:05 16 uniformity good or necessarily so? And where do we want to  
09:39:11 17 avoid or eliminate disparity? Certainly within the sentences  
09:39:17 18 that a single judge imposes, even though there, I think, there  
09:39:20 19 has to be some opportunity for evolution. Sure, we don't want  
09:39:25 20 me treating Judge Holderman one way and Judge Rosen the other  
09:39:29 21 way for no reason and not to be subjected to appeal.

09:39:33 22           In the same courthouse, sure, the community ought to  
09:39:36 23 have a sense that if they go before me or Judge Katz or Judge  
09:39:40 24 Zouhary or whomever, they're going to be treated pretty much  
09:39:42 25 the same way no matter which courtroom they find themselves

09:39:45 1 in. Districtwide maybe, but Cleveland is different from  
09:39:49 2 Toledo and Akron and Youngstown. Regionally, Detroit's  
09:39:52 3 different from Toledo.

09:39:54 4 My concern really is nationally because, you know,  
09:39:58 5 five kilograms of cocaine in Toledo, Ohio is a lot different  
09:40:02 6 offense than it is in Miami, but, yet for both -- for the  
09:40:07 7 judge in Miami and the judge for me to treat the same offender  
09:40:12 8 the same way depending upon where he gets caught I don't think  
09:40:15 9 makes much sense or is particularly desirable.

09:40:17 10 The same is true, for example, with the gun cases.  
09:40:21 11 We in Toledo are a market for Detroit gangs for their  
09:40:25 12 firearms; and when I get those cases, I simply ask how high is  
09:40:29 13 up because I think that's -- you know, the straw purchase  
09:40:32 14 cases because I know what's going on. They're going up and  
09:40:36 15 killing people in Jerry Rosen's jurisdiction.

09:40:40 16 CHIEF JUDGE ROSEN: I'm glad there's a market for  
09:40:43 17 something from Detroit.

09:40:45 18 CHIEF JUDGE CARR: No, the market's in Toledo.  
09:40:47 19 They're buying them here and then taking them to Detroit.  
09:40:49 20 We're also an auto supplier, we're also a gun supplier.

09:40:51 21 But my point is there may be communities where straw  
09:40:53 22 purchases or random straw purchases doesn't have that kind of  
09:40:57 23 effect and consequence, and my concern is that simply the  
09:41:00 24 whole idea that on a national basis we ought to be having this  
09:41:07 25 uniformity that we somehow can't accommodate and acknowledge



09:41:13 1 differences from locale to locale is troublesome.

09:41:17 2           And I think, once again, *Booker* gives us the  
09:41:20 3 opportunity, as I said earlier, to individualize, to localize  
09:41:26 4 and ultimately to humanize our sentences. So ultimately I  
09:41:31 5 think under *Booker*, the one question that remains, and  
09:41:34 6 properly so, is: Is the disparity unwarranted? Have we gone  
09:41:39 7 too far one way or the other? Are we off the reservation?  
09:41:42 8 Are we off the map, and should we be brought back in? And the  
09:41:46 9 guidelines help keep us within the reservation and within the  
09:41:50 10 proper territory.

09:41:51 11           I'd like to close with a bit of history. I opened by  
09:41:55 12 noting that I think *Booker* has enhanced the respect that the  
09:42:00 13 guidelines have in the eyes of district judges and, quite  
09:42:04 14 candidly, I think, has enhanced the respect the judges have  
09:42:08 15 for the Commission and its very difficult work.

09:42:12 16           Between 1987, as the guidelines were first coming  
09:42:18 17 into effect, I happened, as a magistrate, to have been  
09:42:21 18 appointed somehow to the what was then called the Probation  
09:42:26 19 and Criminal Law Committee. It's now the Criminal Law  
09:42:29 20 Committee of the Judicial Conference. I remember attending  
09:42:33 21 the first session out in Durango, not knowing what to expect,  
09:42:37 22 and the time was taken with by Judge [inaudible], the chair, they  
09:42:41 23 were talking about pending legislation and whether we should  
09:42:44 24 recommend to the conference that it was good or bad or had a  
09:42:47 25 particular effect upon the judiciary. Pretty dry and dull

09:42:50 1 and, seemed to me, not particularly significant stuff.

09:42:54 2           The second day was spent with Judge MacKinnon, Judge  
09:42:57 3 George MacKinnon of the D.C. Circuit, and he started talking  
09:43:01 4 about the federal sentencing guidelines. Suffice to say, I  
09:43:05 5 was not the only judge -- there's good reason for me not to be  
09:43:11 6 aware of them, I was a magistrate -- but none of the other  
09:43:14 7 district judges had heard about the sentencing guidelines, and  
09:43:16 8 maybe it was just a small cluster of judges who were unaware  
09:43:19 9 of what was going on.

09:43:21 10           The astonishment was universal. The questions that  
09:43:25 11 were asked were the kinds of questions that, you know, came to  
09:43:32 12 be universally asked by district judges as a guidelines  
09:43:36 13 regimen before *Mistretta* enforced it, and that struck me, that  
09:43:44 14 somehow the judge's voice hadn't been heard. I know there  
09:43:48 15 were judges involved in the guidelines and so forth, but the  
09:43:51 16 judiciary, the district judges, those of us who do this work  
09:43:55 17 apparently -- it may be a mistake, this was anecdotal based  
09:44:00 18 upon one meeting 25 years ago -- apparently the district  
09:44:05 19 judges had not been involved on a widespread basis in that  
09:44:10 20 process.

09:44:11 21           Judge MacKinnon assured us that, no, sentences aren't  
09:44:15 22 going to be more severe. This has all been computed, and  
09:44:17 23 they're going to be within the range. And also, by the way,  
09:44:21 24 the prison population isn't going to go up. We're not going  
09:44:23 25 to have more people in prison.

09:44:25 1 Well, I think it's fair to say that neither of those  
09:44:28 2 predictions on his part proved to be true during the ensuing  
09:44:33 3 period before the *Booker* decision.

09:44:35 4 And I want simply to close, having noted that bit of  
09:44:37 5 history, by saying it is opportunities like this and all the  
09:44:42 6 other ways in which we can communicate to the Commission that  
09:44:46 7 make me grateful and make me confident that the voice of  
09:44:49 8 district judges can, will and always will be heard by the  
09:44:52 9 Sentencing Commission and, through the Commission, in Congress  
09:44:56 10 and elsewhere.

09:44:57 11 Thank you very much for your time and attention.

09:45:00 12 ACTING CHAIR HINOJOSA: Thank you, Chief Judge Carr.  
09:45:02 13 Chief Judge Rosen.

09:45:06 14 CHIEF JUDGE ROSEN: Thank you very much, Chairman  
09:45:08 15 Judge Hinojosa and members for the Commission, and thank you  
09:45:11 16 very much for inviting me to this hearing here today, which  
09:45:15 17 has given me an opportunity to return to Chicago and visit  
09:45:19 18 with some old friends. I actually sat here 15 years ago by  
09:45:23 19 designation for a couple of months and became very well  
09:45:27 20 acquainted with the charms of Chicago and particularly the  
09:45:31 21 local eateries with the great advantage of Judge Zagel here as  
09:45:38 22 my mentor in that area. It's particularly good to be back  
09:45:42 23 here. And I should also say Judge Castillo. We had a couple  
09:45:45 24 of great meals together.

09:45:46 25 But it's also good to be back here particularly this

09:45:50 1 summer when the Detroit Tigers are, for a change, looking down  
09:45:55 2 on the White Sox, chasing them rather than the other way  
09:45:59 3 around. Couldn't resist that.

09:46:00 4 (Laughter.)

09:46:00 5 CHIEF JUDGE HOLDERMAN: We understand.

09:46:02 6 CHIEF JUDGE ROSEN: And I guess I have -- I guess I  
09:46:05 7 have both the advantage and the disadvantage of speaking  
09:46:09 8 clean-up, to extend the baseball metaphor a little bit, the  
09:46:14 9 advantage because it allows me to associate myself with the  
09:46:20 10 remarks of my colleagues, many of them, many of their remarks,  
09:46:25 11 and to disassociate myself with a couple.

09:46:28 12 Judge Carr, in particular, and I have done a lot of  
09:46:32 13 these sort of dog-and-pony shows on various subjects around  
09:46:34 14 the country, and I think it's fair to say, Jim, we've had some  
09:46:38 15 lively discussions.

09:46:40 16 CHIEF JUDGE CARR: Indeed.

09:46:42 17 CHIEF JUDGE ROSEN: We agree on a lot of things, but  
09:46:44 18 we disagree on a few things. And that, too, will be -- both  
09:46:46 19 sides of that will be reflected, I think, in my remarks.

09:46:49 20 We really didn't prepare this.

09:46:51 21 CHIEF JUDGE CARR: No.

09:46:52 22 CHIEF JUDGE ROSEN: But Judge Carr's remarks will  
09:46:54 23 sort of act as a little bit of a segue to my remarks in some  
09:47:00 24 of these areas.

09:47:01 25 I say the disadvantage because I realize that I am at

09:47:05 1 pains of trespassing upon your patience, and I'll try not to  
09:47:08 2 do that, but I have prepared some remarks, and I'll get right  
09:47:12 3 to those now.

09:47:12 4 I thought I'd start by talking a lit bit about my  
09:47:15 5 background because, like all of us, my background informs who  
09:47:19 6 I am and perhaps the prism through which I look at sentencing.

09:47:24 7 Next March, I'll celebrate my, or observe -- I guess  
09:47:31 8 my wife would say observe, I would say celebrate -- my 20th  
09:47:34 9 year as a judge, and I've sat frequently on criminal  
09:47:40 10 sentencing matters, not only in Detroit, of course, as a  
09:47:43 11 district judge, but by designation as an appellate judge on  
09:47:48 12 the Sixth Circuit and, in addition to Chicago, many other  
09:47:53 13 district courts around the country. Before I had a young  
09:47:56 14 child, I suppose, I was a bit of a peripatetic judge. Now  
09:48:02 15 that we have a young child, I do much, much less of that.

09:48:04 16 But, interestingly, I came to the federal bench with  
09:48:08 17 no practical experience, indeed no experience whatsoever in  
09:48:10 18 the criminal law, no prior judicial experience. I'd spent  
09:48:15 19 five years working in the United States Senate as an aide to  
09:48:19 20 Senator Griffin from Michigan, and then a little more than a  
09:48:23 21 decade as a civil litigator with a large sort of, I guess,  
09:48:28 22 silk-stocking law firm in Detroit. In fact, the very first  
09:48:34 23 criminal case that I ever saw from beginning to end I presided  
09:48:37 24 over as the judge.

09:48:39 25 I share this background with you, perhaps not because

09:48:43 1 it's so unique, but to say that I came to the job of judging  
09:48:47 2 and sentencing in criminal cases with very much of a blank  
09:48:53 3 slate. And in the course of my tenure now as a judge, I've  
09:48:57 4 sentenced under three different sentencing regimes, since  
09:49:03 5 because when I first started, I inherited a criminal docket in  
09:49:07 6 which a significant number of the offenders had committed  
09:49:10 7 their crimes before the guidelines had become effective and  
09:49:13 8 were, therefore, not subject to the guidelines.

09:49:15 9 I then, of course, sentenced for many, many years  
09:49:20 10 under the mandatory regime and now in the brave new world of  
09:49:25 11 advisory guidelines since the Supreme Court's watershed *Booker*  
09:49:32 12 jurisprudence and its progeny.

09:49:34 13 So, with that background, I have one sort of general  
09:49:39 14 area of comment I'd like to add. I'd like to talk about the  
09:49:44 15 guidelines, and then a couple of very specific things that I'd  
09:49:48 16 like the Commission to consider.

09:49:51 17 I guess as I was writing my prepared remarks, I was  
09:49:58 18 thinking how all of us have to live in a world of change, and  
09:50:01 19 perhaps nowhere more in judging is that true than in the world  
09:50:05 20 of sentencing.

09:50:07 21 I was thinking that when I was a very young lawyer, I  
09:50:11 22 could never have imagined being a judge, much less a federal  
09:50:14 23 judge, speaking to such an august body about such an important  
09:50:19 24 topic as sentencing. But then again back when I was a young  
09:50:22 25 lawyer, I would never have imagined that Arnold Schwarzenegger

09:50:26 1 would have gone from being The Terminator to the governor. So  
09:50:29 2 the world changes and we have to change with it, and that's  
09:50:33 3 certainly true in sentencing. So I thought I'd start off with  
09:50:37 4 sort of a 30,000-foot view of sentencing under the guidelines.

09:50:42 5           And I do this thanking Judge Carr for a bit of a  
09:50:50 6 set-up for me in his comments about uniformity and disparity  
09:50:53 7 perhaps not always being such a good thing because I'm going  
09:50:57 8 to sound a slightly discordant note to that.

09:51:01 9           In addition to Judge Carr's comments, I've read the  
09:51:06 10 statements of a number of my colleagues that have been  
09:51:08 11 provided to you at the hearings that you've conducted  
09:51:10 12 previously, and I think it's fair to say that a solid majority  
09:51:16 13 of the comments have focused on perceived shortcomings or  
09:51:21 14 deficiencies of the guidelines, and not to be disrespectful,  
09:51:26 15 even the work of some view of your predecessors and  
09:51:30 16 colleagues, and that my colleagues have chafed at the notion  
09:51:33 17 of sentencing recipes and constructs and constraints upon our  
09:51:40 18 discretion, pointing out inherent areas of unfairness or  
09:51:44 19 anomaly.

09:51:46 20           And let me quickly say I freely admit that I, too,  
09:51:49 21 have felt at times unduly constrained by what in a given case  
09:51:54 22 might seem to be an artificial construct that did not account  
09:51:58 23 for the specific unique circumstances of a particular offender  
09:52:03 24 or the crime of which he or she was convicted.

09:52:06 25           But I think that before we are too critical of the

09:52:10 1 guidelines and too celebratory about our newfound or recently  
09:52:15 2 returned discretion, I think it would behoove all of us to  
09:52:19 3 reflect back upon what gave rise to the guidelines in the  
09:52:22 4 first place and to recognize not only some of the very  
09:52:25 5 positive objectives the guidelines and the Commission have  
09:52:29 6 achieved, but also some of the potential institutional risks  
09:52:35 7 to the judiciary in exercising perhaps too fulsomely or  
09:52:40 8 robustly the discretion we recently have been granted in this  
09:52:45 9 post-*Booker* sentencing world.

09:52:47 10           Prior to the guidelines, there was indisputably a  
09:52:56 11 rather widespread lack of uniformity in the sentencing of very  
09:53:02 12 similarly situated offenders, and not only from region to  
09:53:04 13 region or state to state, but even on the same bench, judges  
09:53:08 14 on the same bench. Although Judge Carr is certainly right  
09:53:11 15 when he says that disparity is not always a bad thing on a  
09:53:15 16 case-to-case basis, I think systemically, it's not a good  
09:53:19 17 thing because it promotes a sense of unfairness and a lack of  
09:53:26 18 readiness among the populace, including those in the political  
09:53:30 19 branches, to accept the wisdom collectively of the judiciary.

09:53:38 20           And I guess I would say that the wide disparity in  
09:53:42 21 sentencing that existed is perhaps not surprising, given the  
09:53:48 22 wide disparity and broad divergence in the background and  
09:53:52 23 viewpoint of those who are doing the sentencing because each  
09:53:56 24 of us brings to our job our own unique experiences with people  
09:54:02 25 and life and our own viewpoint about what is fair and



09:54:11 1 appropriate punishment and redress for criminal wrongdoing,  
09:54:15 2 and each of us may have a slightly different moral prism and a  
09:54:20 3 different focus through which we look at particular  
09:54:26 4 individuals and his or her life and their particular criminal  
09:54:29 5 conduct. And given this diversity of background and viewpoint  
09:54:33 6 amongst us, it's not surprising that we would from time to  
09:54:37 7 time feel some frustration and even discontent when we are  
09:54:45 8 being subjected to a national system that attempts to provide  
09:54:48 9 more uniformity and reduce disparity in sentencing. Of  
09:54:56 10 course, the truth is that we as judges sometimes do not always  
09:54:59 11 appreciate having rigid constraints imposed upon us in any  
09:55:04 12 area of our work.

09:55:07 13           But for those of us who do believe that consistency  
09:55:10 14 and uniformity, however difficult to fully achieve, is at  
09:55:15 15 least one important value in criminal sentencing, we should  
09:55:19 16 recognize the guidelines have brought some significant  
09:55:23 17 institutional improvement to the judiciary as a whole in the  
09:55:27 18 exercise of our sentencing responsibilities.

09:55:31 19           Whatever the failings of the guidelines, either in  
09:55:34 20 individual cases or as a national regime, I believe that we  
09:55:38 21 must recognize and applaud the fact that in a broad sense, the  
09:55:44 22 guidelines, under both the mandatory and now the current  
09:55:46 23 advisory regimes, have had a definite and salutary leavening  
09:55:53 24 effect in reducing the unfairness that is inherent in  
09:55:57 25 disparities and lack of uniformity of sentencing individuals

09:56:02 1 with similar backgrounds convicted of identical crimes. I say  
09:56:05 2 this fully understanding that when we are in the vortex of our  
09:56:10 3 daily sentencing lives and focused perhaps on sentencing  
09:56:14 4 equities of a given case or a category of cases, it's easy to  
09:56:19 5 lose the perspective of the larger positive impact that the  
09:56:25 6 guidelines have provided as a sentencing system and the very  
09:56:27 7 laudable improvements to our criminal justice system as a  
09:56:30 8 whole.

09:56:31 9           And for this, I believe the Sentencing Commission and  
09:56:33 10 its work over the years deserve our appreciative commendation  
09:56:38 11 and gratitude because the work is difficult, and I was on the  
09:56:44 12 Criminal Law Committee, worked closely with some sentencing  
09:56:47 13 commissioners for six years. I know the work is difficult.  
09:56:49 14 It's often painstakingly complicated, and the job of  
09:56:54 15 attempting to bring fairness and systemic equity to the very  
09:56:57 16 individual responsibility of imposing criminal sentences upon  
09:57:01 17 our fellow human beings, I know, is difficult, and I think we  
09:57:06 18 should all applaud the guidelines in this area.

09:57:10 19           I know it's fashionable to criticize them and chafe  
09:57:14 20 at them a bit, but I can say from my own experience -- and  
09:57:17 21 these are my personal views at least -- that under both the  
09:57:21 22 mandatory and now the more discretionary regime, that the  
09:57:25 23 guidelines, properly applied and with fidelity to the policies  
09:57:30 24 that underlie them, yield appropriate and just sentences in  
09:57:34 25 the large majority of cases.

09:57:37 1           Although this is obviously something that's very  
09:57:39 2 difficult to quantify with any precision or scientific basis,  
09:57:49 3 my experience, I think, is that in about 75 to 85 percent of  
09:57:54 4 all criminal sentences I've imposed, the guidelines yield a  
09:57:59 5 fair and a just result. And as I said, I readily concede that  
09:58:05 6 I, too, have complained about the guidelines and the  
09:58:08 7 unfairness of the guidelines in a given case or circumstance.  
09:58:12 8 When I'm sentencing, I also try to keep in mind that I'm only  
09:58:16 9 one judge, and that if each of us were to casually and  
09:58:22 10 frequently disregard the guidelines or look for ways to  
09:58:26 11 circumvent them and attempt to reflect in our sentences our  
09:58:31 12 own particular views of morality or life in every single  
09:58:37 13 sentence, we would -- we may very soon find ourselves back in  
09:58:41 14 the pre-guideline world of what I consider to be unfair  
09:58:45 15 disparities and lack of uniformity.

09:58:48 16           And I think also we should remember, and Judge Carr  
09:58:53 17 alluded to this, we don't do our jobs in a void. We should  
09:58:58 18 remember that while we're not part of the political world, we  
09:59:00 19 can, at least in sentencing, be subject to its vicissitudes  
09:59:05 20 and vagaries and that political winds shift, sometimes very  
09:59:10 21 quickly. Those of us who used to work in the political  
09:59:14 22 vineyards know that. And that if the political branches,  
09:59:17 23 either fairly or unfairly, perceive that judges on a broad  
09:59:21 24 scale are abusing our recently returned discretion, resulting  
09:59:24 25 in a return to unfair sentencing disparity, or at least what

09:59:28 1 they perceive as unfair sentencing disparity, the political  
09:59:32 2 branches may again step in and return us to a more mechanical,  
09:59:36 3 rigid sentencing regime.

09:59:39 4           So I guess in this area of my remarks, I would urge  
09:59:43 5 the Commission and my colleagues to bear in mind that while  
09:59:45 6 the guideline system is certainly not perfect and can  
09:59:49 7 certainly be improved in given areas, a couple of which I'm  
09:59:52 8 going to talk about in a moment, the guidelines also have had  
09:59:56 9 an important and positive ameliorative impact on unfair  
10:00:01 10 sentencing disparity and that, as an institution, judges would  
10:00:05 11 undervalue and disregard the importance of the systemic value  
10:00:11 12 at our potential peril.

10:00:12 13           So having said all of that, let me turn to two  
10:00:16 14 areas -- I'll try to be brief here -- that I think do merit  
10:00:20 15 the Commission's consideration and possible corrective action.  
10:00:29 16 And I want to quickly preface my remarks in this area by  
10:00:34 17 saying that in both of these areas, I have at least to date,  
10:00:40 18 even though I may disagree with or be uncomfortable with the  
10:00:43 19 sentences that the guidelines yield, I have almost always  
10:00:47 20 sentenced within the guidelines for the institutional reasons  
10:00:50 21 that I've outlined.

10:00:52 22           I said a few moments ago that I was going to sound a  
10:00:57 23 slightly discordant note to what Judge Carr had said  
10:01:01 24 systemically about the guidelines. Now I want to echo and  
10:01:04 25 associate myself with this one particular area that he did

10:01:07 1 point out, and I appreciate him doing that because, as I said,  
10:01:10 2 I reviewed the statements of not all but many of the judges  
10:01:14 3 who have testified before you in other hearings, and I don't  
10:01:17 4 think I saw very many point to the unfairness in this  
10:01:20 5 particular area before Judge Carr did, and that's in the area,  
10:01:25 6 very sensitive area, of sentencing those who possess child  
10:01:29 7 pornography. For some reason, we seem to have a lot of those  
10:01:32 8 cases in Detroit. In fact, in the past two weeks, I've done  
10:01:35 9 three sentences in this area.

10:01:40 10 In addressing these remarks, I think I have to make a  
10:01:44 11 couple prefatory remarks. First, I realize that at least some  
10:01:48 12 of what I'm about to say may not be very popular or palatable,  
10:01:53 13 and that this particular area of criminal conduct  
10:01:57 14 understandably does not have much of a constituency among our  
10:02:02 15 citizens or in the political branches or even among the civil  
10:02:06 16 liberties groups, in my view unfortunately.

10:02:10 17 And I also want to emphasize very clearly that  
10:02:12 18 nothing that I say here is meant in any way, of course, to  
10:02:16 19 condone the possession of child pornography or minimize its  
10:02:20 20 very adverse impact on our society and particularly on the  
10:02:24 21 children who are the most immediate victims. And that my  
10:02:30 22 remarks here are limited only to sentencing possession of this  
10:02:36 23 material, and that I hold no brief whatsoever for those who  
10:02:41 24 participate in the production of this poison or the  
10:02:45 25 distribution of it for profit.

10:02:48 1           And I fully recognize that just as low-level drug  
10:02:51 2 couriers make the distribution of drugs possible in a systemic  
10:02:55 3 sense, those who possess child pornography provide the profit  
10:02:58 4 and the market for it.

10:03:01 5           So with those prefatory comments in this area, I'd  
10:03:06 6 like to ask the Commission to reflect upon the basic premises  
10:03:12 7 for enhancing and increasing sentences in this area. A number  
10:03:20 8 of my colleagues have, I think, properly focused their remarks  
10:03:23 9 on the unfairness and lack of reasoned experience reflected in  
10:03:27 10 the quantity-driven nature of the drug guidelines -- Judge  
10:03:32 11 Carr has just done that -- particularly as they adversely  
10:03:35 12 affect those whose criminal intent is not directly or even  
10:03:40 13 perhaps indirectly commensurate with the degree of their  
10:03:43 14 criminal culpability, and I certainly agree with many of these  
10:03:46 15 views.

10:03:47 16           But it strikes me that many of the criticisms that  
10:03:50 17 have been leveled against enhancing the severity of sentences  
10:03:54 18 based purely upon drug quantities apply with equal if not even  
10:03:58 19 greater force and reason to the quantity-driven nature of the  
10:04:03 20 child pornography sentencing guideline, child pornography  
10:04:07 21 possession sentencing guidelines.

10:04:09 22           In my review of my colleagues' statements, and in  
10:04:11 23 fact in the sentencing literature in general, very few judges  
10:04:14 24 or academics have extended their analysis from the drug area  
10:04:20 25 to this area. So please allow me to make just a couple of

10:04:24 1 observations about the potential for unfairness in this area.

10:04:28 2           First, the child pornography guidelines skew  
10:04:33 3 sentences even for what I'll call average offenders towards  
10:04:39 4 the very upper end, not just of the guidelines, but of the  
10:04:42 5 statutory maximums, and that's true regardless of the  
10:04:51 6 offender's actual intent or important mitigating factors, such  
10:04:55 7 as acceptance of responsibility and lack of criminal history.  
10:04:59 8 Now, this is a general statement, so I'm going to try to add a  
10:05:02 9 little flesh to these bones.

10:05:04 10           The reason for this is several fold, but primarily  
10:05:09 11 these: The amendments to the guidelines have created  
10:05:14 12 enhancements based upon specific offense characteristics which  
10:05:19 13 apply in almost every possession case. Almost every case. I  
10:05:24 14 don't have the numbers or the statistics or a percentage, but  
10:05:27 15 I would guess 90 percent, maybe even more, and I'm talking  
10:05:30 16 here about pure possession cases.

10:05:33 17           While Congress's direct amendments ostensibly seek to  
10:05:37 18 target actual abusers and mass producers and manufacturers of  
10:05:41 19 this smut and those who profit from this, this class of  
10:05:45 20 offenders constitute, I understand, less than five percent of  
10:05:50 21 those offenders subject to these amendments, and the vast  
10:05:54 22 majority of offenders who simply possess the products of their  
10:05:57 23 work suffer the greatest preponderance of their application.

10:06:02 24           Much of this, if you sort of step back and think  
10:06:05 25 about it, has resulted from advances in technology,

10:06:10 1 particularly the dramatic and rapid enhancements in computer  
10:06:14 2 capabilities which facilitate easy and, in many cases, even  
10:06:18 3 unknowing multiplication of the number of depictions that a  
10:06:21 4 single defendant may possess.

10:06:24 5           For example -- and I use this example because I see  
10:06:28 6 it so often -- the simple use itself of a computer to possess  
10:06:34 7 child pornography results in a two-level increase, and while  
10:06:38 8 the purpose of this enhancement is to target those who use the  
10:06:42 9 Internet to widely disseminate images, the truth is that in  
10:06:47 10 the vast majority of cases, this purpose is not served at all  
10:06:51 11 because at least in recent years, almost all offenders in this  
10:06:57 12 area use a computer.

10:06:58 13           And as the Commission, I think, has already  
10:07:01 14 recognized in terms of building a market, almost all online  
10:07:05 15 child pornography derives from exactly the same pool of images  
10:07:10 16 that are found in hard copy magazines and in adult bookstores.

10:07:15 17           Although I recognize that the Internet does allow for  
10:07:18 18 a great expansion of the market in this area, the result of  
10:07:22 19 the computer Internet enhancement is both overinclusive and  
10:07:27 20 fails to distinguish between different levels of true intent  
10:07:31 21 and true concomitant criminal culpability.

10:07:36 22           An individual who e-mails images is not, in my view,  
10:07:40 23 as criminally culpable as an individual who hosts a child  
10:07:45 24 pornography website or who uses a computer to stream or edit  
10:07:47 25 or produce the product, and yet the same enhancement applies



10:07:52 1 with equal force to both.

10:07:54 2 I'm going to go on a little bit. I hope you'll be  
10:07:59 3 patient with me.

10:08:00 4 An offender receives a possible five-level increase  
10:08:06 5 for possessing certain threshold quantities of images, and in  
10:08:11 6 many cases this is problematic in terms of true culpability  
10:08:15 7 because of the ease in which these large quantities can be  
10:08:17 8 accessed and possessed, sometimes without any direct intent in  
10:08:22 9 terms of the quantity at all.

10:08:26 10 For example, the possession of 600 images or  
10:08:30 11 depictions triggers the maximum five-level increase. When  
10:08:35 12 this is considered together with the fact that a very short  
10:08:37 13 video clip, perhaps obtained by an e-mail, can count for as  
10:08:43 14 many as 75 images per clip, a simple possession offender very  
10:08:49 15 easily becomes subject to the maximum five-level enhancement.

10:08:52 16 In fact, I can tell you just last week I imposed a  
10:08:56 17 very lengthy sentence on a 65-year-old man who had possessed  
10:09:00 18 16 of these short videos -- and he did nothing else with them,  
10:09:05 19 he possessed them -- because he was held responsible for over  
10:09:09 20 1200 depictions. It's a guy who was just -- I don't condone  
10:09:14 21 this, I don't understand it -- but he was just sitting down in  
10:09:18 22 his basement by himself. Five-level increase.

10:09:24 23 Beyond this, the guidelines impose an additional  
10:09:28 24 five-level increase for trading images for a "thing of value."  
10:09:35 25 Because many offenders in this area trade images to receive

10:09:39 1 images, which, of course, is considered receiving something of  
10:09:43 2 value, the majority of those possessing child pornography  
10:09:47 3 receive this maximum increase for distribution, and this  
10:09:50 4 enhancement applies regardless of quantity, thus imposing the  
10:09:55 5 same degree of increase upon those who simply exchange very  
10:09:59 6 few images or even only one as would a commercial purveyor of  
10:10:07 7 child pornography.

10:10:08 8           Think about that. That's remarkable. Somebody who's  
10:10:11 9 just sitting down in their basement trading images receives  
10:10:14 10 exactly the same five-level enhancement as a commercial  
10:10:18 11 purveyor.

10:10:20 12           As a result of these enhancements, a large majority  
10:10:24 13 of defendants in this area actually receive at or near the  
10:10:29 14 statutory maximum term of incarceration. This is true  
10:10:33 15 because, for example, an offender who e-mails only one video  
10:10:37 16 and is on the Internet viewing and receiving child pornography  
10:10:40 17 for just a couple of hours can quickly be subject to an  
10:10:44 18 offense level of 40.

10:10:47 19           Ironically, in such instances, these individuals can  
10:10:53 20 receive a higher sentence, sometimes a much higher sentence,  
10:10:57 21 than that which the guidelines impose upon an offender who  
10:11:00 22 actually coerced a young child into sex or repeatedly raped a  
10:11:04 23 young child over a several-year period.

10:11:09 24           Over time, the impact of advances in computer  
10:11:12 25 technology, coupled with the quantity-driven nature of the

10:11:15 1 enhancements and the guideline amendments, have had the effect  
10:11:20 2 of increasing the average sentence for child pornography  
10:11:24 3 possession dramatically. I believe your statistics show that  
10:11:30 4 from 2002 to 2007 alone, the average sentence has more than  
10:11:35 5 doubled from 49.7 months, which in my view is a pretty long  
10:11:40 6 sentence, to more than 109 months.

10:11:47 7 In addition -- I don't mean to gild the lily on this,  
10:11:50 8 but I think this area really requires some attention -- rarely  
10:11:55 9 will possession offenders be in a position to take advantage  
10:11:59 10 of the significant variances and downward departures that are  
10:12:02 11 available to offenders who have engaged in other kinds of  
10:12:05 12 criminal conduct, such as drug distribution.

10:12:08 13 For example, because of the solitary and very  
10:12:11 14 isolated nature of child pornography possession and the  
10:12:17 15 offenders that I've sentenced in this area, very few of these  
10:12:20 16 offenders have any ability to offer substantial assistance or  
10:12:26 17 cooperation to law enforcement and thereby receive significant  
10:12:32 18 sentence reductions.

10:12:33 19 And then I think I would be remiss if I didn't  
10:12:36 20 address -- and I realize this is general -- the typical nature  
10:12:40 21 or the nature of the typical possession offender. In my  
10:12:44 22 experience, which I think is very representative, the average  
10:12:49 23 possession offender has no prior criminal convictions, is a  
10:12:55 24 very solitary introvert and a socially awkward individual.  
10:13:01 25 Often he himself -- usually it's men, almost always men -- has

10:13:05 1 been the victim of sexual abuse as a child and is an otherwise  
10:13:14 2 very productive member of society who holds a job over a  
10:13:18 3 sustained period of time and is a law-abiding citizen other  
10:13:23 4 than this.

10:13:25 5           There are other inequities in this area that I don't  
10:13:28 6 have time to detail this morning. And as I've said, it's not  
10:13:31 7 my intent here to in any way minimize the seriousness of the  
10:13:35 8 crime or to ignore the fact that these offenders are a  
10:13:39 9 necessary and important part of creating the overall market  
10:13:43 10 and profitability for child pornography; but just as others  
10:13:47 11 have pointed out, the unfair disparities occasioned by the  
10:13:53 12 quantity-driven nature of drug crime sentencing and other  
10:13:56 13 idiosyncrasies in the guidelines that result in sentencing  
10:14:01 14 increases and lengthy sentences, are factors that do not  
10:14:05 15 necessarily reflect true criminal intent or criminal  
10:14:08 16 culpability, I think that this is an area that really requires  
10:14:12 17 the Commission's close consideration and possible corrective  
10:14:17 18 action.

10:14:17 19           And I thank the Commission for allowing me to share  
10:14:21 20 my views on this. I know it's an awkward area for all of us.

10:14:26 21           Another area of recent amendment to the guidelines  
10:14:30 22 which has spawned anomaly and inequity in sentencing is the  
10:14:34 23 result of the November 7th amendment, Amendment 709, which  
10:14:41 24 redefined and, in fact, eliminated related conduct for  
10:14:44 25 purposes of calculating prior criminal history.

10:14:47 1           Prior to this amendment, an offender's prior  
10:14:50 2 convictions were treated as one sentence if the underlying  
10:14:53 3 conduct was considered "related" in the sentence of being part  
10:14:57 4 of the same criminal course of conduct with no intervening  
10:15:00 5 events. Under the amendment, multiple prior sentences are  
10:15:05 6 treated as one sentence if the sentences were imposed on the  
10:15:09 7 same day even if the underlying acts were completely distinct  
10:15:16 8 and separate crimes and even if they were committed in  
10:15:19 9 different jurisdictions at different times and even if the  
10:15:22 10 offenders were sentenced in different courts. So long as they  
10:15:27 11 were sentenced on the same day, it's considered one sentence  
10:15:31 12 and one crime.

10:15:33 13           I've read the rationale for this amendment, which in,  
10:15:36 14 I suppose, very simplified form would basically be that the  
10:15:42 15 related-case rule under the old guideline was considered too  
10:15:45 16 complex and difficult to apply and that it had spawned splits  
10:15:48 17 in the circuits in its application and that, therefore, some  
10:15:52 18 clarification or simplification was required.

10:15:55 19           But instead of clarifying the guidelines, this  
10:15:58 20 amendment simply eliminated the related cases language  
10:16:04 21 entirely and substituted in its place a definition of prior  
10:16:07 22 sentence which turns only on the question of whether or not  
10:16:10 23 there was an intervening arrest between the offenses, and if  
10:16:14 24 there was an intervening arrest, the sentences are considered  
10:16:17 25 separate. If the offenses were not separated by an

10:16:22 1 intervening arrest, they are considered separate sentences  
10:16:24 2 unless -- and this is the key -- unless the sentences were  
10:16:27 3 named in the same charging document, or the sentences were  
10:16:31 4 imposed on the same date even if they were imposed in  
10:16:35 5 different courts and different jurisdictions and the  
10:16:39 6 underlying crimes, as I said, were committed at different  
10:16:43 7 times.

10:16:45 8           This change, in my view, has led to rather  
10:16:49 9 nonsensical criminal history calculations which result both in  
10:16:56 10 potential excess leniency and in excess severity because  
10:17:01 11 defendants can be either rewarded for the efficiency of the  
10:17:04 12 courts, often the state courts below, or penalized for the  
10:17:09 13 lack thereof.

10:17:10 14           For example, if a defendant has committed a robbery  
10:17:12 15 in one jurisdiction and a completely unrelated robbery in  
10:17:17 16 another jurisdiction but the sentence for both is imposed on  
10:17:20 17 the same day, even by different courts, both sentences are  
10:17:24 18 considered together as only one prior offense for the purposes  
10:17:28 19 of calculating criminal history. Whereas in the past, the  
10:17:31 20 second offense would have added three additional points, with  
10:17:36 21 the amendment, it may add only one point.

10:17:39 22           Of course, this can have the effect of substantially  
10:17:41 23 reducing a guideline range merely because of the happenstance  
10:17:45 24 of the sentencing of both crimes having occurred on the same  
10:17:48 25 day.

10:17:49 1           It should also be noted, I think, that by treating  
10:17:52 2 these two convictions as one sentence by virtue of their  
10:17:57 3 having been imposed on the same day, this can also have the  
10:18:00 4 effect of enabling an offender to avoid being classified as a  
10:18:05 5 career offender because the one point the offender would  
10:18:10 6 receive in this instance under, I believe, guideline or  
10:18:13 7 Section 4A1.1(f) is not a predicate for a career offender  
10:18:18 8 enhancement.

10:18:19 9           And I understand from our probation officers that  
10:18:22 10 because of the nature of sentencing in violent crimes as  
10:18:26 11 opposed to nonviolent crimes and, frankly, at least the  
10:18:30 12 vagaries of the state courts in Michigan -- I don't know if  
10:18:33 13 this is true nationally, perhaps you have statistics on  
10:18:36 14 this -- but at least in Michigan, this guideline change has  
10:18:39 15 often had the effect of reducing the potential criminal  
10:18:43 16 history score of violent offenders but increasing the score of  
10:18:47 17 nonviolent offenders.

10:18:50 18           I said just a couple moments ago that it results in  
10:18:55 19 both increased leniency, which I've talked about. It can also  
10:19:00 20 result in increased severity because what was previously  
10:19:03 21 considered a single course of conduct perhaps carried out over  
10:19:08 22 a period of days or even weeks resulting in only one sentence  
10:19:10 23 being counted, now may be considered as multiple sentences if  
10:19:16 24 the defendant simply happens to have been sentenced on  
10:19:18 25 different days for these underlying crimes.

10:19:20 1           For example, if a defendant committed very similar  
10:19:24 2 crimes that previously would have been considered related to  
10:19:27 3 each other as part of an ongoing scheme or pattern, now if the  
10:19:33 4 defendant is sentenced on different days, the sentences count  
10:19:36 5 as multiple offenses for purposes of criminal history  
10:19:41 6 calculation, and this can have the effect of significantly  
10:19:43 7 increasing the defendant's criminal history and, therefore,  
10:19:46 8 his sentence, as compared to what it would have been under the  
10:19:49 9 previous guideline, again, based solely on the happenstance of  
10:19:53 10 when he happened to be sentenced.

10:19:55 11           And, of course, that question of when the defendant  
10:19:59 12 was sentenced in the underlying crime itself turns on many  
10:20:03 13 factors that are completely beyond the control of the  
10:20:06 14 defendant and his lawyer.

10:20:10 15           So although I suppose the bright-line approach that  
10:20:15 16 Amendment 709 reflects might be easier to administer and to  
10:20:19 17 apply than the previous approach, it has not resulted in  
10:20:22 18 greater consistency, predictability or uniformity in  
10:20:26 19 sentencing and, rather, it has, in many cases, brought  
10:20:30 20 counter-intuitive and unfair results. And I would hope that  
10:20:33 21 the Commission would reflect upon this, look at the experience  
10:20:36 22 in sentencing under this amendment and perhaps take corrective  
10:20:40 23 action.

10:20:41 24           I just want to -- when I was invited to speak, I  
10:20:47 25 circulated my invitation to my colleagues in Detroit. I had a



10:20:50 1 number of differing responses, but one in particular that I  
10:20:56 2 was rather forcefully asked to bring to the Commission's  
10:21:02 3 attention, so I hope you'll allow me to conclude with this,  
10:21:05 4 and those are the comments of my colleague and good friend  
10:21:08 5 Judge Paul Borman, who is a former federal defender in our  
10:21:13 6 district and has vast experience in the criminal sentencing  
10:21:17 7 area otherwise.

10:21:18 8           He comments that the Supreme Court has consistently  
10:21:22 9 recognized that sentencing is more than simply the guidelines  
10:21:25 10 and the application of them and that the Commission should  
10:21:28 11 therefore publish a sentencing manual as opposed to a  
10:21:31 12 guideline manual that includes the section 3553(a) factors. I  
10:21:39 13 think Judge Hinojosa alluded to this in his opening comments.  
10:21:45 14 So he would hope that the Commission would broaden the manual  
10:21:50 15 to include 3553(a) factors and the case law that reflect  
10:21:54 16 those.

10:21:58 17           He'd also like me to note that in both the guideline  
10:22:01 18 manual and in national seminars, the emphasis seems to be  
10:22:04 19 largely on the guidelines and, therefore, the effect is to  
10:22:08 20 underemphasize the important Supreme Court and Appellate Court  
10:22:14 21 decisions that remind us that the guidelines are but one  
10:22:17 22 aspect of federal sentencing.

10:22:19 23           For example, he points out that the manual  
10:22:22 24 understates the importance of recent Supreme Court precedent  
10:22:26 25 by mentioning it only in passing on pages 13 and 14 and that

10:22:30 1 this discussion should be right at the very beginning of the  
10:22:32 2 manual, and he would hope it would be more robust. He also  
10:22:37 3 told me, Judge Hinojosa, that you and he have had a number of  
10:22:42 4 conversations in these areas, so this is perhaps not new to  
10:22:45 5 you and perhaps maybe not other Commissioners.

10:22:48 6 Judge Borman finally would like me to conclude by  
10:22:52 7 suggesting to the Commission that it requests that Congress  
10:22:56 8 add as an ex-officio member a federal defender to the  
10:23:03 9 Sentencing Commission to join the Department of Justice member  
10:23:06 10 and the Parole Commission ex-officio members.

10:23:10 11 I've trespassed for a long time on your time. I  
10:23:14 12 apologize for that, and I greatly appreciate the opportunity  
10:23:17 13 to share my views.

10:23:18 14 ACTING CHAIR HINOJOSA: Thank you, Chief Judge Rosen,  
10:23:22 15 and we'll open it up for a few questions if there are any.

10:23:27 16 Commissioner Howell?

10:23:29 17 QUESTION AND ANSWER SESSION

10:23:29 18 COMMISSIONER HOWELL: Thank you again for being here,  
10:23:31 19 and all of your remarks were extremely informative and we  
10:23:35 20 really appreciate your time for being here.

10:23:37 21 I just want to start by talking about your remarks  
10:23:42 22 about the child pornography guidelines. I think the  
10:23:47 23 non-government-sponsored downward departure rates and  
10:23:50 24 variances for child pornography possession remain among the  
10:23:55 25 largest compared to any other guideline, and you'll be happy

10:24:02 1 to know perhaps that it is on our priority list for our  
10:24:06 2 forthcoming year to take a close look at the child pornography  
10:24:09 3 guidelines and particularly the departures in the child  
10:24:12 4 pornography guidelines to see what kind of refinements we can  
10:24:16 5 make that more -- that are more helpful to sentencing judges.

10:24:22 6 I have to say in this area, the Commission has, you  
10:24:29 7 know, been strongly advised by Congress over the years, and  
10:24:34 8 the image table was directed by Congress and directly placed  
10:24:38 9 in the guidelines. So, you know, this is an area where all  
10:24:43 10 the policymakers involved in the child pornography guidelines,  
10:24:46 11 including Congress, have paid very close attention.

10:24:51 12 I have to say that, you know, Congress has made it  
10:24:54 13 quite clear that although, you know, judges -- and we've heard  
10:25:03 14 this, you know, not just from you -- by looking at the  
10:25:06 15 downward departure rates, that they do not view possessors of  
10:25:10 16 child pornography as significant offenders really, Congress  
10:25:17 17 has clearly made it clear that they view possessors of child  
10:25:21 18 pornography as very significant offenders.

10:25:24 19 I think one of the goals that we've had in the child  
10:25:27 20 pornography guidelines is to have some proportionality and a  
10:25:31 21 descending scale in order of severity of penalties between the  
10:25:35 22 different players, from large-scale commercial distributors to  
10:25:40 23 the barterers to those that are the simple possessors, and one  
10:25:47 24 of the things we do want to take a look at is whether the SOCs  
10:25:51 25 and the other parts of that guideline are providing

10:25:57 1 appropriate proportionality between all of those players.

10:26:03 2 I think just for you child pornography was a segue.

10:26:08 3 It's a good segue to go into one of the other areas I wanted

10:26:12 4 to talk about, which comes to fairness and credibility. I

10:26:17 5 think, Chief Judge Holderman, you talked about the credibility

10:26:19 6 that the Commission has.

10:26:22 7 We, you know, in our work, we hope that the byproduct

10:26:27 8 of our work will be helpful to our credibility both -- with

10:26:34 9 all aspects of the criminal justice community, prosecutors,

10:26:37 10 judges and also the Congress, which looks at all of our work.

10:26:42 11 Congress reviews all of our amendments. And, you know, in

10:26:47 12 that context, I want to talk a little bit about what's been

10:26:55 13 called the linkage or delinkage issue with mandatory minimum

10:27:00 14 penalties which plays a role in both the child pornography,

10:27:03 15 the severity of the child pornography guidelines, as well as

10:27:05 16 the severity in the drug guidelines.

10:27:09 17 We, you know, for a number of policy reasons, the

10:27:14 18 Commission has typically looked at mandatory minimum penalties

10:27:20 19 as the articulation by Congress where Congress has made its

10:27:27 20 policy decisions about where the appropriate penalties are,

10:27:29 21 and the Commission, for fairness purposes, to avoid cliffs in

10:27:36 22 sentencing among different defendants convicted of similar

10:27:39 23 crimes, has gauged the guideline offense levels in proportion

10:27:46 24 to those mandatory minimum levels.

10:27:52 25 With the child pornography guidelines, for example,

10:27:53 1 the base offense levels were set below the mandatory minimums  
10:27:57 2 in order because we expected that some of the SOCs would bump  
10:28:03 3 it up, so in terms of not just the base offense levels but  
10:28:07 4 also the applicable SOCs, we take account of the mandatory  
10:28:11 5 minimum penalties.

10:28:12 6 Do you have views? I mean we have been urged by  
10:28:15 7 other judges and other people who have testified before us  
10:28:19 8 that we should not be linking the guideline offense levels to  
10:28:24 9 mandatory minimums. Do you all have a view about that issue  
10:28:29 10 that you would like to share with us?

10:28:33 11 CHIEF JUDGE ROSEN: I'll take a first shot.

10:28:35 12 I guess I think it works in some areas and in other  
10:28:37 13 areas, like child pornography possession, it doesn't work.  
10:28:42 14 For the reasons I articulated in child pornography where you  
10:28:45 15 link it to the statutory sentences, but yet the SOCs apply in  
10:28:52 16 almost every case and have the impact of bumping up against  
10:28:57 17 statutory maximums, I think you lose the sort of rationale  
10:29:04 18 there for linking them to the statutory sentences.

10:29:07 19 In other areas where the SOCs don't apply in every  
10:29:10 20 case or maybe even apply rarely and do truly reflect true  
10:29:15 21 criminal intent or culpability, I think it works fine. I  
10:29:20 22 guess that's a short way of saying it, but it's hard to say  
10:29:25 23 across the board. In some areas it works, and in some areas,  
10:29:29 24 like child pornography, I think it does not work at all.

10:29:34 25 CHIEF JUDGE CARR: I would simply agree with what

10:29:36 1 Judge Rosen says. There's another subject I'd like to address  
10:29:40 2 at some point briefly for a moment or two if I could.

10:29:44 3 CHIEF JUDGE HOLDERMAN: I'll defer to my guests here.

10:29:49 4 VICE CHAIR CARR: Before we get away from that, I  
10:29:50 5 think in particular Commissioner Howell might have been  
10:29:52 6 talking about the drug offenses.

10:29:53 7 For example, when the Commission lowered the  
10:29:55 8 guidelines for crack, it only did so to the extent that those  
10:29:59 9 guidelines would still overlap with the mandatory minimums.  
10:30:02 10 And the suggestion that has been made by some other district  
10:30:05 11 judges -- and they used the word credibility, Judge Holderman,  
10:30:09 12 the same word you used -- was just promulgate the guidelines  
10:30:13 13 in particular for drugs that you think would be the  
10:30:15 14 appropriate sentences, even though they may not reach the  
10:30:19 15 statutory maximums and in a case that is not as curious as the  
10:30:23 16 child pornography guidelines where there are all these other  
10:30:26 17 SOCs, which is a slightly different question than child  
10:30:30 18 pornography, and do any of you have views on that end of it in  
10:30:34 19 terms of drugs in particular?

10:30:36 20 CHIEF JUDGE HOLDERMAN: Well, I believe that the  
10:30:38 21 Commission should carry out its role in setting the  
10:30:43 22 appropriate policy. Of course, you take into account the  
10:30:48 23 statutes that Congress has passed, but I believe that it's  
10:30:52 24 your position to set policy.

10:30:54 25 And so in that regard, I believe that you should

10:31:00 1 certainly in certain areas not be concerned that the  
10:31:04 2 particular guidelines that ultimately are the calculation for  
10:31:08 3 the appropriate guideline range tie in or be linked to the  
10:31:14 4 statutes.

10:31:16 5 VICE CHAIR CARR: And as I'm sure you all know, the  
10:31:18 6 Attorney General has set up a Sentencing and Corrections  
10:31:21 7 Working Group, and we are not going to see for some time,  
10:31:23 8 hopefully not too long, what it is the Administration is  
10:31:29 9 recommending, but there may be some relief coming from the  
10:31:31 10 Administration and Congress in some of these areas.

10:31:34 11 CHIEF JUDGE CARR: I consider your setting your own  
10:31:36 12 guidelines to be a crucial component of the whole concept of  
10:31:40 13 an independent Sentencing Commission. You're not part of us.  
10:31:43 14 You're not part of Congress. You're not part of the  
10:31:46 15 Department of Justice. You are independent.

10:31:48 16 And the other aspect of it that I want to touch upon  
10:31:52 17 that occurred to me is I also think that the Commission  
10:31:54 18 obviously understands and undertakes its educational role  
10:31:59 19 vis-a-vis Congress, and, again, I didn't do the kind of  
10:32:02 20 homework that Judge Rosen did, for which I apologize, and if  
10:32:06 21 I'm suggesting something that you already do, then, again, I  
10:32:09 22 simply endorse it.

10:32:11 23 I think the public generally is slowly becoming aware  
10:32:14 24 of the cost of this whole gulag syndrome that we've been  
10:32:21 25 living with since 1968 and the law-and-order campaign to cut

10:32:24 1 this whole ratchet, ratchet, ratchet up of sentences. When  
10:32:28 2 was the last time a sentence was reduced by a legislature?

10:32:32 3 But I think the Commission can perform an educational  
10:32:36 4 role by making clear to Congress and to the public, to whom  
10:32:40 5 Congress ultimately has to be accountable, of just how much of  
10:32:44 6 our resources, our dwindling resources, are going to keep  
10:32:51 7 people in prison.

10:32:52 8 It's my understanding, again subject to correction,  
10:32:55 9 that we have the highest rate of longest incarceration of any  
10:33:00 10 country in the world, and it's time somehow that that stop and  
10:33:05 11 that we as a public come to understand, and I think that the  
10:33:09 12 Commission, quite simply put, can play a very important  
10:33:13 13 educational role. It works much more closely with Congress  
10:33:21 14 and with the legislators and the Executive Branch than we ever  
10:33:25 15 will.

10:33:26 16 Every time, it's, what, \$30,000 per prisoner year is  
10:33:31 17 what it's cost us, something like that, and if anything, the  
10:33:33 18 states are ahead of the federal government in that regard.  
10:33:36 19 Michigan, Ohio, California, they're all realizing, hey, we  
10:33:40 20 can't continue. We cannot afford the concept of three strikes  
10:33:45 21 and you're out and the constant ratcheting up of prison terms  
10:33:52 22 in this country.

10:33:54 23 So as I said, part of that I think goes hand-in-hand  
10:33:57 24 with the concept, hey, we are independent. We must abide with  
10:34:03 25 what you compel us to abide with, but if we didn't have to do



10:34:07 1 that, then this is what we think is fair, just, and sufficient  
10:34:10 2 to protect the public.

10:34:12 3 CHIEF JUDGE ROSEN: It sometimes seems to me that  
10:34:14 4 Congress disagrees on many, many things, but there are two  
10:34:17 5 very easy things to disagree on for members of Congress or to  
10:34:22 6 agree on for members of Congress: Higher sentences in the  
10:34:24 7 criminal area and voting against judicial compensation.

10:34:27 8 (Laughter.)

10:34:29 9 CHIEF JUDGE ROSEN: Seems to be two areas that unite  
10:34:32 10 almost all members of Congress.

10:34:36 11 VICE CHAIR SESSIONS: Well, I am sensitive to Paul  
10:34:38 12 Borman's comment, frankly, that we focus in upon guidelines  
10:34:44 13 too much, and he's certainly talked to me about that at great  
10:34:49 14 length, and I want to, I guess, assure him, indirectly through  
10:34:52 15 you, Jerry, that in fact what we're looking at is sentencing  
10:34:56 16 policy for the country, and it's in that context that I ask  
10:35:00 17 you just a general question about your own individual  
10:35:07 18 experiences.

10:35:08 19 I mean, obviously, you're from larger areas, and I'm  
10:35:12 20 from a very rural area. What I'm interested in looking at is  
10:35:19 21 both issues that we're looking at globally as well as in much  
10:35:24 22 finer detail. I mean the first is to what extent are your  
10:35:29 23 dockets controlled by mandatory minimums? Because when you  
10:35:34 24 talk about opposing a guidelines system that is restrictive in  
10:35:42 25 any way, that becomes a little less persuasive if, in fact,

10:35:47 1 your own sentencing docket is controlled by mandatory minimums  
10:35:52 2 and would it not be better to look at the global picture so  
10:35:56 3 that you look at a guidelines system which may be more  
10:36:00 4 structured in return for fewer, less restrictive mandatory  
10:36:07 5 minimums?

10:36:08 6 And the second question that I have about your  
10:36:10 7 individual dockets relates to nonviolent criminal drug  
10:36:17 8 offenders. There's a major push by the Obama Administration,  
10:36:23 9 certainly you've heard the Attorney General speak about  
10:36:24 10 alternatives to imprisonment for nonviolent drug offenders,  
10:36:30 11 and there's all kinds of possibilities. There's a possibility  
10:36:33 12 of perhaps having alternative base offense levels, just as an  
10:36:37 13 example, for nonviolent, low-level drug defendants. But then  
10:36:41 14 some people say that doesn't have any bearing at all upon my  
10:36:47 15 individual circumstance because I never see small, low-level  
10:36:53 16 drug defendants.

10:36:54 17 Now, I see small, low-level drug defendants all the  
10:36:57 18 time; but in Chicago or in Toledo or Cleveland or Detroit, do  
10:37:04 19 you see them at all? Would they be impacted by developing  
10:37:08 20 alternatives to incarceration? Or is it basically something  
10:37:12 21 which is not so significant for you?

10:37:16 22 CHIEF JUDGE ROSEN: I guess I'll bat lead-off here,  
10:37:24 23 maybe unwisely.

10:37:25 24 First of all, I think you're going to hear from our  
10:37:28 25 Chief Probation Officer Phil Miller, who is back in the back

10:37:32 1 here. He would certainly be better able to quantify answers  
10:37:37 2 in both of these areas, so I'll just speak anecdotally, Bill,  
10:37:42 3 if I can.

10:37:42 4 My sense is that relatively few, even in the drug  
10:37:49 5 area, relatively few sentences as a percentage are driven by  
10:37:54 6 mandatory minimums, and even in those cases that are driven by  
10:38:03 7 mandatory minimums, we have a very large percentage of cases  
10:38:08 8 in which offenders cooperate and, therefore, receive the  
10:38:12 9 benefit of a 5K1 departure below the mandatory minimum or  
10:38:19 10 statutory departure below the minimum, and, therefore, I think  
10:38:28 11 the number of mandatory minimum sentences, on my docket at  
10:38:32 12 least, is relatively small, hard for me to quantify it.  
10:38:38 13 25 percent maybe, 20 percent maybe.

10:38:42 14 Alternatives to incarceration and the question of  
10:38:45 15 sort of low-level players, particularly in the drug area. We  
10:38:49 16 do get a fair number of those. I think it's fair to say that  
10:38:54 17 the vast majority of drug offenders that come into our docket  
10:39:00 18 are sort of scooped up as part of larger investigations. And  
10:39:08 19 unlike, I know, in some districts in which those offenders, if  
10:39:12 20 it's a conspiracy, are held responsible for more than they  
10:39:18 21 actually did in the sense, for example, of a courier who is  
10:39:22 22 caught with a kilogram, he may be held responsible, in terms  
10:39:26 23 of the guidelines or mandatory minimum, for not only what he  
10:39:33 24 was doing but larger parts of the conspiracy.

10:39:36 25 That doesn't really happen in Detroit. I think the

10:39:39 1 policy of our U.S. Attorney's Office in Detroit is to only  
10:39:43 2 hold participants responsible, other than the folks at the top  
10:39:49 3 of the conspiracy pyramid, only to hold those responsible for  
10:39:53 4 the quantities that they are actually involved with  
10:39:57 5 themselves.

10:39:57 6 Now, having said that, obviously, there are couriers  
10:40:01 7 and other sort of midlevel folks who are involved with, you  
10:40:06 8 know, greater quantities and some of which trigger mandatory  
10:40:09 9 minimums; but we do see a lot of low-level folks. And  
10:40:13 10 surprisingly, my experience, as I indicated in my remarks,  
10:40:18 11 it's a bit old, but in sentencing in other districts,  
10:40:21 12 particularly, for example, in New York where I sat, my sense  
10:40:28 13 is that the U.S. Attorney's Office in Detroit is much more  
10:40:34 14 willing to recommend downward departures and to attribute  
10:40:40 15 lower levels of quantity than in some of the other districts  
10:40:43 16 that I've sat in.

10:40:47 17 CHIEF JUDGE CARR: I think in Toledo, and I don't  
10:40:51 18 know about elsewhere in the district but I'd be surprised if  
10:40:54 19 it was different, predominantly low-level dealers, people  
10:40:57 20 selling to their customers. And then perhaps, and quite  
10:41:01 21 typically, it will be the people from whom those people  
10:41:03 22 selling to the customers get their drugs, all local people.

10:41:07 23 Once in a great while, I just tried a case involving  
10:41:10 24 somebody from Arizona against whom they'd gotten enough  
10:41:16 25 evidence to convict. But alternatives to sentencing would be

10:41:20 1 terrific, particularly with people of that sort. Also, too  
10:41:27 2 often we get a multi-defendant indictment where the main  
10:41:31 3 players are fugitives, and the ones we wind up trying are the  
10:41:35 4 local people. And what happens, I think, Jerry, my sense is  
10:41:42 5 what happens to the drug quantities, they either get charged  
10:41:46 6 or threatened with being prosecuted for the total conspiracy,  
10:41:50 7 and it works out so that the prosecutor makes the adjustment  
10:41:53 8 that equates roughly with what the particular individual had  
10:41:58 9 his or her hands on or was responsible for. But I don't  
10:42:04 10 think, I've had maybe one or two people I'd call really major  
10:42:09 11 drug dealers.

10:42:11 12 VICE CHAIR SESSIONS: To what extent is your [docket]  
10:42:13 13 controlled by mandatory minimums?

10:42:16 14 CHIEF JUDGE CARR: About the same percent as Jerry's,  
10:42:18 15 I think. It's there, it's troublesome, but generally, through  
10:42:23 16 the 5K mechanism, however else it gets worked out, they tend,  
10:42:28 17 quite candidly, and I hadn't really thought about it. As much  
10:42:31 18 as we rail against them, I think you ask a very good question.  
10:42:35 19 Well, so, day in, day out, what effect do they have? Some,  
10:42:40 20 but not much. It's not the predominant factor by any means at  
10:42:44 21 all.

10:42:47 22 VICE CHAIR SESSIONS: If you sat in this seat and you  
10:42:49 23 were offered a compromise, let's say get rid of mandatory  
10:42:52 24 minimums and in return have a system which is a little bit  
10:42:55 25 more structured, you'd say don't take that compromise.

10:42:58 1 CHIEF JUDGE CARR: Well, what's the structure? A  
10:43:04 2 little more or a lot more?  
10:43:06 3 CHIEF JUDGE ROSEN: It depends.  
10:43:09 4 CHIEF JUDGE CARR: Pre-*Booker* or --  
10:43:11 5 CHIEF JUDGE ROSEN: I'll give you a straight answer:  
10:43:13 6 Yes. It's a bad deal, bad deal.  
10:43:15 7 CHIEF JUDGE CARR: For me, that would be, yeah,  
10:43:18 8 choice of lesser of two evils.  
10:43:21 9 I don't mean to be facetious. Do you mean going back  
10:43:24 10 to the pre-*Booker* system where we really were constrained, and  
10:43:28 11 I come back to the point I tried to make earlier, that, you  
10:43:33 12 know, in all of these discussions, keep in mind the role of  
10:43:36 13 appellate review and our sense of accountability, not just as  
10:43:41 14 Jerry says -- and I share it; I don't want my remarks to be  
10:43:42 15 viewed that somehow I don't -- the guidelines are the law.  
10:43:44 16 They're part of the law that we must apply and follow, and I  
10:43:47 17 think as district judges, we respond to that and I think much  
10:43:50 18 more willingly and happily and confidently than we did before  
10:43:55 19 *Booker*, but we also know the court of appeals is there.  
10:43:59 20 And I think also most judges, and this phase may  
10:44:04 21 pass, and it may be impelled by the child pornography  
10:44:07 22 guidelines. I mean I view that whole area as a real point of  
10:44:12 23 vulnerability for the Commission and the judiciary to be  
10:44:17 24 attacked and for Congress to wake up and impose a lot of  
10:44:24 25 things on us that we don't want to have imposed, but I think

10:44:29 1 that -- and I've lost the train of my thought. I'm sorry.

10:44:34 2 Several thoughts there.

10:44:34 3 COMMISSIONER WROBLEWSKI: Could I ask one quick  
10:44:36 4 question because you mentioned appellate review a number of  
10:44:39 5 times.

10:44:39 6 From where I'm sitting in Washington, it looks like  
10:44:41 7 appellate review is not a significant force. And the reason I  
10:44:45 8 say that is because literally over the past five years since  
10:44:48 9 *Booker*, maybe a handful or two handfuls of cases --

10:44:52 10 CHIEF JUDGE CARR: Thank you for mentioning that.

10:44:53 11 COMMISSIONER WROBLEWSKI: If you could just explain  
10:44:56 12 that to me a little more.

10:44:56 13 CHIEF JUDGE CARR: I think I can.

10:44:57 14 CHIEF JUDGE ROSEN: Maybe we're just a little more  
10:44:59 15 sensitive when we do get reversed.

10:45:02 16 CHIEF JUDGE CARR: No, no, but speaking first,  
10:45:03 17 myself, I'm always aware that this sentence may be reviewed if  
10:45:09 18 I vary. I mean I have that sense. Does it happen very often?  
10:45:16 19 And, actually, I was favored with the statement of our first  
10:45:20 20 assistant public defender from whom you'll hear later, and she  
10:45:24 21 mentions the low rate of appeal. I was astonished at how  
10:45:28 22 infrequent appeals are.

10:45:30 23 I attribute that to one very simple thing: That even  
10:45:33 24 when we vary, the prosecutors, who are the ones more likely to  
10:45:40 25 appeal because we more often vary down, look at it and say,

10:45:45 1 you know, that is acceptable under the law. The judge didn't  
10:45:52 2 go off the reservation, and it also is acceptable in terms of  
10:45:56 3 what should happen to this defendant now.

10:46:00 4           So I would say the low rate of appeals is a sign that  
10:46:05 5 even the prosecutors, in 95 percent of the cases, think we get  
10:46:10 6 it right when we vary, when we exercise that discretion that  
10:46:17 7 we now have.

10:46:17 8           Now, may that change, and if I could -- I've listened  
10:46:20 9 to Jerry's very thoughtful remarks and much more well thought  
10:46:27 10 out than my own and as well thought out as any I've ever heard  
10:46:48 11 in this area -- it seems to me that as right as it is to do as  
10:46:48 12 he suggests in terms of simple justice, the Commission's in a  
10:46:48 13 very difficult position to undertake that task. However, if  
10:46:48 14 it doesn't undertake it, what's going to happen, I fear,  
10:47:19 15 especially as we have more and more judges coming in who  
10:47:19 16 didn't grow up with the guideline system, who don't have that  
10:47:19 17 sense of obligation that I think those of us who did [have] of  
10:47:19 18 the guidelines, the sense of respect for the guidelines and the  
10:47:19 19 sense of having to be faithful to them, as more and more  
10:47:19 20 judges confront cases in that area which are [an] increasing part  
10:47:19 21 of our docket, more and more are going to be inclined to vary  
10:47:20 22 widely and greatly, not just six months, and that's going to  
10:47:26 23 get Congress's attention, no matter what the appellate courts  
10:47:30 24 do with that because they're going to get Congress's attention  
10:47:34 25 before the appellate court's had time to act and correct and



10:47:37 1 pull us back in because of the volatile nature of that whole  
10:47:40 2 subject.

10:47:41 3 So I don't know the answer to that dilemma.

10:47:46 4 ACTING CHAIR HINOJOSA: Thank you, judges, very much  
10:47:48 5 and we really appreciate your time and your comments and your  
10:47:51 6 responses to the questions.

10:47:53 7 And we'll go on to the next panel. We're somewhat  
10:47:55 8 behind, so we won't take a break here.

10:47:59 9 CHIEF JUDGE HOLDERMAN: Thank you very much.

10:48:00 10 CHIEF JUDGE CARR: Thank you.

10:48:02 11 CHIEF JUDGE ROSEN: Thank you for giving us the time.

10:48:02 12 ACTING CHAIR HINOJOSA: Thank you.

10:48:05 13 CHIEF JUDGE CARR: And the attention.

10:50:09 14 PANEL II. VIEW FROM THE DISTRICT COURT BENCH

10:50:09 15 ACTING CHAIR HINOJOSA: We thank our next panel for  
10:50:11 16 being present and patient. We're about half an hour late with  
10:50:15 17 you, so we will add half an hour to your time, but on behalf  
10:50:19 18 of the Commission, I do want to thank each one of you for  
10:50:22 19 taking your time to be here with us today.

10:50:25 20 We have the Honorable Jon P. McCalla who's been Chief  
10:50:31 21 Judge of the United States District Court for the Western  
10:50:32 22 District of Tennessee since 2008, last year, and he has served  
10:50:36 23 on the court since 1992. He did clerk for a judge in the  
10:50:40 24 Western District of Tennessee right out of law school, and he  
10:50:44 25 had his private practice in Memphis prior to becoming a judge.

10:50:47 1 He's received his bachelor's degree from the University of  
10:50:50 2 Tennessee, which has real orange as their color as opposed to  
10:50:57 3 burnt orange --

4 CHIEF JUDGE McCALLA: That's correct.

10:50:58 5 ACTING CHAIR HINOJOSA: -- and his law degree from  
10:50:59 6 Vanderbilt.

10:51:01 7 We also have the Honorable Karen K. Caldwell who has  
10:51:04 8 been a district judge for the United States District Court for  
10:51:05 9 the Eastern District of Kentucky since the year 2001. She  
10:51:08 10 served as U.S. Attorney for the Eastern District of Kentucky  
10:51:11 11 from '91 to '93 and as an assistant U.S. attorney in that  
10:51:17 12 district from '87 to '90. She received her bachelor's degree  
10:51:20 13 from Transylvania University and her law degree from the  
10:51:25 14 University of Kentucky.

10:51:26 15 And we're also having the Honorable Philip P. Simon  
10:51:30 16 who has been a district judge for the United States District  
10:51:32 17 Court for the Northern District of Indiana since the year  
10:51:35 18 2003. Judge Simon was engaged in the private practice of law  
10:51:39 19 here in Chicago from '87 to '90 and became an assistant U.S.  
10:51:43 20 attorney both in the Northern District of Indiana and also in  
10:51:45 21 the District of Arizona. He received his bachelor's degree  
10:51:49 22 from the University of Iowa and his law degree from Indiana  
10:51:52 23 University.

10:51:53 24 And we will start with Judge McCalla.

10:51:57 25 CHIEF JUDGE McCALLA: Judge Hinojosa, thank you very

10:52:00 1 much, and I'm delighted to be here today. I listened very  
10:52:03 2 carefully to the remarks of my colleagues in the Sixth Circuit  
10:52:06 3 and particularly agree with the remarks of Judge Rosen whose  
10:52:11 4 remarks were very thoughtful. I think they're ones that are  
10:52:15 5 commended to you and you know are ones that should be  
10:52:18 6 considered.

10:52:19 7 I also made the observation, Judge Caldwell and I  
10:52:24 8 did, that our court reporters would have taken a gun out and  
10:52:27 9 shot us if we had not taken that restroom break, which we want  
10:52:31 10 to be deferential, and we know who's important in the  
10:52:33 11 courtroom.

10:52:34 12 It is important that we have a chance to come and  
10:52:38 13 speak to you, and this is an important occasion because it not  
10:52:45 14 only is an anniversary, but it's the passage of time in which  
10:52:49 15 people acquire a certain degree of perspective and wisdom.

10:52:55 16 I think that the work of the Sentencing Commission  
10:52:57 17 has greatly elevated our work as district judges. I don't say  
10:53:00 18 that just because you're here. I tell every defendant in  
10:53:05 19 almost every case that the guidelines are important. I tell  
10:53:11 20 them they're important because they help us reduce sentencing  
10:53:14 21 disparity, and that is a key part of our work.

10:53:21 22 I was a little concerned, although he's my dear  
10:53:24 23 friend, Judge Carr argues that we should be more individual.  
10:53:28 24 We couldn't be much more individual. We are all district  
10:53:31 25 judges. It's simply part of our nature, and we have to, every

10:53:37 1 day, deal with the impulse to make a decision on a short-term  
10:53:41 2 basis. We see sympathetic individuals before us constantly.

10:53:47 3 Our district is a busy district, and I'll talk about  
10:53:50 4 that in just a moment, but I've sentenced probably 2,000  
10:53:53 5 individuals since having come on the bench.

10:53:56 6 I want each person to know that I considered the same  
10:54:01 7 factors each time. That is important to me, it is important  
10:54:06 8 to that individual, and it is important to the public. Your  
10:54:11 9 work has made that possible, and you should not in any way  
10:54:16 10 underestimate at all the importance of that work.

10:54:20 11 Now, I do have a few comments that I would like to  
10:54:23 12 make, and I'm also going to suggest that if my colleagues do  
10:54:27 13 not insist upon it, we will not insist upon all of our time.  
10:54:31 14 We will answer questions as you suggest.

10:54:36 15 In this case or in this matter, I want to tell you a  
10:54:40 16 few things about our court. I think it matters that you  
10:54:44 17 understand what each court is. We talked about that just a  
10:54:47 18 moment ago. If it's a rural court with a certain type of  
10:54:51 19 docket, it may affect how that judge perceives things, but the  
10:54:55 20 judge in every case has to perceive things from a national  
10:54:58 21 point of view. A judge must challenge himself or herself  
10:55:06 22 every day to do that in order to act in a just way.

10:55:09 23 The Western District of Tennessee is like a lot of  
10:55:13 24 districts. We have a big district, a big part of the  
10:55:17 25 district, and we have a small one. We have two divisions.

10:55:20 1 One is in Memphis, Tennessee. We have four district judges,  
10:55:23 2 three magistrate judges. And the one in Jackson, Tennessee  
10:55:28 3 has one district judge, one senior judge, Judge Todd, who I  
10:55:32 4 know some of you know, and, of course, one magistrate judge.

10:55:36 5 We are a busy district. I think all districts feel  
10:55:39 6 that they're busy. Some are extremely busy, busier than we  
10:55:43 7 are, and some are less busy. You kind of need to know where  
10:55:47 8 you stand in that range of possibilities. If you don't have  
10:55:53 9 any idea about it, you're going to make decisions that are  
10:55:55 10 inconsistent with the national policy.

10:56:00 11 Last year, our district tried approximately 55  
10:56:06 12 matters per judge. That's a very large number of trials. So  
10:56:09 13 we're a very busy trial district. You've got to understand  
10:56:12 14 that in some districts the culture is to try many cases. In  
10:56:18 15 some districts it's to try very few. You need to know which  
10:56:22 16 ones it is. Of those 55 trials, most of them were criminal,  
10:56:27 17 but there were very significant civil cases in that mix.

10:56:32 18 Regarding sentencing for 2007, as you well know, in  
10:56:37 19 the Western District we sentenced 601 defendants, averaging  
10:56:40 20 120 sentencings per judge. I know that that's substantially  
10:56:46 21 fewer than some of our courts. I don't know how they do it.  
10:56:50 22 But on our borders, some of our courts have extreme numbers,  
10:56:55 23 but our district's sentences are usually in the top one-third  
10:57:00 24 of the number of sentencings per judge in the United States.

10:57:04 25 I provide these numbers not just to brag about my

10:57:07 1 colleagues on the bench in the Western District of Tennessee  
10:57:10 2 or to say that we work hard -- I think judges work hard  
10:57:13 3 everywhere -- but to point out that in light of a heavy  
10:57:18 4 workload, we, and our colleagues throughout the United States,  
10:57:23 5 believe that the guidelines provide us with an invaluable tool  
10:57:28 6 for the analysis of a substantial body of data in a systematic  
10:57:34 7 way, and that facilitates the fair and just determination of  
10:57:37 8 issues regarding sentencing for each individual appearing  
10:57:41 9 before the court. Without the guidelines, again, we could not  
10:57:45 10 do our job.

10:57:49 11           Post-Booker discussion. Well, obviously, *United*  
10:57:52 12 *States v. Booker* has had a profound effect on the court.  
10:57:59 13 Sentencings require now a detailed analysis under 18 U.S.C.  
10:58:04 14 § 3553(a), and I hardly need to tell you that. My  
10:58:07 15 colleagues look back with some fondness to the period when  
10:58:11 16 sentencings were somewhat shorter and not quite so  
10:58:17 17 complicated. It may not be possible to return to that, but  
10:58:20 18 simplicity would not be a bad idea.

10:58:24 19           *Booker* has returned discretion to the district judge,  
10:58:29 20 and, of course, when I was clerking for Judge Brown in 1974  
10:58:33 21 and 1975, judges had all of the discretion, and I will tell  
10:58:37 22 you that Judge Brown liked that. I came on as it was  
10:58:44 23 changing. I had some discretion for a period of time, and  
10:58:47 24 then not so much. I like the idea of having a structured  
10:58:52 25 process because sometimes discretion is the freedom to make a

10:58:57 1 bigger mistake, so I think that discipline in the process  
10:59:04 2 lends credibility to the process and assists us in doing a  
10:59:09 3 difficult job.

10:59:13 4           Of course, we still properly calculate the  
10:59:16 5 guidelines. It's a critical part of the process. While the  
10:59:21 6 return of discretion has been welcomed by, I think, all  
10:59:25 7 judges, as I was indicating, it has increased our workload and  
10:59:29 8 it has been time consuming.

10:59:34 9           The Commission has already received many thoughtful  
10:59:37 10 comments. I enjoyed listening to the comments of my  
10:59:42 11 colleagues, as I've indicated, from the Sixth Circuit, and Judge  
10:59:47 12 Rosen's were particularly on point with some of the issues  
10:59:50 13 that all of us are aware of.

10:59:53 14           I also reviewed comments, and Judge Arcara from  
10:59:59 15 Western District of New York provided on July the 9th of this  
11:00:04 16 year very useful comments, and I would simply suggest that I  
11:00:09 17 would adopt those. His comments discuss many of the points  
11:00:15 18 that judges think about, including the need to examine the  
11:00:19 19 possibility of simplifying the sentencing process if we can.  
11:00:24 20 Probably a goal we cannot reach because in a moment, I'm going  
11:00:27 21 to suggest some non-simplification of the process.

11:00:32 22           There's also some need for perhaps better guidance on  
11:00:35 23 the parsimony clause of 18 U.S.C. § 3553(a). Everybody  
11:00:41 24 always looks at me and says what is no greater than is  
11:00:45 25 necessary?

11:00:48 1           We need to be concerned about undue prosecutorial  
11:00:53 2 influence, and I think we all understand how that occurs and  
11:00:56 3 can occur in our current process. And everyone agrees that we  
11:01:01 4 need to examine, I think most people would agree, more  
11:01:05 5 alternatives to incarceration in some circumstances. So  
11:01:10 6 generally, I would adopt those comments and, again, commend  
11:01:13 7 them to the Commission for further consideration.

11:01:17 8           I've tried to take a little broader view about a  
11:01:21 9 couple of points. The first point is and still relates to  
11:01:28 10 consecutive mandatory minimums which have been the subject of  
11:01:32 11 a lot of discussion, and the second point relates to the  
11:01:35 12 potential use of the guidelines to incentivize progressive or  
11:01:40 13 progress towards rehabilitation, a more progressive view that  
11:01:45 14 we would hope, I would hope, would accomplish the same thing  
11:01:49 15 that the 5K1 has, and I'll talk about that a little more in a  
11:01:52 16 minute.

11:01:53 17           The third point that I want to make is that there is  
11:01:57 18 difficulty in achieving certain sentencing objectives that is  
11:02:02 19 created by state systems that diverge markedly from general  
11:02:08 20 federal sentencing policy. I know you can't do anything about  
11:02:11 21 that, but we have to recognize that because it is part of the  
11:02:15 22 public perception as to what we do.

11:02:19 23           Well, mandatory minimums we've heard a lot about.  
11:02:26 24 The judges in our district have recently concluded a series of  
11:02:31 25 criminal civil rights cases which were characterized by the



11:02:35 1 Civil Rights Division of the Department of Justice as the  
11:02:41 2 largest criminal civil rights prosecution ever undertaken by  
11:02:46 3 DOJ.

11:02:49 4 As a result of that investigation, more than 40  
11:02:51 5 Memphis police officers and reserves were either indicted or  
11:02:56 6 disciplined for conduct arising out of a criminal conspiracy  
11:03:02 7 to deprive numerous individuals, many of whom were involved in  
11:03:05 8 drug transactions, of their civil rights. The police officers  
11:03:10 9 engaged in robbing these individuals of both drugs and money  
11:03:15 10 but finally got caught when the fellow they robbed only had  
11:03:18 11 money and had a lot of it and went to the police. They robbed  
11:03:25 12 them while acting in their capacity as Memphis police  
11:03:32 13 officers.

11:03:32 14 Because of the nature of these crimes, a series of  
11:03:36 15 robberies over a significant period of time, individuals were  
11:03:40 16 frequently confronted with the possibility of numerous  
11:03:44 17 consecutive 924(c) sentences. Needless to say, guideline  
11:03:52 18 sentences in these cases were also often substantial, but not  
11:03:56 19 nearly as substantial as the consecutive 924(c)s.

11:04:02 20 When the 924(c) charges were added or were added as a  
11:04:10 21 result of a plea or a jury verdict -- we had very long jury  
11:04:13 22 cases, on occasion -- the sentence had the appearance of being  
11:04:19 23 disproportionate. Sentences that appear to be  
11:04:24 24 disproportionate run the risk of undermining confidence that  
11:04:33 25 the judiciary is acting in a deliberate, disinterested and

11:04:37 1 impartial way even though the judge is only imposing the  
11:04:41 2 consecutive sentence required by the statute. So when you add  
11:04:46 3 255 years to essentially a life sentence, little is  
11:04:51 4 accomplished but an unfavorable impression with the public and  
11:04:56 5 often with members of the bar.

11:05:04 6           While this is an area where it's already been  
11:05:07 7 discussed, the Sentencing Commission has limited alternatives  
11:05:12 8 and a limited role perhaps. It would be useful to continue to  
11:05:19 9 present to the Congress information regarding mandatory  
11:05:23 10 sentences, and that, I believe, has been done. The issue was  
11:05:29 11 covered far more extensively by my colleague, Judge Julie  
11:05:35 12 Carnes, chair of the Criminal Law Committee on behalf of the  
11:05:39 13 Judicial Conference in her testimony before the United States  
11:05:42 14 House of Representatives Committee on the Judiciary,  
11:05:46 15 Subcommittee on Crimes, Terrorism and Homeland Security, on  
11:05:49 16 the subject of mandatory minimums given on July the 14th of  
11:05:55 17 this year. And I commend that to you because it's not  
11:05:58 18 necessary for me to repeat her well researched and well  
11:06:02 19 directed comments.

11:06:04 20           I do urge the Commission, when appropriate, to  
11:06:07 21 address this issue in the context of the corrosive effect on  
11:06:13 22 public confidence when sentences are perceived as unjust or  
11:06:18 23 arbitrary. It is the view from the district court that  
11:06:24 24 advisory guideline sentencing under 18 U.S.C. § 3553(a)  
11:06:31 25 avoids the problem created by mandatory minimum sentencing.

11:06:38 1           On a more positive note, I'd like to suggest that you  
11:06:42 2 consider the concept of significant progress toward  
11:06:48 3 rehabilitation as something that we might now include in the  
11:06:52 4 guidelines at the end of these 25 years. While district  
11:07:01 5 judges, as I've indicated, would prefer a simpler process, I  
11:07:07 6 believe that the Commission should consider the possibility of  
11:07:11 7 creating a deduction, perhaps on a sliding scale, and a  
11:07:21 8 sentencing guideline calculation that would reward individuals  
11:07:24 9 who demonstrate significant progress toward rehabilitation in  
11:07:28 10 the period between indictment and sentencing. It might not be  
11:07:37 11 limited between indictment and sentencing because sometimes  
11:07:39 12 the commission of the crime is some years earlier, so it might  
11:07:42 13 be from the commission of the crime to sentencing.

11:07:45 14           This would be similar to and reflect the strong,  
11:07:48 15 positive effect on behavior of 5K1 motions. In the Western  
11:07:56 16 District of Tennessee for fiscal year 2008, 51 percent of  
11:08:01 17 those sentenced were sentenced within the guideline range.  
11:08:05 18 Importantly, however, an additional 27.6 percent received a  
11:08:11 19 departure pursuant to 5K1.1 for substantial assistance.

11:08:19 20           Additionally, another 3.3 percent received other  
11:08:25 21 government-sponsored, below-guideline sentences. Thus, over  
11:08:30 22 80 percent of the sentences in the Western District of  
11:08:33 23 Tennessee, had there been no motion from the government, would  
11:08:39 24 in all likelihood have been guideline sentences. The critical  
11:08:44 25 point is that almost 28 percent of those sentenced in 2008

11:08:50 1 chose to cooperate with the government and provide substantial  
11:08:54 2 assistance because of the availability of a 5K1.1 departure.

11:09:03 3           It is clear that the guidelines have a great  
11:09:06 4 potential for affecting human behavior, and yet we have not  
11:09:11 5 explored the possibility of affecting other, perhaps even more  
11:09:17 6 favorable, human behavior with a guideline incentive.

11:09:23 7           Recently, I had a young man before me in connection  
11:09:26 8 with a sentencing on a 18 U.S.C. § 922(g) violation. We  
11:09:34 9 certainly have a lot of those, as does every court. He was in  
11:09:39 10 his early twenties. He had not finished high school, and he  
11:09:43 11 did have limitations regarding potential for academic  
11:09:47 12 achievement.

11:09:50 13           When he first appeared before me for sentencing, his  
11:09:53 14 attorney asked me for a resetting to next week. She  
11:09:59 15 explained -- and it was April Good, who's a wonderful  
11:10:02 16 defender -- that he was very anxious to complete two  
11:10:06 17 certificates on which he was working while detained. I  
11:10:12 18 granted the additional time, and when he appeared the  
11:10:15 19 following week, the lawyer advised me that he had completed  
11:10:18 20 one of the courses. It was in anger management. There's  
11:10:23 21 usually a parenting course. There's several others they can  
11:10:26 22 complete.

11:10:27 23           She explained that he wanted to complete the  
11:10:33 24 certificate -- he really wanted to complete both of them, he  
11:10:38 25 didn't have time -- to show me that he had done that, that he

11:10:43 1 had accomplished something. It was, of course, important to  
11:10:48 2 me that he was making an effort to deal with some of the  
11:10:52 3 problems that had been disclosed in the sentencing process.

11:10:57 4           The creation of a deduction for those who have taken  
11:11:02 5 substantial steps toward rehabilitation would incentivize the  
11:11:09 6 type of rehabilitative conduct that would reduce recidivism, I  
11:11:14 7 would hope, and achieve the goals of our justice system. I'm  
11:11:21 8 not sure that the single certificate of that young man in my  
11:11:26 9 example would have constituted a substantial step -- although  
11:11:31 10 I will tell you for him that it was an important step -- but  
11:11:38 11 it might have qualified for a partial deduction.

11:11:45 12           For those on bond -- he was not on bond --  
11:11:49 13 rehabilitative conduct might consist of obtaining regular  
11:11:53 14 employment and maintaining that employment. In Memphis,  
11:11:59 15 that's a very significant step. It might involve the  
11:12:05 16 obtaining of a G.E.D., completing various types of counseling,  
11:12:11 17 making early contributions to restitution.

11:12:16 18           And let me give you one example in that regard. Not  
11:12:19 19 long ago, a gentleman who had defrauded an insurance company  
11:12:24 20 of over a million dollars, a very creative gentleman in the  
11:12:29 21 cotton industry, and I think if you know anything about  
11:12:31 22 Memphis and the South, it is an area where it would be  
11:12:34 23 possible to defraud someone. It's also an area in which a  
11:12:39 24 handshake is critical, and usually people are known so that  
11:12:46 25 that doesn't happen often.

11:12:47 1 Well, he had been successful in his endeavor to  
11:12:53 2 obtain that extra million dollars, but he was remarkably  
11:12:56 3 creative. He didn't start out when he was arrested with a big  
11:13:01 4 bank account. He didn't have a rich relative. But he is an  
11:13:06 5 inventor. He proceeded to create a process for repackaging  
11:13:11 6 certain types of cotton that could not otherwise be used and  
11:13:15 7 has gone all over particularly Texas and Tennessee in that  
11:13:21 8 process. He actually earned, within a fairly short period of  
11:13:25 9 time, a million dollars and paid it back. He should get  
11:13:30 10 credit for that. And, in fact, in this case he did. The  
11:13:35 11 government was anxious that he get credit.

11:13:38 12 For those who are incarcerated pending sentencing, it  
11:13:41 13 would promote, that is, an incentive would promote more  
11:13:46 14 desirable behavior while being incarcerated, such as  
11:13:50 15 completing various programs dealing with addiction often,  
11:13:55 16 mental health issues, or educational needs. Those sentenced  
11:14:00 17 to prison who had achieved a substantial-rehabilitative-steps  
11:14:05 18 reduction would hopefully serve their sentence attempting to  
11:14:08 19 take advantage of those programs available in the BOP, since  
11:14:17 20 they had already learned that taking advantage of that type of  
11:14:21 21 program had resulted in a direct benefit to that person  
11:14:25 22 already.

11:14:28 23 One final comment regarding state prosecution and  
11:14:34 24 sentencing variance, which I'm sure you're very aware of.  
11:14:39 25 Throughout the United States, state prison systems often

11:14:42 1 suffer from underfunding and overcrowding. State prosecutors  
11:14:49 2 face similar resource deficits; and, therefore, we have a  
11:14:57 3 double -- a perfect storm in the state system. This tends to,  
11:15:03 4 in West Tennessee and other places, create an undesirable  
11:15:08 5 situation in which most individuals in the criminal justice  
11:15:13 6 system in the state have one expectation, which is severely  
11:15:20 7 restricted by the absence of adequate resources. Therefore,  
11:15:25 8 those that appear in the federal system for the first time are  
11:15:29 9 confused by their state court and prison experience.

11:15:35 10 An analysis by the Sentencing Commission of the  
11:15:37 11 various state experiences versus federal experiences and  
11:15:41 12 research determining whether or not these variations in  
11:15:47 13 experience create potentially higher rates of criminal  
11:15:50 14 activity might be of value to the Congress and the states as  
11:15:55 15 they try to determine the most successful models for our  
11:15:59 16 criminal justice system.

11:16:02 17 The Sentencing Commission has a unique position to  
11:16:06 18 provide this type of analysis and I'm sure, if requested,  
11:16:11 19 would do so. May well have already done that to some degree.

11:16:18 20 In conclusion, the advisory sentencing guideline  
11:16:22 21 regime in the post-*Booker* era provides more balance between  
11:16:26 22 judicial discretion and uniformity in sentencing than existed  
11:16:31 23 under the prior mandatory system. District judges continue to  
11:16:37 24 benefit enormously from the Commission's important work in  
11:16:43 25 providing model sentences.

11:16:47 1           The Commission's research and historic data is  
11:16:51 2 greatly valued by the district court. Without the guidelines,  
11:16:57 3 we would lack the logical, statistical and mathematical data  
11:17:03 4 that allows district judges to make the difficult decisions  
11:17:08 5 required in sentencing on a consistent basis.

11:17:12 6           I want to again thank you for an opportunity to  
11:17:14 7 address you. I join in Judge Rosen's and other judges'  
11:17:20 8 remarks. It's not necessary for me to repeat those. I did  
11:17:23 9 note some of the questions that were asked, but I'm going to,  
11:17:25 10 of course, in light of the time defer to my colleagues, if  
11:17:29 11 that's acceptable.

11:17:31 12           ACTING CHAIR HINOJOSA: Thank you, Judge McCalla.  
11:17:33 13           Judge Caldwell.

11:17:35 14           JUDGE CALDWELL: Judge Hinojosa and members of the  
11:17:38 15 Sentencing Commission, thank you for inviting me to appear  
11:17:42 16 here today, and I must say, if only for a brief time, it feels  
11:17:44 17 pretty good to be back on this side of the bench.

11:17:46 18           But like many federal judges, I find that sentencing  
11:17:49 19 is indeed one of the most difficult tasks assigned to me. The  
11:17:56 20 responsibility weighs very heavily upon me as virtually every  
11:17:59 21 case that comes before me is awash in human tragedy.

11:18:06 22           When it comes to determining the fate of an  
11:18:09 23 individual who appears before me, I believe in utilizing every  
11:18:12 24 available resource to ensure that punishment is fair and just,  
11:18:18 25 and I'm extremely grateful for a guideline scheme that infuses



11:18:23 1 order and rationality into that process.

11:18:27 2 I became an assistant United States attorney in  
11:18:30 3 August of 1987, about three months before the sentencing  
11:18:34 4 guidelines became effective and two years before *Mistretta*;  
11:18:40 5 therefore, for most of my legal career, I've worked within the  
11:18:43 6 mandatory federal sentencing guideline scheme. As both a  
11:18:48 7 practitioner and a judge, I never felt particularly  
11:18:52 8 constrained by the federal guidelines scheme. However, while  
11:18:58 9 I value the guidance that the Commission provides me, I have  
11:19:01 10 come to enjoy life after *Booker* and the flexibility that an  
11:19:06 11 advisory system has provided me.

11:19:10 12 The advisory guidelines to me serve as a model,  
11:19:14 13 taking into account relevant factors that should influence  
11:19:17 14 every sentence. The methodical arrangement of the sentencing  
11:19:22 15 guidelines creates a logical framework for considering similar  
11:19:25 16 factors in every criminal case.

11:19:29 17 However, to be effective, a uniform analysis does not  
11:19:33 18 have to always produce uniform results. After *Booker*, the  
11:19:38 19 sentencing guidelines provide federal judges with a solid  
11:19:41 20 platform from which to exercise their discretion in achieving  
11:19:46 21 the sentencing objectives established by Congress.

11:19:50 22 In many ways, I think most of my colleagues would  
11:19:52 23 agree that, post-*Booker*, sentencing has become more difficult.  
11:19:58 24 Additional discretion makes sentencing harder, not easier.  
11:20:03 25 Judges can no longer hide behind the mandatory guidelines and

11:20:07 1 must take even more time in fashioning sentences in criminal  
11:20:10 2 cases. In many instances, of course, factors may be relevant  
11:20:16 3 to both guideline departures and variances. Admittedly,  
11:20:21 4 conducting the strict guideline departure analysis in advance  
11:20:24 5 of the less restrictive variance analysis is sometimes time  
11:20:28 6 consuming and a bit frustrating. However, if an advisory  
11:20:33 7 guideline scheme is to have any validity, district judges must  
11:20:37 8 continue to carefully and correctly calculate the advisory  
11:20:40 9 guidelines.

11:20:41 10           Accordingly, in my court, I conduct bifurcated  
11:20:46 11 sentencing hearings so that guidelines may be properly  
11:20:49 12 calculated before variances are considered. I do this not  
11:20:52 13 only to avoid error, but also to ensure fairness in the  
11:20:57 14 process. I also have found this process to be particularly  
11:21:01 15 important when I have elected to vary upward from the  
11:21:05 16 guidelines.

11:21:07 17           Since the sentencing guidelines went into effect,  
11:21:11 18 lawyers and commentators have argued that federal sentences  
11:21:14 19 are simply too long; however, I find that much of that  
11:21:19 20 criticism is actually aimed at applicable minimum mandatory  
11:21:23 21 statutory penalties rather than the guideline ranges  
11:21:25 22 themselves. These creations of Congress are neither the  
11:21:30 23 product nor the responsibility of this Commission. However, I  
11:21:34 24 do encourage this Commission to consider empirical data along  
11:21:39 25 with congressional mandates as it continues to re-evaluate and

11:21:44 1 revise guidelines that have corresponding statutory minimum  
11:21:47 2 sentences.

11:21:49 3           In my eight years on the bench, there have been a  
11:21:53 4 handful of cases in which I have observed that the minimum  
11:22:00 5 mandatory sentence provided an unduly harsh result. In  
11:22:03 6 contrast, I've presided over a handful of cases in which I  
11:22:07 7 believe that the maximum statute sentence was too lenient.  
11:22:10 8 However, most of the cases in our district, as they are in  
11:22:13 9 federal courts throughout this country, are resolved by a plea  
11:22:17 10 agreement and also, for the most part, the safety valve and  
11:22:20 11 downward departure motions have served to mitigate unduly  
11:22:24 12 harsh results that might otherwise have resulted from  
11:22:27 13 statutory penalties, which, I might add, drive very few of the  
11:22:32 14 cases in my district.

11:22:34 15           While much of the discretion to depart downward from  
11:22:41 16 a statutory minimum penalty is vested with the prosecution  
11:22:44 17 rather than with the court, prosecutors in my district make  
11:22:48 18 liberal, if not too generous, use of that discretion.

11:22:54 19           With respect to downward departures based on a  
11:22:58 20 defendant's cooperation, it's not, of course, uncommon for the  
11:23:01 21 most culpable person in a scheme to get the most beneficial  
11:23:04 22 deal from the government. Under the mandatory guidelines,  
11:23:08 23 there were times in which it appeared that a less culpable  
11:23:12 24 person, having little information to assist the government,  
11:23:15 25 might receive punishment equal to or exceeding a far more

11:23:21 1 culpable defendant. Under an advisory scheme, however, the  
11:23:27 2 judge is able to avoid injustice or disproportionate  
11:23:31 3 sentencing by taking into account each defendant's relative  
11:23:33 4 culpability in the context of the defendant's downward  
11:23:37 5 departure.

11:23:39 6 As the Sentencing Commission continues its work, I  
11:23:43 7 hope that it will consider the comments of everyone here, and  
11:23:47 8 I'd like to take just a moment to vary from my prepared  
11:23:51 9 remarks to address something that one of my colleagues said  
11:23:54 10 earlier, and it dealt with the child pornography guidelines.

11:23:58 11 In my district, even in simple possession cases, in  
11:24:04 12 almost every instance, the defendant has acted in some way  
11:24:08 13 either to abuse a child or to have abused a spouse or to have  
11:24:12 14 done something besides simple possession of the pornography,  
11:24:17 15 and they have a history of that. So I do not have the same  
11:24:21 16 experience as some of my colleagues. That could be the result  
11:24:24 17 of prosecutorial decisions. I think many of the cases that  
11:24:28 18 we're confronted with, we have to look at what drives the  
11:24:32 19 prosecution of that case.

11:24:33 20 Similarly in gun cases, the case that one of my  
11:24:36 21 colleagues talked about in which an elderly man had a gun in  
11:24:40 22 his car, we don't see that in my district. Most of the people  
11:24:45 23 in the Eastern District of Kentucky are armed, and we live in  
11:24:49 24 a rural district and there's probably a gun in most of the  
11:24:52 25 cars going up and down I-75. So the prosecutors in our

11:24:57 1 district are cautious in the use of their prosecutorial  
11:25:01 2 discretion regarding prosecution of firearms cases.

11:25:05 3 In conclusion and in the interests of time, I'd like  
11:25:09 4 to commend the Sentencing Commission for its work, both before  
11:25:14 5 and after *Booker*. Under the new advisory guidelines scheme, I  
11:25:20 6 believe that the Commission's work takes on additional  
11:25:22 7 relevance as it assists federal judges in arriving at just  
11:25:27 8 punishment in every criminal case.

11:25:30 9 Thank you.

11:25:31 10 ACTING CHAIR HINOJOSA: Thank you, Judge Caldwell.  
11:25:33 11 Judge Simon, sir.

11:25:34 12 JUDGE SIMON: Good morning, everyone. Thanks for  
11:25:36 13 giving me the opportunity to be here this morning.

11:25:39 14 I have roughly 20 years experience working with the  
11:25:42 15 sentencing guidelines. I was a federal prosecutor for about  
11:25:46 16 13 years, and I've been on the district court bench for about  
11:25:49 17 seven now, and so I have a lot of interest in this area of the  
11:25:53 18 law and so I really welcome the opportunity to be here and I'm  
11:25:56 19 really honored to have been asked to testify.

11:25:58 20 You know, when I first started in the system, there  
11:26:02 21 were a number of cases that I handled as a prosecutor that  
11:26:05 22 were still governed by the old law. And, you know, there was  
11:26:10 23 a lot of problems with the system and most obvious being the  
11:26:14 24 complete lack of uniformity in sentencing.

11:26:16 25 I can recall a tax case where a defendant was

11:26:19 1 convicted of three counts of filing false tax returns. By the  
11:26:25 2 luck of the draw, or lack of luck, he drew a particular judge,  
11:26:29 3 and he received a sentence of three years on each count  
11:26:32 4 consecutive with one another for a nine-year total. A couple  
11:26:37 5 months later, a very similar prosecution, draws a different  
11:26:40 6 judge, same building. That defendant received probation.

11:26:46 7           So, you know, quite literally, the happenstance of  
11:26:50 8 the name being drawn out of the bin made all the difference in  
11:26:53 9 the world to these two people who were being prosecuted. I  
11:26:57 10 can always remember the first question you'd get after a case  
11:26:59 11 was filed was who's the judge? Who did I draw? Because it  
11:27:04 12 was, in many ways, going to dictate the end result.

11:27:08 13           So at the outset, I want to make clear that I am, in  
11:27:12 14 general, a big proponent of the guidelines. But with that  
11:27:16 15 being said, I do think there are a number of problems with the  
11:27:18 16 guidelines, and that's what I'm going to focus my comments on  
11:27:22 17 today.

11:27:23 18           You know, the first concern I've always had is that  
11:27:26 19 prior to *Booker*, you know, the name itself was a misnomer.  
11:27:30 20 The United States sentencing guidelines weren't guidelines. I  
11:27:35 21 always thought that the name suggested that they were merely a  
11:27:39 22 source of advice or some starting point in arriving at a  
11:27:43 23 reasonable sentence; but, of course, prior to *Booker*, that was  
11:27:46 24 untrue. The guidelines had the force of law, and district  
11:27:51 25 judges were bound by them with, at least in this circuit, very

11:27:54 1 limited ability to depart.

11:27:56 2           In my view, the guidelines should have always been  
11:27:59 3 just that, guidelines. In other words, they should have been  
11:28:02 4 a starting point in focusing the judge's attention and to set  
11:28:08 5 sort of a mean average sentence or a narrow range, given the  
11:28:11 6 particular offense or the defendant's criminal history. But  
11:28:15 7 since the guidelines had the force of law, judges would just  
11:28:19 8 rotely follow them, even if it may not have been the most  
11:28:23 9 sensible thing to do.

11:28:24 10           I can venture to say that all of us have had cases in  
11:28:28 11 the system where you would compute the guidelines and they  
11:28:30 12 simply don't make any sense, given the individual  
11:28:34 13 circumstances of the person actually sitting in the courtroom.

11:28:37 14           And so with *Booker*, all of this has changed. And  
11:28:41 15 although *Booker* and its companion case are, with respect to  
11:28:47 16 the Supreme Court, a little awkward in how they achieved the  
11:28:50 17 result, from my perspective, the result in *Booker* is nothing  
11:28:53 18 short of a master stroke. *Booker*, I think, has struck the  
11:28:58 19 exact right balance between uniformity in sentencing on the  
11:29:02 20 one hand with flexibility on the other. It's kept the  
11:29:06 21 structure of the guidelines in place, and in any federal  
11:29:12 22 sentencing they remain the starting point for determining the  
11:29:15 23 sentence and most often the end point. But *Booker* has given  
11:29:18 24 me the ability to honestly deal with cases where the  
11:29:22 25 guidelines simply don't yield a sensible result.

11:29:25 1           One of the first cases I had after *Booker* was two  
11:29:28 2 weeks later. *Booker* was decided in January of '05. A couple  
11:29:33 3 weeks later, I had a defendant in front of me named Henry  
11:29:38 4 Nelligan. He was caught selling crack to an informant. He's  
11:29:42 5 57 years old. He's a profound crack addict. It's clear that  
11:29:45 6 he sold the crack to support his own habit. He looks like  
11:29:48 7 he's about 70 or 75, even though I said he's 57. He's been a  
11:29:53 8 crack addict for 15 years. He's an army veteran, served in  
11:29:58 9 Vietnam, honorably discharged, has a very supportive family,  
11:30:02 10 and is in very poor health. He has high blood pressure,  
11:30:06 11 suffered a heart attack a year before the offense.

11:30:09 12           Now, he has a Criminal History Category III by virtue  
11:30:13 13 of the fact of two prior misdemeanors for crack possession.  
11:30:18 14 So I computed the guidelines, and out spit 168 to 210 months,  
11:30:25 15 roughly 14 to 18 years. Now, I want to be clear about it, I'm  
11:30:28 16 no fan of crack dealers, but this was a case where I simply  
11:30:32 17 thought that, given the various goals of sentencing --  
11:30:36 18 punishment, specific deterrence, general deterrence,  
11:30:39 19 rehabilitation -- that an 18-year sentence is simply  
11:30:44 20 excessive.

11:30:44 21           So prior to *Booker*, I would have, in rote fashion,  
11:30:49 22 given Mr. Nelligan a sentence of 168 months. There really were  
11:30:53 23 no legitimate grounds for departure, and I read those  
11:30:57 24 departures the way the court of appeals told me to read them,  
11:31:00 25 and so he would have received a sentence of 168 months.



11:31:04 1           But *Booker* gave me the ability to give a sentence  
11:31:07 2 that I believe is simply more reasonable, given his individual  
11:31:10 3 characteristics. He'll be in prison for roughly seven years,  
11:31:15 4 still a rather lengthy prison term, not something he's going  
11:31:18 5 to do standing on his head. And with *Booker* as the guide, I  
11:31:23 6 arrived at this sentence, taking into account his age, the  
11:31:26 7 fact that I think it's unlikely that when he's released at age  
11:31:29 8 65 that he'll be a recidivist, although there's a possibility;  
11:31:34 9 his strong family background; his poor health; his status as  
11:31:37 10 an army veteran. So he received a sentence of roughly half  
11:31:41 11 what the guidelines called for, but it's a sentence that I  
11:31:43 12 simply think is more in line with the goals of sentencing, and  
11:31:46 13 it's a sentence that I believe is more reasonable than that  
11:31:49 14 which is called for by the guidelines.

11:31:51 15           The U.S. Attorney got up and objected. They were  
11:31:54 16 appalled, shocked, however you want to characterize it; filed  
11:31:58 17 a notice of appeal; and about a month later, they withdrew it.  
11:32:03 18 So *Booker* has given me the flexibility, you know, to adjust  
11:32:08 19 the sentences when I believe it's appropriate.

11:32:11 20           Now, with that being said, even after *Booker*, I tend  
11:32:14 21 to give guideline sentences, not because I presume that the  
11:32:17 22 guidelines are reasonable, but more often than not, the  
11:32:23 23 guideline computation is reasonable in my judgment. But I  
11:32:26 24 would say in about one out of four cases, and I'm just  
11:32:29 25 estimating here, I give a sentence that's outside the

11:32:32 1 guideline range based on the 3553(a) factors.

11:32:36 2           Now, I welcome the change that *Booker* has brought,  
11:32:41 3 but I must say that, as my colleagues have said here, it's  
11:32:45 4 made the job way more difficult. In almost every case now, I  
11:32:49 5 receive comprehensive sentencing memoranda from counsel  
11:32:52 6 requesting non-guideline sentences, and sentencing was much  
11:32:56 7 easier when all you had to do was calculate the guidelines and  
11:32:59 8 give the sentence that was spit out by the computation. But I  
11:33:02 9 can no longer do that, and so the sort of the emotional toll  
11:33:07 10 of sentencing, I think, is much greater today, but I welcome  
11:33:11 11 that extra burden. I think it was needed in the system.

11:33:14 12           Let me address some individual concerns that I have  
11:33:17 13 with the guidelines. Let me give you some brief background --  
11:33:19 14 I know we're running late -- on my district.

11:33:22 15           I sit in Northern Indiana. It's about 30 miles from  
11:33:26 16 here. The major city is Gary, Indiana. The crime rate in  
11:33:29 17 Gary, Indiana is astounding. It's been the murder capital of  
11:33:34 18 the country many years out of the last 15, and our district  
11:33:41 19 has an inordinate quantity of crack cocaine cases.

11:33:44 20           I pulled the statistics. In the last ten years, we  
11:33:48 21 had 789 crack cocaine cases for five judges. About half of  
11:33:56 22 all of our drug cases are crack cocaine cases. I think the  
11:33:59 23 national average is about 14 percent.

11:34:01 24           So I would venture to say that on a per-judge basis,  
11:34:05 25 we have as many crack cocaine cases than almost anybody in the

11:34:09 1 country. I let you know this just to tell you that I'm well  
11:34:14 2 aware of the problems that crack can bring to a neighborhood  
11:34:17 3 and a community, but -- and I know this is beating a dead  
11:34:22 4 horse, this is an issue that's been currently in the midst of  
11:34:28 5 being hopefully addressed. But, you know, the disparity  
11:34:32 6 between crack and powder, it was just a terrible injustice.  
11:34:36 7 Treating crack it used to be a hundred more times more serious  
11:34:40 8 than cocaine is ludicrous. They should be treated the same,  
11:34:44 9 and in my view, in fact, I think the powder cocaine guidelines  
11:34:47 10 should be slightly higher.

11:34:50 11           So, for example, a distribution of a quarter kilogram  
11:34:53 12 of powder should be perhaps a level 20 instead of a level 18,  
11:34:58 13 and the crack guidelines should be reduced to a one-to-one  
11:35:01 14 ratio based on those new guidelines. I know that Congress is  
11:35:06 15 currently looking at this, and I believe there's legislation  
11:35:09 16 pending to eliminate the disparity. I would just hope that  
11:35:12 17 the Commission would support that legislation.

11:35:15 18           You know, I'm just tired of sending street-level  
11:35:19 19 dealers to prison for 10, 15, 20 years, sometimes life. It's  
11:35:25 20 just ridiculous.

11:35:27 21           Second, the guidelines' treatment of first-time  
11:35:31 22 offenders has always troubled me. It has never made sense to  
11:35:35 23 me to treat, for example, a third-time offender similarly to a  
11:35:40 24 first-time offender, but that's essentially what the  
11:35:42 25 guidelines do. Take a defendant who's an offense level 15 and

11:35:46 1 who's a first-time offender. His range is 18 to 24 months.

11:35:50 2 Now, take somebody at the same offense level with two prior

11:35:53 3 armed robbery convictions. He's a Criminal History Category

11:35:58 4 III, but he faces a range only six months more, 24 to

11:36:03 5 30 months.

11:36:04 6 It's incomprehensible to me how these two defendants

11:36:07 7 would actually have overlapping sentencing ranges. This

11:36:11 8 really strikes me as an injustice and really a poor use of

11:36:15 9 scarce criminal justice resources.

11:36:18 10 As we all know and has been discussed, incarceration

11:36:21 11 is incredibly expensive. I believe that people in Criminal

11:36:27 12 History Category I should be given more opportunity at

11:36:29 13 probation or some alternative sentencing.

11:36:31 14 I firmly believe, setting cases aside where there's

11:36:34 15 violence involved, that defendants should be given an

11:36:38 16 opportunity to demonstrate that they simply made a mistake.

11:36:41 17 Now, I become much less sympathetic to defendants who are

11:36:44 18 coming through the system for the second, third or fourth

11:36:48 19 time. For those defendants, they're not entitled to the

11:36:50 20 benefit of the doubt, so prison is absolutely necessary for

11:36:54 21 those type of offenders. But for first-time offenders,

11:36:58 22 proceeding immediately to incarceration even for relatively

11:37:02 23 minor offenses has always struck me as rash.

11:37:06 24 Third, the way in which mandatory minimums dovetail

11:37:11 25 with the guidelines sometimes poses problems. I don't believe

11:37:14 1 this is an appropriate forum to debate pros and cons of  
11:37:19 2 mandatory minimums. In general, I believe that they're  
11:37:22 3 unwise; but in the end, that's for Congress to decide, and I  
11:37:26 4 accept that.

11:37:26 5 I do, however, have a mild criticism for how the  
11:37:31 6 Commission responds to mandatory minimums. Let me give you a  
11:37:36 7 concrete example.

11:37:37 8 A few years ago, the Adam Walsh Act increased, among  
11:37:40 9 other things, the mandatory minimum for those convicted under  
11:37:43 10 18 U.S.C. 2422(b). It went from five years to ten years.  
11:37:48 11 Again, we could debate for a long time whether that was a wise  
11:37:52 12 decision, but let's just set that aside for a moment.

11:37:54 13 Shortly after the change in the statute, the U.S.  
11:37:58 14 Attorney in my district conducted a sting operation and  
11:38:01 15 arrested I would say 20 to 25 people in this sting, people who  
11:38:06 16 were using the Internet, trying to coerce under-age girls to  
11:38:10 17 meet them for sex. Of course, these girls were, in fact, law  
11:38:14 18 enforcement officers posing as minors. And the problem from  
11:38:17 19 my point of view is that it took 16 months, I believe, for the  
11:38:21 20 guidelines to catch up with the mandatory minimums.

11:38:24 21 And I guess, Commissioner Carr, you had asked this  
11:38:26 22 earlier how dovetailing the two, you know, the mandatory  
11:38:31 23 minimum went up from five to ten effective in July of '06 and  
11:38:35 24 the guidelines, through Amendment 701, took that into account  
11:38:39 25 in November of '07. I ended up having a lot of trials on

11:38:46 1 these sexual predator cases simply because there was no  
11:38:50 2 incentive for the defendant to plead guilty.

11:38:53 3           The guidelines in existence yielded a sentence of  
11:38:56 4 about six years, but since they were looking at ten-year  
11:39:00 5 mandatory minimums, there was simply no point to pleading  
11:39:02 6 guilty.

11:39:03 7           I know that the Commission is extremely busy, and I  
11:39:07 8 candidly don't fully understand how emergency amendments get  
11:39:11 9 enacted and whether it would have been feasible to do so in  
11:39:14 10 that situation, but as I sat through all those trials, I kind  
11:39:18 11 of wished that it had happened. I do know that many of the  
11:39:24 12 defense lawyers candidly told me that their clients would have  
11:39:27 13 pled guilty had the guidelines been amended earlier.

11:39:31 14           So, fourth, I've often felt that the guidelines score  
11:39:35 15 out entirely too low on large-scale fraud cases. I used to  
11:39:40 16 teach federal criminal practice and procedure at a law school,  
11:39:43 17 and about a fourth of the class was devoted to the sentencing  
11:39:47 18 guidelines, and I would start that portion of the course by  
11:39:49 19 positing two hypotheticals to the students.

11:39:54 20           Defendant A is convicted of distributing a small  
11:39:56 21 amount of crack cocaine, say, 25 grams. The defendant is  
11:40:01 22 given the crack by her boyfriend, told to bring it across town  
11:40:05 23 to his distributor. She knows it's crack, but she's doing him  
11:40:09 24 a favor. She's got four kids, maintains a job, has never been  
11:40:13 25 arrested before, and she's a minor participant and safety

11:40:16 1 valve eligible.

11:40:18 2 Defendant B is an investment advisor. He steals  
11:40:22 3 \$2 million, \$400,000 from each of five clients. The scheme  
11:40:25 4 covers five years. The victims are elderly. He's rendered  
11:40:29 5 them penniless, and he's quite literally ruined their lives.  
11:40:34 6 He's preyed on other vulnerable victims. He gets that  
11:40:39 7 enhancement, and he's obviously abused a position of trust.  
11:40:44 8 He pleads guilty and gets acceptance of responsibility.

11:40:46 9 So I present these two hypotheticals to my students,  
11:40:49 10 and I try to foster a discussion on what's an appropriate  
11:40:52 11 sentence for these two people. And, of course, Defendant A's  
11:40:56 12 guidelines, the crack defendant, are roughly three-and-a-half  
11:41:01 13 to four-and-a-half years. Defendant B's are two to  
11:41:04 14 two-and-a-half years. And most people are stunned by that --  
11:41:08 15 I am -- that the Defendant A is looking at four years while  
11:41:13 16 Defendant B is looking at roughly half that amount of time. I  
11:41:16 17 think most people would think it should be the exact opposite.

11:41:19 18 I only bring that up to illustrate what I think is  
11:41:23 19 the relative ease with which the guidelines treat serious  
11:41:26 20 white-collar offenders who abuse their position of trust and,  
11:41:29 21 quite literally, ruin people's lives. So that's an area that  
11:41:34 22 I would like to see the Commission address.

11:41:36 23 With all this being said, I do reiterate that I am a  
11:41:39 24 proponent of the guidelines, and the criticisms that I have  
11:41:42 25 delineated are really on the margin. I think the guidelines

11:41:46 1 provide me a really important starting point at arriving at a  
11:41:50 2 reasonable sentence, and with the benefit of *Booker*, I'm now  
11:41:54 3 able to adjust it up or down to achieve what I hope to be is a  
11:41:59 4 reasonable sentence.

11:41:59 5           Once again, I thank you all for giving me the  
11:42:02 6 opportunity to present my views.

11:42:04 7           ACTING CHAIR HINOJOSA: Thank you, Judge Simon. And  
11:42:07 8 we'll open it up for questions.

11:42:10 9 QUESTION AND ANSWER SESSION

11:42:10 10           VICE CHAIR CASTILLO: Let me just comment that I  
11:42:12 11 think it's appropriate that we started these hearings with six  
11:42:16 12 district court judges who are very capable. I think, given  
11:42:22 13 where sentencing is at this point, it's appropriate to start  
11:42:27 14 with the district court.

11:42:28 15           So let me just ask just two questions that occurred  
11:42:32 16 to me with regard to this panel. Judge Simon, I really  
11:42:37 17 commend you for writing the *Nellum* opinion, and I see that one  
11:42:40 18 of the things you focused on so quickly after *Booker* was not  
11:42:44 19 only detailing all your thoughts, but focusing on the age of  
11:42:48 20 that particular defendant. Mr. *Nellum* was 65 years old, and  
11:42:52 21 you cite all the statistics that we had generated on age and  
11:42:57 22 recidivism and ultimately, you conclude that there's a  
11:43:03 23 positive correlation between age and recidivism that's  
11:43:06 24 impossible to deny. Those are your words.

11:43:10 25           Would it be helpful if we clarified our sentencing



11:43:14 1 manual and made it clear that district court judges can rely  
11:43:17 2 on age as opposed to some dated language in the manual right  
11:43:22 3 now that says that age is not normally a factor?

11:43:28 4 JUDGE SIMON: Yes, I certainly think so. That's the  
11:43:30 5 point I was driving at in that opinion, and I was really  
11:43:33 6 stunned to see those statistics. I asked my law clerk,  
11:43:36 7 because, you know, you're operating under the gun.

11:43:39 8 VICE CHAIR CASTILLO: Right.

11:43:40 9 JUDGE SIMON: I think I wrote that opinion in about a  
11:43:43 10 day because you really are under the gun. So I asked my law  
11:43:45 11 clerk, see if you can find statistics on it, and I was just  
11:43:48 12 stunned at how recidivism just plunges as every decade people  
11:43:53 13 advance in age.

11:43:54 14 I guess it obviously makes some sense, but when I saw  
11:43:57 15 it, it struck me as this is an opportunity, in the wake of  
11:44:02 16 *Booker*, to maybe try to get creative in adjusting a sentence.  
11:44:08 17 Otherwise, Mr. Nellum obviously would die in jail, and I don't  
11:44:12 18 see the point in that.

11:44:13 19 VICE CHAIR CASTILLO: The only other question I have  
11:44:15 20 is of Judge Caldwell, can you say a word or two more about  
11:44:19 21 your bifurcated sentencing proceedings? How does that  
11:44:22 22 actually work?

11:44:23 23 JUDGE CALDWELL: What I found when judges started,  
11:44:27 24 when defense lawyers in particular first started trying to  
11:44:31 25 persuade me to vary rather than depart from the guidelines is

11:44:34 1 that our discussion would become blurred, the lines would  
11:44:37 2 become blurred. So I began each sentencing hearing  
11:44:41 3 determining whether there are any objections to the  
11:44:43 4 presentence report, making my findings of fact.

11:44:46 5 Then we go forward with the guideline determination  
11:44:51 6 and we arrive at the properly calculated guidelines. I hear  
11:44:55 7 the objections. I make my findings on the record.

11:44:59 8 Then I move to the 3553(a) analysis. I have a  
11:45:04 9 separate portion. Many times we're repeating what we've  
11:45:08 10 already talked about, but it's through a slightly different  
11:45:12 11 lens. I think if you don't do that, and certainly under the  
11:45:15 12 Sixth Circuit's recent mandate in a written opinion in which,  
11:45:19 13 once again, we were cautioned about making sure that we were  
11:45:22 14 stating our reasons on the record, but it really does help  
11:45:26 15 both the defendant, who's totally confused by this process  
11:45:30 16 most of the time, and reviewing court to understand what we're  
11:45:34 17 doing.

11:45:35 18 It also helps me to sort of understand what I've  
11:45:39 19 done. It firms up my sentencing guideline analysis, but I  
11:45:43 20 really do think what was happening or what I perceived as  
11:45:47 21 happening was that a lot of lawyers were glossing over the  
11:45:50 22 guideline calculation in hopes of getting to me personally in  
11:45:55 23 a 3553(a) variance. So that's the reason that I carefully  
11:45:59 24 bifurcate the area. It's all in one hearing, but it's just in  
11:46:03 25 different segments of the hearing.

11:46:04 1 VICE CHAIR CASTILLO: Thank you for clarifying that.

11:46:07 2 COMMISSIONER HOWELL: Just explore one other issue on  
11:46:09 3 departures. It is one of our priorities for the Commission in  
11:46:13 4 the forthcoming year to talk to, to look at our departure  
11:46:17 5 provisions upward and downward, in particular in Chapter Five.  
11:46:22 6 And, Judge McCalla, I just want to thank you so much for some  
11:46:26 7 of the concrete ideas you've given us as we move forward in  
11:46:30 8 that endeavor in articulating some concrete departure  
11:46:33 9 provisions that we ought to consider.

11:46:35 10 And I also appreciate that, unlike in the Seventh Circuit,  
11:46:39 11 which I guess has declared that departures are obsolete, that  
11:46:43 12 you are paying close attention to those departures because it  
11:46:46 13 makes our work in this area in refining some of those  
11:46:51 14 departures certainly more probative or perhaps helpful to  
11:46:56 15 judges who are still paying attention to the specific  
11:46:58 16 departure provisions provided in the manual.

11:47:01 17 One of the things that, you know, that we're  
11:47:05 18 sensitive to is that not only are, as Judge Castillo said, are  
11:47:12 19 departures in Chapter 5 perhaps outdated, but they're very  
11:47:16 20 restrictive and they also have an overlay of, as, Judge Simon,  
11:47:21 21 you've pointed out, sort of this overlay of appellate  
11:47:24 22 restrictions that makes them even more restrictive than  
11:47:27 23 perhaps they are articulated in the plain terms in the  
11:47:30 24 guidelines manual.

11:47:31 25 But as we move forward, do you think that it would be

11:47:35 1 helpful or not in giving additional guidance to judges to do  
11:47:40 2 something that we haven't done even in the departures in  
11:47:43 3 Chapter Five [] -- to give some more guidance as to the extent of  
11:47:47 4 the departure?

11:47:49 5 Judge McCalla, you talked about perhaps a sliding  
11:47:53 6 scale of departures for rehabilitation efforts --

11:47:57 7 CHIEF JUDGE McCALLA: Yes.

11:47:58 8 COMMISSIONER HOWELL: -- made by the defendant, and I  
11:48:00 9 was very interested in your sliding scale term because one of  
11:48:03 10 the things that, while they're generally very restrictive in  
11:48:07 11 Chapter Five, if a judge decides that age or vocational skills or  
11:48:13 12 whatever are, in fact, sufficiently extraordinary to warrant a  
11:48:17 13 departure under some of the Chapter Five departure language, it  
11:48:21 14 doesn't tell you by how much.

11:48:24 15 Do you have any reaction to, as we, as the  
11:48:29 16 Commission, are looking at revisiting those Chapter Five  
11:48:32 17 departure terms, whether you think it would be a helpful thing  
11:48:35 18 to leave it as open as they currently are or whether a sliding  
11:48:39 19 scale, to use your term, Judge McCalla, would be, in fact,  
11:48:44 20 helpful guidance to judges as to how much to depart should  
11:48:47 21 they decide a departure is warranted in a particular case?

11:48:50 22 CHIEF JUDGE McCALLA: I think it would be helpful,  
11:48:52 23 and what I get concerned about, and probably a lot of other  
11:48:55 24 people, is having a situation in which there is not a clearly  
11:49:00 25 articulated rationale for where the judge ended up, and so I

11:49:05 1 think that articulating a scale, it may be a three point and  
11:49:10 2 you're looking at one, two or three, and there's some  
11:49:13 3 discussion about that is helpful.

11:49:14 4 I think what that does is it tends to put that in  
11:49:18 5 perspective. And the risk is that if you don't do that, you  
11:49:24 6 run the risk of abuse in the process. I think it's absolutely  
11:49:28 7 appropriate. It really is.

11:49:34 8 ACTING CHAIR HINOJOSA: Commissioner Friedrich, you  
11:49:35 9 had a question?

11:49:37 10 COMMISSIONER FRIEDRICH: Yes. Chief Judge McCalla,  
11:49:40 11 you've talked about the importance in your view of national  
11:49:42 12 uniformity and how important you view being able to have  
11:49:46 13 defendants feel that when you sentence a defendant, you're  
11:49:48 14 considering the same factors in every case over time. And I'm  
11:49:52 15 just wondering whether you have concerns regarding the amount  
11:49:57 16 of increased disparity in the system. And by that, I don't  
11:50:00 17 mean sentences slightly outside the guideline range. What I'm  
11:50:04 18 referring to is, as I think Chief Judge Carr mentioned in the  
11:50:08 19 Law Review article that we didn't get to discuss with him in  
11:50:11 20 great detail when he testified, but he talked about cases that  
11:50:14 21 are sentenced well outside of the bell curve, kind of  
11:50:17 22 aberrational cases.

11:50:19 23 And I'm wondering whether you or the other judges  
11:50:21 24 have concerns about the ability to prevent that kind of great  
11:50:29 25 disparity in a system where the appellate courts are

11:50:31 1 exercising such restraint in exercising their authority to  
11:50:34 2 review sentences on substantive reasonableness grounds. You  
11:50:39 3 know, it's a rare case that's reversed on those grounds, and  
11:50:42 4 moreover with respect to *Kimbrough* and that line of cases, a  
11:50:45 5 number of appellate courts are saying that district courts can  
11:50:50 6 disagree with the guidelines not based simply on the  
11:50:53 7 individual facts and circumstances of the case, but based on  
11:50:55 8 policy disagreements with guidelines. And just recently you  
11:50:58 9 had the Sixth Circuit affirm a district court's decision to go up  
11:51:03 10 well above the guidelines in an illegal re-entry case based on  
11:51:05 11 a policy disagreement with the guideline, while you had the Seventh  
11:51:08 12 Circuit affirm a district court's decision not to even  
11:51:12 13 consider arguments with respect to policy challenges to the  
11:51:15 14 same guidelines.

11:51:16 15           So I'm just wondering whether you have concerns that  
11:51:18 16 over time we will be unable to achieve the goals of the  
11:51:22 17 Sentencing Reform Act?

11:51:23 18           CHIEF JUDGE McCALLA: No, I agree that eventually  
11:51:25 19 what is likely to happen with the graduation of some of us as  
11:51:31 20 we get to senior status and try fewer cases and fewer and  
11:51:35 21 fewer people have experience with the guidelines and really  
11:51:37 22 hear the criticism and not the favorable aspects of the  
11:51:40 23 guidelines is that we'll start to see inappropriate sentencing  
11:51:43 24 disparity.

11:51:44 25           I think we actually -- that's likely. It may not

11:51:48 1 happen, but it seems likely. I think that judges should  
11:51:51 2 articulate that, one, they should be thinking in terms of that  
11:51:56 3 bell curve. I agree with you. There may be a few things that  
11:52:00 4 are outliers that if you can fully articulate that, maybe  
11:52:03 5 that's appropriate, but it needs to be fully and completely  
11:52:05 6 articulated.

11:52:06 7           The thing that I wrote down when there was some  
11:52:11 8 discussion about this was we have to remember that we all  
11:52:14 9 bring to our process, despite the fact that we have been  
11:52:17 10 scrubbed pretty much, a tendency to believe certain things.  
11:52:22 11 We have predispositions ourselves, and the tremendous risk is  
11:52:27 12 that those predispositions will become articulated in a way  
11:52:32 13 that is couched as an appropriate departure, either upward or  
11:52:38 14 downward.

11:52:39 15           I don't think that -- and I know that sounds harsh,  
11:52:42 16 but I think we all know that. When a person appears before  
11:52:46 17 me -- I had two people yesterday; we do sentence a lot of  
11:52:50 18 folks -- and I had gotten to know them through the process of  
11:52:53 19 many times appearing before me. Well, a number of times.

11:52:57 20           One of them was a Mr. Renfro, and Mr. Renfro is a  
11:53:01 21 very engaging fellow, but he comes in and when you first see  
11:53:05 22 him, he has long braids and is a younger African-American guy.  
11:53:09 23 And I've gotten to where -- I usually try to get to where I  
11:53:13 24 like everybody. That way I'm sort of even. But he doesn't  
11:53:16 25 articulate quite the same way as the second person before me.

11:53:19 1 So you've got to constantly scrub that out of your system.

11:53:24 2           If you don't do that every day, you're going to look  
11:53:28 3 at the second person who appeared before me, who was a police  
11:53:32 4 officer who had -- he kept saying, made a terrible mistake. I  
11:53:36 5 didn't exactly characterize it that way, since he had made it  
11:53:39 6 on a repeated basis and beating up various people, but he had  
11:53:43 7 an appealing persona. He was more articulate, a little bit  
11:53:48 8 more articulate, and he had a certain amount of engaging  
11:53:54 9 personality.

11:53:55 10           I am terrified of those two -- I actually liked both  
11:53:57 11 of these guys. I think we ought to like our people even if we  
11:54:02 12 have to sentence them. It's not a pleasant job. I view every  
11:54:05 13 person as a human being. But you are articulating the fear  
11:54:10 14 that we all have, which is that we will see a distortion, not  
11:54:16 15 on some intellectual -- on some articulated reason, because I  
11:54:22 16 don't think we do that, but the terrible risk, the terrible  
11:54:26 17 risk is that we will sentence someone because they are less  
11:54:29 18 articulate, because that person presents a less conventional  
11:54:33 19 appearance perhaps to us in one way or the other.

11:54:37 20           So your point I think is do I think that we're  
11:54:42 21 possibly going to see that? I think that we might. I don't  
11:54:48 22 cast any aspersions on any judge. It is so difficult and  
11:54:54 23 constant reminder that you can't let those factors -- I don't  
11:54:59 24 think any judge would intentionally ever do that. I think  
11:55:02 25 that we do tend to have a risk there.



11:55:05 1           And even if there isn't a real risk, even if no one  
11:55:08 2 will do it, it may be perceived to be a risk, and there may be  
11:55:12 3 a perception of that type of activity. So it must be clear in  
11:55:17 4 every sentencing that we have used the type of criteria that  
11:55:21 5 the Sentencing Commission has articulated. It is absolutely  
11:55:25 6 critical.

11:55:26 7           And so I, like you, fear that we will tend to move  
11:55:30 8 away from that objective analysis, that analysis that is so  
11:55:38 9 fact driven, and move into a more subjective area. I think we  
11:55:43 10 all fear that.

11:55:45 11           COMMISSIONER FRIEDRICH: To guard against that, do  
11:55:46 12 you also believe that over time we're going to need an  
11:55:48 13 appellate standard that has more teeth to it to prevent that  
11:55:53 14 sort of discretion?

11:55:54 15           CHIEF JUDGE McCALLA: I would like to say that I  
11:55:56 16 didn't think that, but I think that that would be naive. I  
11:55:59 17 think that we will need that type of standard.

11:56:02 18           ACTING CHAIR HINOJOSA: Just to follow up on that,  
11:56:04 19 there was a discussion about the appellate review standard  
11:56:06 20 with the prior panel, and my question is do you think the  
11:56:11 21 judges who have properly determined the guidelines and have  
11:56:14 22 stated reasons really stop to think about what the appellate  
11:56:19 23 court is going to think after they've done that, properly  
11:56:22 24 calculated the guidelines and stated their reasons for  
11:56:24 25 whatever sentence they chose?

11:56:25 1           Do you think that there's a thought in the judges  
11:56:29 2           that the appellate court might second-guess them? I got that  
11:56:33 3           feeling from the prior panel, at least from some of the  
11:56:37 4           judges, that they felt that that was the thinking of judges at  
11:56:40 5           the district court level.

11:56:41 6           Do you think under the present appellate review  
11:56:44 7           standards that we have, that that is something that the judges  
11:56:46 8           think about?

11:56:49 9           CHIEF JUDGE McCALLA: I'm going to say probably not  
11:56:51 10          very much. We do our job and they do theirs, but I could be  
11:56:57 11          wrong. It may be -- I don't know what my colleagues think.

11:57:02 12          JUDGE SIMON: I agree. You just make your best call.  
11:57:04 13          It doesn't really cross my mind, in all honesty.

11:57:08 14          CHIEF JUDGE McCALLA: I think it has been helpful to  
11:57:12 15          have continued focus on proper calculation. We would agree  
11:57:14 16          with that in the Sixth Circuit. We think that's -- am I  
11:57:17 17          misspeaking here?

11:57:18 18          JUDGE CALDWELL: No, no. The focus on proper  
11:57:21 19          calculation at least forces you into a proper process that  
11:57:24 20          helps every judge use the same uniform analysis; and by  
11:57:30 21          maintaining strict adherence to that, at least then it's up to  
11:57:35 22          the judge in his or her personal role in determining facts  
11:57:40 23          that are not relevant under that guideline determination to  
11:57:43 24          vary.

11:57:44 25          But I think that I would echo everyone's statement

11:57:51 1 that I'm going to do the best I can with that defendant in  
11:57:54 2 front of me, and if the Sixth Circuit disagrees, they'll tell me.

11:57:58 3 CHIEF JUDGE McCALLA: And they will.

11:58:01 4 JUDGE CALDWELL: Every now and then, they do.

11:58:04 5 CHIEF JUDGE McCALLA: Every now and then.

11:58:04 6 VICE CHAIR SESSIONS: Judge Simon, just a quick  
11:58:05 7 question. You do a lot of crack cases. We've heard from some  
11:58:10 8 prosecutors that if there's an equalization of powder and  
11:58:13 9 crack, 500 grams is the threshold for five-year mandatory  
11:58:16 10 minimum, the government will get out of the crack business  
11:58:20 11 because there are none. There [will be no cases at] 500 grams.

11:58:23 12 Is that your experience?

11:58:24 13 JUDGE SIMON: Not completely, no, although I do think  
11:58:30 14 at least in my district, most of the crack offenders are very  
11:58:33 15 low levels, very small quantities, but small in an absolute  
11:58:39 16 sense, but then when you compute the guidelines, not so small.

11:58:44 17 I just don't see big crack cases involving  
11:58:48 18 organizations anyway. Most of the cases are street-level  
11:58:53 19 dealers because they're the ones who are cooking the powder  
11:58:58 20 into crack. And so you don't get large organization cases of  
11:59:05 21 crack gangs. They're all -- most of them are free agents, as  
11:59:12 22 opposed to heroin or methamphetamine or powder cocaine, where  
11:59:18 23 you do see larger organizations. I just don't see that in the  
11:59:21 24 crack cases. So I guess I really can't respond to it.

11:59:26 25 VICE CHAIR SESSIONS: So do you think that means the

11:59:27 1 government will get out of the crack business then?

11:59:30 2 JUDGE SIMON: I don't think so.

11:59:32 3 CHIEF JUDGE McCALLA: I would think -- may I comment  
11:59:34 4 on that? I apologize.

11:59:35 5 VICE CHAIR SESSIONS: Oh, sure.

11:59:36 6 CHIEF JUDGE McCALLA: I would think, in the Western  
11:59:37 7 District, one of the prosecutors who has handled many, many  
11:59:42 8 drug cases spoke to me the other day. I didn't ask him for  
11:59:46 9 his comment, and he was very, very, very concerned about the  
11:59:50 10 possibility that they would be equal because he said I think  
11:59:54 11 it will push them in most respects out of the crack business.  
11:59:58 12 However, we do get some kilos of crack cocaine, so I don't  
12:00:01 13 want to mislead anybody. We've got real entrepreneurial  
12:00:07 14 people down where I live, so we do get some pretty big cases.

12:00:10 15 But the idea that the effect within society, the  
12:00:17 16 detrimental effect is the same is just -- I don't think it's  
12:00:21 17 connected with sound research, and I don't think it's  
12:00:25 18 connected with reality. I think we're dealing with somewhat  
12:00:30 19 different problems.

12:00:32 20 I don't have a problem with modification adjustment  
12:00:34 21 and so forth. That's fine. But they are not the same. They  
12:00:37 22 do not have the same effect. They are dealt with differently.  
12:00:40 23 They are dealt differently on the street, and so it's a  
12:00:45 24 tremendous issue. Obviously, where both of us live, both in  
12:00:51 25 Northern Indiana and in Western District of Tennessee, it's a

12:00:55 1 tremendous problem. It's just a huge problem.

12:01:01 2           Now, do I think that that's the only thing that we  
12:01:03 3 should be doing? I think we're turning over here to what are  
12:01:06 4 we going to do to also try to address the problem in a more  
12:01:09 5 constructive way as that person comes through the process, and  
12:01:12 6 how do we try to change behavior.

12:01:14 7           That's a different question. It is a serious  
12:01:20 8 question. When the prosecutors tell you that, they believe  
12:01:22 9 it, and I think there's some basis in fact for that.

12:01:29 10           JUDGE CALDWELL: Crack cocaine in the Eastern  
12:01:30 11 District of Kentucky is not a particular problem. It's  
12:01:34 12 methamphetamine and pills, so we have a totally different kind  
12:01:38 13 of caseload there. But what I have, of course, experienced as  
12:01:42 14 a federal prosecutor and as a judge that congressional funding  
12:01:47 15 to prosecute crimes comes from the concerns of constituents;  
12:01:52 16 and in many U.S. Attorneys' offices, special assistant United  
12:01:56 17 States attorneys are hired for the purpose of prosecuting  
12:01:59 18 certain kinds of cases. So we will see clusters of cases that  
12:02:03 19 are brought before us.

12:02:04 20           And I recognize that is not this Commission's  
12:02:07 21 concern, but sometimes I think that we look at prosecutorial  
12:02:12 22 discretion being used to get funding to hire more people to  
12:02:17 23 prosecute certain kinds of cases and, as a result, maybe some  
12:02:21 24 of those cases aren't as good or as significant as the  
12:02:26 25 original intent was. But, again, that's not our problem here

12:02:29 1 today, but it does have an impact on what comes before us at  
12:02:34 2 the time of the sentencing.

12:02:35 3 CHIEF JUDGE McCALLA: I think the question on crack  
12:02:38 4 cocaine, also you have to talk about crack cocaine in the  
12:02:40 5 context of methamphetamine. Crack and methamphetamine have a  
12:02:44 6 lot of characteristics, several characteristics.

12:02:48 7 We've had, I think everybody's had significant  
12:02:50 8 problems with both of them. They just operate a little  
12:02:53 9 differently than powder cocaine. Now, I'm glad somebody else  
12:03:02 10 is going to make the final call on that.

12:03:04 11 ACTING CHAIR HINOJOSA: Well, thank you all very  
12:03:05 12 much. We appreciate your patience, and we will take a  
12:03:09 13 five-minute break now.

12:03:13 14 JUDGE CALDWELL: The court reporter --

12:03:14 15 ACTING CHAIR HINOJOSA: The court reporter  
12:03:15 16 appreciates it.

12:03:19 17 (Recess from 12:03 to 12:13.)

12:13:01 18 PANEL III. VIEW FROM THE PROBATION OFFICE

12:13:01 19 ACTING CHAIR HINOJOSA: The next panel is composed of  
12:13:04 20 individuals who head up offices whose officers are used to  
12:13:11 21 waiting in the courtroom sometimes, and so we definitely  
12:13:14 22 appreciate their patience.

12:13:15 23 We have two Chief Probation Officers to give the "View  
12:13:19 24 from the Probation Office," the office that plays such a vital  
12:13:23 25 role with regards to the sentencing process and their role

12:13:27 1 with the courts.

12:13:28 2           We have Philip Miller who is the Chief U.S. Probation  
12:13:32 3 Officer in the Eastern District of Michigan, and he's been the  
12:13:34 4 Chief Probation Officer since the year 2008. He joined the  
12:13:38 5 office in May of 1992, was assigned to the Presentence  
12:13:42 6 Investigation Division and was promoted to a guidelines  
12:13:45 7 specialist in September of 2000. He's a graduate of Michigan  
12:13:50 8 State University.

12:13:50 9           And we have Mr. Richard L. Tracy who is the Chief  
12:13:54 10 U.S. Probation Officer for the Northern District of Illinois.  
12:13:57 11 Prior to joining the probation office, he worked as a  
12:14:00 12 probation officer with Cook County Juvenile Probation and as a  
12:14:04 13 school social worker at New Trier High School in Illinois. He  
12:14:09 14 holds a bachelor's degree in administration of justice from  
12:14:13 15 Southern Illinois University at Carbondale and a master's  
12:14:16 16 degree in social work from the University of Illinois at  
12:14:18 17 Chicago.

12:14:18 18           And we'll start with Mr. Miller.

12:14:20 19           MR. MILLER: Thank you.

12:14:21 20           I'd like to thank the Sentencing Commission for  
12:14:24 21 inviting me to appear before you today. And as somebody  
12:14:28 22 that's served on the Probation Officers Advisory Group, I'd  
12:14:32 23 also like to thank you for having that advisory group, relying  
12:14:35 24 on the information that probation officers give. I'd also  
12:14:38 25 like to thank you for reinstating the visiting probation

12:14:41 1 officer program.

12:14:42 2 I just had an officer come back from that that spent  
12:14:46 3 three months in Washington. He came back a better officer for  
12:14:49 4 that, just for the different perspectives that he gets from  
12:14:52 5 around the country in implementing different sentencing  
12:14:56 6 guidelines. So I'd like to thank that, and I'd also like to  
12:14:59 7 acknowledge the work that Pamela Montgomery and Alan Dorhoffer  
12:15:03 8 do when working with the advisory groups.

12:15:05 9 ACTING CHAIR HINOJOSA: Did Alan ask you to do that?

12:15:08 10 (Laughter.)

12:15:08 11 MR. MILLER: Yes, he did, and he's buying me lunch.

12:15:12 12 I've had the opportunity to review the testimony of  
12:15:14 13 my colleagues at the prior hearings and agree with their well  
12:15:18 14 reasoned opinions. Specifically, I wish to acknowledge the  
12:15:22 15 statements of Chiefs William Henry and Greg Forest from  
12:15:26 16 Maryland and North Carolina that provide a historical  
12:15:30 17 perspective of the role of probation officers and the  
12:15:33 18 guidelines, and also the testimony that Chris Hansen from  
12:15:35 19 Nevada and Deputy Chief Kerwood from the District of Hawaii  
12:15:40 20 gave and how they looked at the role in the future of the  
12:15:43 21 probation officers under the guideline system.

12:15:45 22 Like our colleagues in Nevada and Hawaii, Michigan  
12:15:50 23 Eastern is a pilot district for the Administrative Office's  
12:15:54 24 effort to implement evidence-based practices into federal  
12:15:58 25 community corrections. And specifically in Detroit, we have



12:16:01 1 actually implemented a lot of evidence-based practices into  
12:16:04 2 the sentencing process. A lot of the work from the AO that's  
12:16:08 3 going on right now has to do with post-conviction, and I'll  
12:16:12 4 talk a little bit later about that, but we've actually  
12:16:14 5 implemented some evidence-based practices at the initial  
12:16:17 6 sentencing stage.

12:16:18 7           Although at first blush, you know, it may be strange  
12:16:23 8 to compare Detroit to the island paradise of Hawaii that the  
12:16:27 9 deputy chief talked about, we are really working together with  
12:16:30 10 them in Hawaii on introducing things like motivational  
12:16:36 11 interviewing at the presentence stage. And Judge Sessions, he  
12:16:39 12 talked about being from a small district and how that compares  
12:16:41 13 with a lot of the larger districts, we're finding that the  
12:16:46 14 work that we're doing with Hawaii, that we're able to  
12:16:49 15 replicate many of the things they're doing in community  
12:16:53 16 corrections in Hawaii in a larger city like Detroit.

12:16:56 17           Introducing things like motivational interviewing,  
12:16:59 18 evidence-based practices into the sentencing process has  
12:17:02 19 allowed us to better identify criminogenic needs of the  
12:17:07 20 defendant as we prepare the presentence report, and  
12:17:10 21 historically the work that we've done in presentence reports  
12:17:14 22 with guidelines have always been from a historical  
12:17:17 23 perspective, and what evidence-based practices, motivational  
12:17:21 24 interviewing that's done now has turned the focus from a  
12:17:23 25 historical perspective for the sentencing judge to now a

12:17:26 1 future based, where we're able to identify those criminogenic  
12:17:31 2 needs and make recommendations at sentencing that will better  
12:17:34 3 help that offender in their re-entry back into society.

12:17:37 4 As Judge Hinojosa said, I was appointed a probation  
12:17:44 5 officer back in 1992. My whole career was spent in the  
12:17:47 6 Presentence Unit. As such, I grew up as an officer under the  
12:17:51 7 mandatory guideline scheme. As Chief Henry noted in his  
12:17:55 8 testimony, the guidelines brought really a dramatic change to  
12:18:00 9 the role of a probation officer. Prior to the Sentencing  
12:18:03 10 Reform Act, the probation officer spent their focus  
12:18:05 11 identifying the factors that may have had an impact on the  
12:18:08 12 offense and the offender.

12:18:11 13 When the Sentencing Reform Act came about, we spent  
12:18:14 14 our focus identifying the factors that had the most impact on  
12:18:18 15 the offense conduct and the offender's criminal history. And  
12:18:25 16 under the mandatory guideline structure -- I'm sorry.

12:18:30 17 There are many critics, I think, of that rigid  
12:18:32 18 calculation approach. They thought that the pendulum went too  
12:18:35 19 far in one direction. They thought pre-guidelines, it was  
12:18:39 20 over here; under the mandatory system, it went a little bit  
12:18:43 21 too far.

12:18:44 22 But I believe that throughout the years, the  
12:18:47 23 Sentencing Commission has attempted to keep that pendulum  
12:18:51 24 centered. However, many times your work was stopped by  
12:18:53 25 Congress. A good example of that is the early work you did in

12:18:58 1 the early 1990s to bring some sense of rationality to the  
12:19:03 2 sentences that are imposed under the crack cocaine cases.

12:19:07 3 In the post-*Booker* era, the Commission, I think, is  
12:19:10 4 in the unique position of melding the pre-guideline and  
12:19:14 5 mandatory guideline schemes to ensure the pendulum always  
12:19:18 6 stays centered. Under the advisory guidelines sentencing  
12:19:22 7 system, officers have now been asked to look beyond the  
12:19:24 8 calculation of the offense conduct in criminal history  
12:19:28 9 category and identify those 3553 factors and reasons not only  
12:19:32 10 for departures now but for variances. This has led to  
12:19:37 11 numerous discussions over the past few years on what the role  
12:19:39 12 should be of not only the guidelines but of the probation  
12:19:43 13 officer in the sentencing process.

12:19:47 14 Some have argued that the advisory guidelines are  
12:19:49 15 just that, advisory, and should have a minimal impact on the  
12:19:52 16 sentence imposed, serving only as a baseline. Others have  
12:19:56 17 argued that the probation officer should only concentrate on  
12:19:59 18 the correct application of the guidelines and should leave the  
12:20:01 19 3553 factors and reasons for variances to defense counsel.

12:20:07 20 I strongly disagree with both of those positions. I  
12:20:10 21 think it's the role of the probation officer to correctly  
12:20:13 22 calculate the guideline, but also to bring the whole picture  
12:20:16 23 to the sentencing judge. The sentencing guidelines have and  
12:20:21 24 will always continue to be the only reasonable way to  
12:20:24 25 eliminate unwarranted sentencing disparities for similarly

12:20:28 1 situated defendants. The work the Commission undertook in the  
12:20:31 2 early years of the Sentencing Reform Act, coupled with the  
12:20:35 3 continuing research and analysis that the Commission has  
12:20:39 4 conducted over the years has ensured that a current system is  
12:20:42 5 honest, it's fair and, to a great extent, proportionate to the  
12:20:45 6 severity of the crime involved.

12:20:48 7           In the Eastern District of Michigan, officers in our  
12:20:52 8 Presentence Units have been required to develop a totally  
12:20:56 9 different mindset in how we conduct our jobs in this  
12:20:58 10 post-*Booker* area. The officer is now required to give the  
12:21:02 11 court a complete picture of the defendant and not merely a  
12:21:04 12 properly calculated guideline range. My officers, who are all  
12:21:08 13 experts in calculating guideline ranges, are now called upon  
12:21:13 14 to become experts in identifying other factors whether they're  
12:21:17 15 mitigating, aggravated or criminogenic. Many of my officers  
12:21:22 16 had to actually look up in a dictionary to see what  
12:21:23 17 criminogenic meant.

12:21:25 18           We're now required to humanize the defendant for the  
12:21:28 19 sentencing court. Our officers are acutely aware that prior  
12:21:33 20 to the presentence report being delivered to that sentencing  
12:21:36 21 judge, the court only knows the defendant based on the  
12:21:39 22 pleadings in the case. The report is often the first time a  
12:21:43 23 total picture of that defendant is presented to the court in  
12:21:45 24 an objective way. We have been transformed from being the  
12:21:50 25 traditional guardians of the guidelines that we've talked

12:21:53 1 about so many times to a more progressive role of professional  
12:21:57 2 sentencing advisors.

12:22:00 3           This 25th anniversary of the guidelines comes, I  
12:22:04 4 think, at a unique time in this country. We're at a  
12:22:10 5 crossroads where the question's been asked do the guidelines  
12:22:13 6 continue to focus solely on the offense conduct and criminal  
12:22:16 7 history, allowing those two intersecting lines on a chart to  
12:22:20 8 determine the course of a defendant's life? Or should we  
12:22:23 9 instead choose a path that's going to require a great deal  
12:22:26 10 more time, not only for the sentencing court, but for the  
12:22:29 11 probation officers, and structure our sentences based on each  
12:22:32 12 individual as prescribed in 3553(a)? And I think if we look  
12:22:36 13 at it openly, honestly, and with a great deal of transparency,  
12:22:41 14 we'll be able to do that.

12:22:43 15           I think this is going to require the Commission to  
12:22:46 16 continue to be the leader in collecting and analyzing data  
12:22:49 17 relevant to the sentencing procedures and to continue to  
12:22:53 18 modify and revise the guidelines based on its research,  
12:22:56 19 experience and analysis.

12:22:59 20           I believe the Commission should also continue to  
12:23:01 21 expand upon its efforts at exploring alternatives to  
12:23:05 22 incarceration, not only at the post-sentence stage which  
12:23:08 23 you're doing right now, but also at the time of the initial  
12:23:10 24 sentencing. I would encourage the Commission to use the data  
12:23:15 25 it collects, coupled with the current criminal justice

12:23:18 1 research, to guide its amendment decisions to reflect  
12:23:20 2 reasonable sentences that address punishment, deterrence and  
12:23:25 3 rehabilitation.

12:23:27 4           In the Eastern District of Michigan, we're, I think,  
12:23:30 5 the only district in the country that's right now using a risk  
12:23:34 6 assessment tool at the presentence stage that assists us in  
12:23:39 7 recommending and justifying special conditions of supervision  
12:23:41 8 for defendants based on their criminogenic needs.

12:23:45 9           I think as the sentencing process continues to move  
12:23:49 10 away from a mandatory guideline structure, a comprehensive,  
12:23:53 11 validated risk/needs tool will be critical in allowing  
12:23:56 12 officers to make a number of important sentencing  
12:23:58 13 determinations when it comes to alternatives to incarceration.  
12:24:03 14 I'd encourage the Commission to work closely with the  
12:24:06 15 Administrative Office as they develop their national risk  
12:24:08 16 assessment tool to determine if their research can be  
12:24:11 17 integrated into the guidelines sentencing process.

12:24:16 18           You're going to hear tomorrow from a panel on  
12:24:18 19 alternatives to incarceration in the form of Judge Warren  
12:24:22 20 talks a lot about using risk assessment tools. And I think  
12:24:26 21 when we go in the future for sentencing guidelines, we're  
12:24:31 22 looking when they mention alternatives to incarceration,  
12:24:34 23 really right now it's alternatives to revocation. The  
12:24:37 24 programs that are out there are re-entry programs.

12:24:40 25           But if the Commission starts to look at alternatives

12:24:42 1 to sentencing at the initial stage, there's going to have to  
12:24:46 2 be some assessment tool that's in there that's not a static  
12:24:49 3 tool, that's dynamic, so that the court, the officers, aren't  
12:24:53 4 making the recommendations for alternatives just by their  
12:24:58 5 hunch or their own experiences. And I think that's something  
12:25:01 6 that the Commission can use a lot of its research and data  
12:25:05 7 for.

12:25:05 8 Thank you.

12:25:06 9 ACTING CHAIR HINOJOSA: Thank you, Mr. Miller.

12:25:07 10 Mr. Tracy, sir.

12:25:09 11 MR. TRACY: Good afternoon. Thank you for the  
12:25:12 12 invitation to be here today. I welcome you to Chicago, and I  
12:25:17 13 commend you on your wise choice of this city as your site for  
12:25:21 14 these hearings.

12:25:23 15 This is my hometown. I was born and raised here, and  
12:25:26 16 I agree with what Judge Castillo said earlier this morning  
12:25:30 17 when he said that Chicago represents Midwestern common sense,  
12:25:34 18 and I think that's been evident already here this morning, and  
12:25:38 19 I know there will be much more Midwestern common sense  
12:25:41 20 expressed this afternoon and as this program progresses  
12:25:44 21 tomorrow.

12:25:45 22 On the occasion of a 25th anniversary, I think it's  
12:25:52 23 fitting that we use this to pause to consider whether there's  
12:25:55 24 a gap between where we are and where we want to be. Twenty-five  
12:26:00 25 years ago, Congress decided that we were not where we wanted to

12:26:04 1 be in terms of fairness and equity in sentencing. Today I think  
12:26:09 2 it's appropriate to acknowledge that we have come a long way.

12:26:13 3 I'll address the eight suggested topics through my  
12:26:16 4 general comments. However, there's one topic, and that's  
12:26:20 5 Topic No. 7 that I'd like to address specifically at the end.

12:26:24 6 Last month, I passed my 26th anniversary as a  
12:26:29 7 probation officer in this district. I did presentence  
12:26:32 8 reports -- which are also known by the acronym PSRs -- under  
12:26:39 9 old law, and I participated in the transition to guideline  
12:26:42 10 PSRs. It was a dramatic and challenging change. The  
12:26:49 11 probation system not only survived, it thrived. The probation  
12:26:53 12 officer became an even more important figure in the sentencing  
12:26:55 13 process. We became experts in the guidelines by virtue of our  
12:27:00 14 specialization.

12:27:01 15 No longer could probation officers both conduct PSRs  
12:27:05 16 and also supervise offenders. Our office bifurcated at that  
12:27:10 17 time, and probation officers had to do one or the other, and  
12:27:14 18 this created a specialized focus and quickly built our  
12:27:17 19 confidence in our expertise through this experience.

12:27:22 20 Prior to the Sentencing Reform Act, I always thought  
12:27:25 21 of the word guidelines as akin to a helpful suggestion, but it  
12:27:31 22 quickly became clear that guidelines in this new era really  
12:27:35 23 meant mandatory rules. It was not long before probation  
12:27:40 24 officers became known as guardians of the guidelines. This  
12:27:45 25 was usually uttered with a sarcastic and derisive tone and was



12:27:50 1 not meant to be flattering.

12:27:52 2 I know people and human nature's such that people  
12:27:56 3 typically resent change, and we, as probation officers, were  
12:28:00 4 the faces trying to carry out this change. Many people  
12:28:05 5 despised the guidelines because they depersonalized the  
12:28:09 6 offender and focused more on the offense. Many people felt  
12:28:12 7 that the guidelines were too rigid and became outraged at the  
12:28:16 8 lack of wiggle room in their application. As probation  
12:28:20 9 officers, we performed in our role as guardians of the  
12:28:24 10 guidelines even when we may have felt that they were  
12:28:28 11 unnecessarily severe.

12:28:30 12 As professionals, we apply the guidelines  
12:28:33 13 dispassionately and never tried to manipulate the outcome. I  
12:28:38 14 know the judges appreciate our efforts, and over time we've  
12:28:42 15 earned the respect of attorneys, even though disagreements  
12:28:46 16 often were and still are passionate.

12:28:49 17 I was vaguely aware that disparity existed in  
12:28:53 18 sentencing throughout the country, but I did not need any  
12:28:56 19 convincing to believe that there were inequities nationally  
12:29:01 20 because there was plenty of disparity in our own district.  
12:29:04 21 How could there not be? I believe that anyone who worked in  
12:29:08 22 the pre-guidelines era would acknowledge that the guidelines  
12:29:11 23 represent a huge step toward fairness, and how can anyone be  
12:29:15 24 against fairness?

12:29:17 25 Of course, fairness is like perfection in that it

12:29:20 1 never really exists except in the eye of the beholder. The  
12:29:24 2 only reason to be against fairness is the cost. Like the  
12:29:29 3 Lexus slogan, "The Relentless Pursuit of Perfection," the  
12:29:34 4 Sentencing Reform Act created the relentless pursuit of  
12:29:39 5 fairness. Every year there have been more amendments designed  
12:29:43 6 to increase fairness. Both missions imply the acknowledgment  
12:29:46 7 that these goals can only be pursued and never fully attained.  
12:29:50 8 They are worthy goals, and the mission statement is a good one  
12:29:53 9 for a luxury automobile maker because the loftiness of the  
12:29:57 10 slogan dovetails with the expensive cost.

12:30:00 11           The federal court is like the Lexus of the sentencing  
12:30:03 12 process, and we should be proud of that, but also mindful that  
12:30:08 13 it is expensive and that we can never obtain perfect fairness  
12:30:11 14 in the sentencing process.

12:30:13 15           I remember back 25 years ago, there were predictions  
12:30:16 16 that sentencing hearings would become impossibly protracted  
12:30:20 17 because of all the details that could be argued about, and  
12:30:23 18 appeals would rise dramatically. These predictions, I think,  
12:30:27 19 have turned out to be true, and I've seen sentencing hearings  
12:30:30 20 go on for hours and routinely still get continued for multiple  
12:30:35 21 times.

12:30:36 22           It's true that the guidelines are actually simple  
12:30:39 23 when you apply them to a simple case; but when you apply them  
12:30:43 24 to a complicated case, they become extremely complex. In the  
12:30:48 25 Northern District of Illinois, it seems we have mostly large,

12:30:51 1 complex cases and a disproportionate number of political  
12:30:56 2 corruption and organized crime cases that pose many unique  
12:30:58 3 scenarios that are hard to reduce to guideline numbers;  
12:31:02 4 therefore, sentencing hearings are routinely long,  
12:31:06 5 complicated, and contentious.

12:31:10 6           It's been my opinion that the Sentencing Reform Act  
12:31:13 7 has been a resounding success in taking a huge leap toward  
12:31:18 8 achieving the elusive goal of fairness. Fairness is usually  
12:31:23 9 defined as treating similar cases similarly. This sounds  
12:31:27 10 simple enough, but in complicated cases, it is clear that  
12:31:30 11 similar does not mean the same. By treating similar cases as  
12:31:35 12 if they are exactly the same, some critics see the guidelines  
12:31:39 13 as cutting out the heart and soul of sentencing.

12:31:44 14           Since the *Booker* decision, however, we have restored  
12:31:47 15 the heart and soul of sentencing, so judges and probation  
12:31:51 16 officers can start with the guidelines and then exercise their  
12:31:53 17 discretion to sentence people as unique individuals and not  
12:31:58 18 feel that their hands are tied when they believe that the  
12:32:01 19 guidelines do not result in fairness.

12:32:05 20           The *Booker* decision has allowed the system to take  
12:32:08 21 the next step in our evolution towards sentencing and  
12:32:11 22 considering fairness as well as the unique individual  
12:32:14 23 circumstances of each case.

12:32:19 24           The Sentencing Commission sets standards for the  
12:32:21 25 entire country for what the severity of punishment should be

12:32:26 1 for every offense. This accomplished the goal of fairness,  
12:32:29 2 but in our district, it dramatically increased the severity of  
12:32:36 3 sentences, especially for drug offenses. So we gained equity  
12:32:39 4 25 years ago at the cost of increased severity at sentencing.

12:32:44 5 My view from the probation office is that the base  
12:32:47 6 offense levels for most of the drug offenses are simply too  
12:32:50 7 high. People who were sentenced to twenty-year prison terms  
12:32:56 8 in 1989 have finally come to us on supervised release. Was  
12:33:01 9 twenty years necessary for deterrence? Would ten years have  
12:33:04 10 sufficed? Would five years have been enough? I believe that  
12:33:09 11 most guidelines sentences for drugs have been more than enough  
12:33:13 12 to accomplish individual deterrence.

12:33:16 13 Then we must ask how much time is necessary to  
12:33:20 14 achieve general deterrence? It is hard to measure or  
12:33:22 15 determine to what extent others have been deterred from  
12:33:26 16 distributing drugs by these long and costly sentences. It  
12:33:31 17 seems as though the number of drug cases have continued to  
12:33:34 18 increase over the past 25 years, which would suggest that any  
12:33:38 19 measure of general deterrence has not been achieved. Thus, I  
12:33:43 20 would say that guideline sentencing has been a resounding  
12:33:49 21 success of the attainment of equity, but the results have been  
12:33:52 22 an extremely costly quest for deterrence of drug distribution  
12:33:57 23 with questionable results. I would submit that the same goal  
12:34:00 24 of equity could have been achieved by setting a standard that  
12:34:04 25 was less severe for drug cases.

12:34:07 1           Those are my general comments. I did want to focus  
12:34:12 2 on the particular topic No. 7, which was the question of what,  
12:34:17 3 if any, recommendations should the Commission make regarding  
12:34:21 4 the Federal Rules of Criminal Procedure. I think this is a  
12:34:24 5 very relevant topic from the view of the probation office.

12:34:28 6           I'm aware that the American Bar Association has  
12:34:31 7 requested that Rule 32 be amended. The probation office  
12:34:36 8 recommends that no changes be made. That's my view as a  
12:34:42 9 representative in the Northern District of Illinois. I'm also  
12:34:44 10 on the Chief's Advisory Group, and I know that that's the same  
12:34:47 11 position that the Chief's Advisory Group takes, and I think  
12:34:52 12 the reasons have been comprehensively articulated by my  
12:34:57 13 colleagues at prior Commission hearings earlier this year and  
12:34:59 14 so I won't recount them again except just to reference them,  
12:35:03 15 and there are 14 distinct reasons that were listed by Chief  
12:35:07 16 Probation Officer Chris Hansen in his testimony before the  
12:35:11 17 Commission on May [27th], 2009.

12:35:15 18           But in summary, whenever there was anything in the  
12:35:19 19 presentence report that any of the parties have questions  
12:35:22 20 about, there has always been a very efficient process in place  
12:35:26 21 to address those questions. The individual judges are always  
12:35:30 22 in the best position to determine the ramifications of  
12:35:34 23 disclosure of any of the information that we gather. The  
12:35:38 24 judge decides at that time whether the interest of justice  
12:35:41 25 related to disclosure of certain information is critical in

12:35:46 1 the particular situation to take precedence over the safety,  
12:35:51 2 the confidentiality, and also just the time and expense  
12:35:55 3 associated with the typically voluminous documents and files  
12:36:00 4 that would need to be duplicated. The judge is in the  
12:36:05 5 position to decide if such effort and risk is purposeful and  
12:36:08 6 worthwhile.

12:36:10 7 Thank you.

12:36:12 8 ACTING CHAIR HINOJOSA: Thank you, Mr. Tracy. We'll  
12:36:14 9 open up for questions.

12:36:15 10 Commissionener Carr?

12:36:17 11 QUESTION AND ANSWER SESSION

12:36:17 12 VICE CHAIR CARR: Mr. Miller, you said that your  
12:36:19 13 district uses risk assessment tools now which identify  
12:36:22 14 criminogenic needs and factors so that you can make your  
12:36:25 15 recommendation as to what should happen when the defendant is  
12:36:27 16 on supervision, correct?

12:36:29 17 MR. MILLER: For conditions of supervised release,  
12:36:32 18 yes.

12:36:32 19 VICE CHAIR CARR: Okay. Now, unless that person is  
12:36:34 20 actually being put on probation now or getting community  
12:36:37 21 confinement or something, those conditions might not be  
12:36:39 22 imposed for months or years, correct?

12:36:42 23 MR. MILLER: Correct.

12:36:43 24 VICE CHAIR CARR: Do you share with the sentencing  
12:36:45 25 judge what the nature of the risk assessment tool is and what

12:36:49 1 its conclusions are with respect to that defendant, and do  
12:36:53 2 they ever say, gee, can't we do anything about this now  
12:36:56 3 instead of waiting two, three, five, ten, years?

12:37:01 4 MR. MILLER: We share with the judge in the context  
12:37:03 5 of the presentencing report, having that information in there,  
12:37:06 6 whether it's in the mental health section, substance abuse  
12:37:10 7 section, family section, we show that information in there.  
12:37:15 8 We then use it in justifying our recommendations to the bench.  
12:37:18 9 And, yes, in chambers the court has said should this be  
12:37:21 10 something that should be taken care of now?

12:37:24 11 We do use it for the recommendations to the Bureau of  
12:37:28 12 Prisons, which are strictly recommendations, but there have  
12:37:30 13 been times when the judge has looked at that and said this  
12:37:34 14 person has this situation that needs immediate attention now,  
12:37:38 15 and the best place to have that treatment need done is while  
12:37:44 16 on probation.

12:37:45 17 VICE CHAIR CARR: And are those conditions ever used  
12:37:47 18 for purposes of pretrial release?

12:37:51 19 MR. MILLER: I don't -- we're in a separate district.  
12:37:54 20 We're not consolidated pretrial and probation. The pretrial  
12:37:57 21 unit is developing now with the AO a risk assessment tool  
12:38:03 22 specifically for pretrial release and bond conditions.

12:38:07 23 VICE CHAIR CARR: Thanks.

12:38:09 24 VICE CHAIR CASTILLO: If I could follow up with  
12:38:10 25 Mr. Miller. You mentioned a couple of things that I would

12:38:13 1 just like you to expand upon.

12:38:14 2 First of all, you said that Detroit was using  
12:38:17 3 evidence-based practices at the initial sentencing in some  
12:38:22 4 sense. Can you expand on that a little bit?

12:38:24 5 MR. MILLER: The evidence-based practice is the use  
12:38:27 6 of the risk tool where you have a risk assessment tool done to  
12:38:31 7 identify it because, as Judge Warren will speak about  
12:38:35 8 tomorrow, a lot of times we're oversupervising individuals,  
12:38:41 9 we're actually doing more harm.

12:38:43 10 So what we're doing now with this risk assessment  
12:38:47 11 tool is we're identifying what those needs are, and we're only  
12:38:50 12 focusing then on two to three conditions, special conditions  
12:38:54 13 of supervised release to address those needs.

12:38:57 14 VICE CHAIR CASTILLO: Would that also include shorter  
12:38:59 15 periods of supervision?

12:39:01 16 MR. MILLER: Yes.

12:39:02 17 VICE CHAIR CASTILLO: Then you also tossed out the  
12:39:03 18 words -- I'm just not familiar with it -- motivational  
12:39:07 19 interviewing.

12:39:08 20 Can you tell us a little bit about that?

12:39:10 21 MR. MILLER: When we do our presentence interview  
12:39:12 22 now, and the prior way we did it was just the fact gathering  
12:39:17 23 with the Probation Form 1, doing that thing.

12:39:19 24 Now what we're trying to do with motivational  
12:39:22 25 interviewing is to get the offender to think intrinsically to



12:39:26 1 make changes of themselves, to get them to start talking about  
12:39:29 2 making changes in their life instead of us saying you have to  
12:39:32 3 do this, you have to do that.

12:39:34 4           The technique of motivational interviewing gets them  
12:39:38 5 to start talking about the change themselves and reflecting on  
12:39:41 6 it. It's had the effect also of our presentence interview of  
12:39:46 7 going from anywhere from 45 minutes to an hour to now  
12:39:49 8 approximately two hours, where now we have the offenders that  
12:39:53 9 are opening up, they're talking more about why they got  
12:39:56 10 involved in the offense, certain factors in their life that  
12:39:59 11 happened, what they want to do now when they go -- when  
12:40:03 12 they're incarcerated, what type of treatment, what type of  
12:40:05 13 vocational training. We're having them set goals now for  
12:40:09 14 themselves for when they come back out into society.

12:40:12 15           VICE CHAIR CASTILLO: Thank you.

12:40:14 16           VICE CHAIR SESSIONS: The judges in the last panel  
12:40:16 17 talked about using the guidelines to incentivize  
12:40:21 18 rehabilitation on essentially a pretrial and presentence  
12:40:27 19 basis. That to me translates to possibly drug courts or other  
12:40:33 20 programs presentence essentially to get people involved in  
12:40:38 21 treatment right before sentencing and that by impacting the  
12:40:42 22 ultimate sentence.

12:40:43 23           What do you think of that, and do you think there's  
12:40:46 24 any way that could be done?

12:40:50 25           MR. MILLER: We in Michigan Eastern are implementing

12:40:55 1 a re-entry court next year in the spring. I've looked at it.  
12:40:59 2 The re-entry courts that are going on across the country are  
12:41:02 3 for the high-risk offenders that have high needs.

12:41:06 4           When you're looking at those individuals at the  
12:41:08 5 initial sentencing stage as far as drug court, we could  
12:41:12 6 duplicate the framework of a re-entry court but, instead,  
12:41:17 7 target those people that have that specific need but don't  
12:41:21 8 have the other issues that are involved with somebody in the  
12:41:24 9 re-entry court, the high-risk offenders.

12:41:27 10           If you gear it specifically at the drug need or  
12:41:30 11 something like that to give them that treatment up front, that  
12:41:32 12 that would be workable, yes.

12:41:37 13           MR. TRACY: I'd like to just answer your question by  
12:41:39 14 saying that I think there's a tremendous untapped potential  
12:41:42 15 there. I'm part of a committee that meets that actually Judge  
12:41:46 16 Castillo chairs, committee of judges looking at re-entry  
12:41:49 17 courts for this district, and I think that it has a lot of  
12:41:53 18 potential, although it's difficult to implement the way the  
12:41:56 19 guidelines are structured now.

12:41:59 20           I think my understanding is that in a lot of state  
12:42:02 21 court systems, re-entry courts are diversionary programs, and  
12:42:09 22 we don't have any alternatives like that in the way the  
12:42:11 23 federal guidelines are structured now. So it's a challenge to  
12:42:15 24 do that, but I think that it still has a lot of promise, and  
12:42:22 25 it's something that we're looking at it and at least from a

12:42:25 1 probation officer's view, we're very excited about. That, I  
12:42:29 2 think, works right into what we've been doing for quite a few  
12:42:32 3 years.

12:42:32 4 VICE CHAIR SESSIONS: You actually are looking at  
12:42:34 5 that in the presentence process in addition to the re-entry  
12:42:37 6 process.

12:42:39 7 MR. TRACY: We're not really looking at it at the  
12:42:41 8 presentence stage, no, no. We're looking at that for when  
12:42:44 9 people are out of prison or placed on probation.

12:42:47 10 So that's the context in which we're looking at  
12:42:49 11 re-entry courts currently. So we've been looking at a few of  
12:42:52 12 the other districts that have begun those programs, and my  
12:42:57 13 understanding is there isn't much that's part of the  
12:43:01 14 presentence stage.

12:43:03 15 VICE CHAIR SESSIONS: But do you think there's  
12:43:05 16 potential in the presentence process to essentially amend the  
12:43:09 17 guidelines to incentivize these kinds of programs?

12:43:13 18 MR. TRACY: Oh, yes, I definitely think that.

12:43:19 19 MR. MILLER: Judge Sessions, if I could just add, I  
12:43:22 20 think it is possible at the presentence stage, but I think we  
12:43:25 21 need to have some type of assessment tool available to the  
12:43:28 22 probation officers and the court to make that type of  
12:43:31 23 assessment and make sure we're putting the correct people into  
12:43:34 24 those programs to get the treatment that they need.

12:43:39 25 MR. TRACY: I would just add that right now, there

12:43:41 1 really isn't much incentive for offenders to participate in  
12:43:45 2 re-entry courts, that the only incentive that really is  
12:43:49 3 offered is to get off of supervised release perhaps a year  
12:43:53 4 early.

12:43:54 5           But at the sentencing stage, there's no way to give a  
12:43:57 6 reduced sentence with the re-entry court in mind.

12:44:02 7           COMMISSIONER WROBLEWSKI: Mr. Tracy, can I just  
12:44:03 8 mention just something that's going through my mind as I'm  
12:44:06 9 listening to you and I heard from the judges before about this  
12:44:09 10 idea of a credit for this period between the crime being  
12:44:14 11 committed and the sentencing. It seems like a very strange  
12:44:18 12 temporal requirement, and it seems that it's driven just  
12:44:20 13 because the judicial branch has these folks from the arrest  
12:44:25 14 until the sentencing. Then you're handed off to the Bureau of  
12:44:30 15 Prisons and the Executive Branch, and then you're handed back  
12:44:33 16 off to the re-entry courts back to the Judicial Branch.

12:44:38 17           It seems, it just strikes me that if we go this route  
12:44:41 18 about further incentives; and, of course, there are incentives  
12:44:44 19 now to go through residential drug treatment program in  
12:44:46 20 prison, and if we go expanding those that it seems strange  
12:44:50 21 that we're going to try to fit it into this strange temporal  
12:44:54 22 structure that we have, as opposed to doing it more  
12:44:56 23 comprehensively, and that may require Congress as opposed to  
12:45:01 24 just, you know, you getting together with Judge Castillo and  
12:45:04 25 some other judges in the courtroom if we do it across

12:45:08 1 branches.

12:45:08 2           But anyway, just something that crossed my mind that  
12:45:11 3 because, of course, there are districts, one where I live,  
12:45:15 4 where they have something called a rocket docket, which you're  
12:45:19 5 not going to have much opportunity to go through  
12:45:21 6 rehabilitation programs because we're going to resolve your  
12:45:24 7 case in 90 days or so, where other districts there will be  
12:45:28 8 much more time. And it seems strange that we would create a  
12:45:31 9 program based on how much time we have in between.

12:45:33 10           Anyway, I'm just thinking we could do it more  
12:45:36 11 comprehensively --

12:45:38 12           VICE CHAIR SESSIONS: We could debate that, but if  
12:45:40 13 you look into a system by which there may be alternative base  
12:45:43 14 offense levels and you put into the groundwork that the  
12:45:50 15 participant were getting a lower base offense level actually  
12:45:56 16 has participated in drug treatment or completed drug treatment  
12:45:59 17 or done well and thereby encouraging that person right from  
12:46:02 18 the beginning to get involved in intensive treatment, I think  
12:46:06 19 what the judges were talking about is that might be a viable  
12:46:09 20 way of using the guidelines to incentivize rehabilitation  
12:46:15 21 right from the beginning.

12:46:16 22           And it wouldn't necessarily have to translate to,  
12:46:19 23 well, you get six months off or you get a year off, like the  
12:46:23 24 500-hour program; but it might be a factor that you might want  
12:46:26 25 to credit toward the ultimate sentence generally. But

12:46:33 1 anyway ...

12:46:34 2 ACTING CHAIR HINOJOSA: Mr. Miller, one final  
12:46:35 3 question here, these presentence interviews that you're saying  
12:46:39 4 are taking now more than an hour and 15, they're going up to  
12:46:43 5 two hours at least.

12:46:44 6 MR. MILLER: Yes.

12:46:45 7 ACTING CHAIR HINOJOSA: Does the defense attorney get  
12:46:48 8 the right to be present? Because you said one of the things  
12:46:50 9 that they do -- that's being done is open up about why you  
12:46:53 10 committed this offense and how you committed this offense, but  
12:46:56 11 is the defense attorney given the opportunity to be present  
12:46:58 12 for those?

12:46:59 13 MR. MILLER: Yes, they are. They are. In Michigan  
12:47:01 14 Eastern, the federal defenders attend all our presentence  
12:47:05 15 interviews. The retained attorneys, I'd say 90 percent of the  
12:47:08 16 time, attend. And one of the things we did before we  
12:47:12 17 implemented this program is we worked with the Federal  
12:47:15 18 Defender's Office in how we revised our Form 1 to do these  
12:47:20 19 motivational interviewing questions. We worked with them  
12:47:22 20 closely in having something that would be agreeable to all  
12:47:26 21 parties.

12:47:27 22 VICE CHAIR CARR: The ten percent of retained  
12:47:29 23 attorneys who are not attending those things are not earning  
12:47:32 24 their money.

12:47:35 25 ACTING CHAIR HINOJOSA: Was that a question?

12:47:37 1 VICE CHAIR CARR: Would you agree?

12:47:38 2 (Laughter.)

12:47:38 3 ACTING CHAIR HINOJOSA: You don't need to answer that  
12:47:40 4 question, and we will break for lunch. Thank you all very  
12:47:43 5 much. We appreciate it.

12:47:53 6 (Recess from 12:47 to 2:14 p.m.)

02:14:20 7 PANEL IV. LAW ENFORCEMENT AND COMMUNITY IMPACT

02:14:20 8 ACTING CHAIR HINOJOSA: On behalf of the Commission,  
02:14:21 9 I do want to welcome the next panel, and before I do that, I  
02:14:25 10 also want to welcome one of the legal writing classes of the  
02:14:27 11 first year law students at John Marshall Law School who are  
02:14:31 12 here attending this particular presentation.

02:14:36 13 And we do have this is law enforcement and community  
02:14:39 14 impact testimony or statements, and we have the Honorable J.  
02:14:43 15 Michael Brown, who is the Secretary of the Justice and Public  
02:14:46 16 Safety Cabinet for the State of Kentucky. He previously  
02:14:51 17 served as a state district court judge in Jefferson County,  
02:14:54 18 Kentucky, and as assistant commonwealth attorney. He  
02:14:58 19 graduated from the University of Louisville Brandeis School of  
02:15:01 20 Law.

02:15:01 21 We also have Mr. David Kennedy, who is the director  
02:15:04 22 of the Center For Crime Prevention and Control and a professor  
02:15:07 23 of anthropology of John Jay College of Criminal Justice in New  
02:15:12 24 York City. Mr. Kennedy, from 1993 through 2004, was a senior  
02:15:17 25 researcher and adjunct professor at Harvard University's

02:15:18 1 Kennedy School of Government. He has worked with numerous  
02:15:21 2 cities and the Departments of Justice to develop anti-crime  
02:15:26 3 initiatives, and he holds a bachelor's degree from Swarthmore.  
02:15:31 4 So we'll start with Mr. Brown.

02:15:32 5 MR. BROWN: Thank you, Mr. Chairman.

02:15:34 6 By the way, I attempted to do some due diligence in  
02:15:37 7 the hall as to the pronunciation of your name, and having 14  
02:15:41 8 different versions come out, I'll take a stab and believe it's  
02:15:44 9 Hinojosa.

02:15:47 10 ACTING CHAIR HINOJOSA: Perfect.

02:15:48 11 COMMISSIONER WROBLEWSKI: You've got to try my name.

02:15:51 12 ACTING CHAIR HINOJOSA: I don't think I get that  
02:15:52 13 great a treatment all across the country, but you did a very  
02:15:57 14 good job.

02:15:58 15 MR. BROWN: I am Michael Brown. I'm the Secretary of  
02:16:00 16 Justice for the Commonwealth of Kentucky. I've had a now  
02:16:04 17 30-year career in law and have been all sides of the bench  
02:16:09 18 with the exception of having been a defendant myself. I find  
02:16:12 19 myself now in the position since December of '07 in this  
02:16:17 20 cabinet. I have responsibility in Kentucky for the Kentucky  
02:16:22 21 State Police, the Department of Corrections, the Department of  
02:16:26 22 Juvenile Justice, Office of Drug Control Policy, Criminal  
02:16:29 23 Justice Training and a number of other functions.

02:16:32 24 Of those, I find myself surprised that suddenly the  
02:16:37 25 spotlight has all been cast on the corrections side of that



02:16:42 1 large family primarily due to budget constraints throughout  
02:16:48 2 the states. As the economy has gone through the stresses and  
02:16:53 3 strains that we've all experienced recently, it's been  
02:16:57 4 particularly difficult on states, and then the states look to  
02:17:01 5 see where are, if not the causal factors of those  
02:17:05 6 difficulties, at least where they might find some quick  
02:17:08 7 relief, they look toward the correctional systems because in  
02:17:11 8 many states, that is a driving factor in the budget, as it is  
02:17:19 9 in Kentucky.

02:17:20 10 I'm honored to be asked to speak to a United States  
02:17:27 11 commission, particularly this Commission, because I'm sure you  
02:17:31 12 are aware of it in the federal system, but even amongst the  
02:17:34 13 states, you provide somewhat of a role model in the sense that  
02:17:39 14 states will often mimic or seek guidance from what is the  
02:17:44 15 federal trend, whatever that trend might be. Sometimes that's  
02:17:49 16 a good thing.

02:17:50 17 Sometimes that can be a very painful thing because if  
02:17:55 18 the trend is to, for instance, in drug laws, as we've heard  
02:18:01 19 testimony, I sat through a lot of the testimony this morning,  
02:18:03 20 and you have disparity of sentencing parameters for a variety  
02:18:09 21 of different drugs and then the drug du jour changes in the  
02:18:14 22 midst of one of those trends, you can have states which lag  
02:18:19 23 behind somewhat but are enthusiastic trying to follow a  
02:18:23 24 pattern, and then they pass stronger, what they believe to be  
02:18:26 25 stronger and tougher drug laws aimed at whatever the drug was

02:18:30 1 at the time that was in vogue, and then wind up with prison  
02:18:35 2 systems which are bursting at the seams with people sometimes  
02:18:41 3 who are not the most dangerous of society.

02:18:46 4 Kentucky is one of those. The Pew Report that came  
02:18:48 5 out in February of 2008 listed us as having the  
02:18:52 6 fastest-growing prison population by percent in the United  
02:18:54 7 States. We're certainly not the largest just because of our  
02:18:57 8 population, but we have the fastest growing, and that gained  
02:19:00 9 some national notoriety and caused my governor to look to me  
02:19:04 10 and those involved in the criminal justice system to see if  
02:19:08 11 there were things which could be done to stem that.

02:19:13 12 Most of the things which can be done to stem that,  
02:19:15 13 however, are really not within the control of the agency that  
02:19:19 14 I lead because I get these customers after the fact. They've  
02:19:23 15 already been through the criminal justice system and are  
02:19:26 16 delivered to us solely to carry out the sentence, with the  
02:19:31 17 exception of issues that involve parole, which I'll come back  
02:19:36 18 to later on, and again an area which I think that this  
02:19:40 19 Commission, albeit through study or through statement, can  
02:19:44 20 help influence nationwide what goes on in these areas.

02:19:50 21 Clearly in Kentucky, and I believe in many states,  
02:19:56 22 drugs as a generic category is a huge factor. As I told  
02:20:02 23 people, I made a statement, we had -- I brought today's  
02:20:06 24 numbers. I have 21,441 felons under the custody and control  
02:20:16 25 of the Department of Corrections. I have another 40,000 that

02:20:19 1 are on parole.

02:20:22 2           That number, the good news is that number is down  
02:20:25 3 about 1,300 year [inaudible] due to some acts that were  
02:20:29 4 implemented by the legislature and some education that has  
02:20:33 5 gone on with our parole board, so we have at least in the year  
02:20:38 6 and a half or so since the Pew Report at least stemmed that  
02:20:43 7 tide a little bit and turned it around in the other direction.  
02:20:48 8 But it's still a large enough number when you add in what it  
02:20:51 9 costs to incarcerate people and then the cost that people  
02:20:56 10 don't take into consideration, medical costs.

02:20:59 11           Our medical bill is running about \$50 million, and in  
02:21:04 12 large part that's because we inherit a population that comes  
02:21:07 13 to us with the poorest -- I know health care is the big debate  
02:21:14 14 even tonight -- but they have virtually no health care as they  
02:21:19 15 come into our system. They didn't do any preventive things.  
02:21:22 16 Not only that, almost 100 percent were abusers of some type of  
02:21:27 17 chemical substance or alcohol or tobacco.

02:21:30 18           All of their illnesses tend to manifest after they've  
02:21:33 19 been in our system for a number of years, and thus you wind up  
02:21:36 20 with an expensive population to take care of when they get  
02:21:40 21 chronically ill. And unlike the federal system -- and we do  
02:21:44 22 have an excellent federal prison hospital in Kentucky, I've  
02:21:50 23 visited it several times -- but Kentucky itself does not have  
02:21:54 24 one. So we have some makeshift wards that we've carved out of  
02:22:00 25 our other institutions to take care of these ill people. And

02:22:04 1 we are going to be pushing some bills to our legislature to  
02:22:07 2 take a look at geriatric or what others have called  
02:22:12 3 compassionate care and get to a situation of can we do  
02:22:16 4 something with this particular population.

02:22:21 5           We made the statement about that 21,441 that if they  
02:22:27 6 live long enough, all but 105 of those individuals will be  
02:22:33 7 returned to society, and that's something that the public in  
02:22:38 8 general does not seem to be aware of or at least doesn't want  
02:22:41 9 to grasp that concept. It seems to be this underlying feeling  
02:22:46 10 that once they go, they go in forever and that there are no  
02:22:50 11 degrees of homicide or there are no degrees of sexual assault,  
02:22:54 12 so they're all murderers and rapists and child molesters; and,  
02:22:59 13 therefore, they should all, once they get convicted, they  
02:23:01 14 should all go away forever. But that's not actually the case,  
02:23:05 15 and most are going to be released back into society, again if  
02:23:11 16 they live long enough, in one form or fashion, and that is a  
02:23:18 17 message that I think this Commission and indeed all of us has  
02:23:21 18 to get through to society so we can prepare for those  
02:23:25 19 returnees.

02:23:26 20           Recidivism is a term that is vastly and gravely  
02:23:30 21 misunderstood by the general public. Indeed, I wasn't aware  
02:23:35 22 of it. I'm just still learning all this jargon. My  
02:23:39 23 corrections officials tell me that recidivism in their minds  
02:23:39 24 are any individual who's returned to incarceration within  
02:23:43 25 24 months, sometimes it's 36 months. But the issue there is

02:23:47 1 return, and the focus is on return, not so much the reason for  
02:23:52 2 return because they count heads, and they have to know who's  
02:23:56 3 there for how long and how they're going to feed them, what  
02:23:59 4 they're going to go about doing, not necessarily focused on  
02:24:04 5 what is the cause of that return.

02:24:05 6           The public would think recidivism means new crime,  
02:24:10 7 that this is a re-offender, that this is someone who's gone  
02:24:14 8 out and gone back to his or her -- I say her now because  
02:24:20 9 within that fast-growing population, females are my  
02:24:24 10 fastest-growing segment of the prison population. They're  
02:24:28 11 only ten percent overall, but they're rising rapidly.

02:24:31 12           So he or she who comes back normally doesn't come  
02:24:34 13 back because of the commission of a new felony. In fact, we  
02:24:39 14 instituted a policy of parole credits last year, and we've had  
02:24:44 15 7,000 individuals who wound up either being discharged from  
02:24:48 16 the institutions or released from active supervision under  
02:24:52 17 that program, and of that 7,000, to date, a little more than a  
02:24:58 18 year and three months into it, six have come back because of  
02:25:03 19 the commission of a new felony. People come back because they  
02:25:08 20 struggle to re-enter and they struggle to meet the conditions  
02:25:11 21 of their parole or probation, and many, many times, drugs are  
02:25:14 22 at the cause of that.

02:25:15 23           The head of our -- in Kentucky, we're a commonwealth  
02:25:19 24 so our prosecutors are known as commonwealth attorney, and as  
02:25:24 25 Judge Caldwell stated, drugs are the big driving factor. In

02:25:29 1 Eastern Kentucky, the eastern half of our state, which is very  
02:25:32 2 rural, those driving factors are methamphetamine and pills.  
02:25:40 3 OxyContin, for instance, can go anywhere from \$60 to \$120 a  
02:25:44 4 pill in Eastern Kentucky. And they come in the 575 and I-85,  
02:25:50 5 from Florida and Georgia, and it's a big marketplace for that.

02:25:53 6 We also have a lot of marijuana. Kentucky is second  
02:25:57 7 in the nation, I believe, in marijuana production or growth.  
02:26:03 8 We're also second in the nation in marijuana eradication, and  
02:26:07 9 that's something that's good. And when people ask me, well,  
02:26:09 10 do you think that maybe we should legalize those drugs, and I  
02:26:12 11 say, well, I look at that issue in Kentucky and I know that I  
02:26:17 12 don't have a population that's large enough to smoke what we  
02:26:20 13 grow, so that money must be going someplace, and I believe  
02:26:24 14 it's going and getting regenerated back into other criminal  
02:26:27 15 activities, so I prefer not to legalize it at this point, nor  
02:26:31 16 do I say that we should legalize any of these particular  
02:26:36 17 controlled substances.

02:26:37 18 But I think what we do have to recognize is that if  
02:26:41 19 23 percent of my population is there directly due to a drug  
02:26:44 20 charge, a possession charge, and up to 80 percent -- and that  
02:26:48 21 estimate comes from the Commonwealth's Attorneys  
02:26:51 22 Association -- is there because of a drug-related charge, then  
02:26:54 23 while I recognize that I have a couple of thousand folks in  
02:26:59 24 there for crimes that need to be there maybe forever that are  
02:27:04 25 the true lions and tigers and bears, that are the murderers

02:27:08 1 and the rapists and sex offenders, that in reality, government  
02:27:12 2 will have to address this issue, this substance abuse issue,  
02:27:16 3 particularly at the state level and, by definition, of how we  
02:27:21 4 sentence for what drug crimes, or it's going to continue to  
02:27:26 5 drive states to either bankruptcy or drastic actions.

02:27:31 6           And the public and the media has a lot of trouble,  
02:27:36 7 again, putting their arms around that. *USA Today* on June 8th  
02:27:41 8 ran an editorial. The editorial, and I can speak to this  
02:27:48 9 because they offered me the opportunity to write the opposing  
02:27:52 10 piece to the editorial, which I did, but the causation of the  
02:27:57 11 editorial was the fact that Governor Schwarzenegger had said  
02:28:00 12 if they couldn't come up with some deal in California, then he  
02:28:03 13 might have to release 27,000 inmates. I think they're coming  
02:28:08 14 back to that same sort of situation again, except the number,  
02:28:11 15 I believe, has now gone up to maybe 40,000.

02:28:13 16           And, of course, the writers were saying in this  
02:28:16 17 particular situation that any type of early release or states  
02:28:21 18 considering this type of step were doing it at the detriment  
02:28:24 19 of the public. In fact, the punch line to their editorial was  
02:28:29 20 this: "So far, early release programs don't even look like  
02:28:33 21 honest budgeting. They only stop the flow of red ink  
02:28:37 22 temporarily, potentially replacing it with something else in  
02:28:41 23 the same color: blood."

02:28:43 24           That's a pretty inflammatory statement. At the top,  
02:28:47 25 by the way, at the top of their masthead, they say, *USA Today*

02:28:51 1 hopes to serve as a forum for better understanding and unity  
02:28:55 2 to make us one nation.

02:28:56 3 I'm not questioning their goal. I'm saying that an  
02:29:01 4 inflammatory statement like that, particularly led by  
02:29:04 5 legislators who serve at the state level, by prosecutors who  
02:29:08 6 have to run for election, by judges -- and in Kentucky all 239  
02:29:12 7 of our judges are elected -- and set up a situation where, in  
02:29:16 8 response to what may be a system of public information, they  
02:29:20 9 carry out sentencing and/or penal code initiatives that are  
02:29:28 10 dated, that are not following the evidence-based-type  
02:29:31 11 situations that you've heard testified here even in the couple  
02:29:34 12 of hours that I've been sitting here.

02:29:36 13 So if the United States Sentencing Commission has  
02:29:39 14 this type of information and understands recidivism in its  
02:29:43 15 true form and understands that the prison population has, in  
02:29:46 16 fact, been driven by substance abuse, then statements and  
02:29:51 17 policies and indeed federal guidelines that come out of this  
02:29:56 18 Commission may be picked up and, again, this time, mimicked by  
02:30:00 19 the states in a fashion that's going to be more beneficial for  
02:30:03 20 our populations.

02:30:04 21 The same thing with the -- you heard the, what was  
02:30:11 22 it, Henry Nellum example I think it was Judge Simon was  
02:30:16 23 talking about, a 65-year-old individual who had a mandatory  
02:30:21 24 sentence because he had, in that case, peddled or trafficked  
02:30:27 25 in a relatively small amount of crack cocaine and the drug



02:30:31 1 disparity. We have that situation even in Kentucky.

02:30:34 2           We have a situation in Kentucky where one of our drug  
02:30:38 3 laws states that for the first charge of possession of a  
02:30:40 4 controlled substance, for instance, it's a Class D, or a  
02:30:47 5 five-year sentence. Almost no one goes to prison for the  
02:30:49 6 first offense, so they are likely to be probated or shock  
02:30:53 7 probated. However, if there's no intervention at that,  
02:30:57 8 there's almost a hundred percent chance that they're going to  
02:31:01 9 be back before the court, one of our courts, for another  
02:31:04 10 possession charge.

02:31:06 11           Now, on the second possession charge, the sentence is  
02:31:08 12 automatically doubled by operation of statute. So you go from  
02:31:13 13 someone who has possessed one time, not done any prison time,  
02:31:17 14 goes out, does it again, and now they're facing ten flat in  
02:31:21 15 prison. They also then become subject to our persistent  
02:31:27 16 felony offender statutes, and once those enhancements are  
02:31:30 17 enhanced, they can wind up being in the institution for a very  
02:31:33 18 long time.

02:31:35 19           In the meantime, the actual issue of how much we've  
02:31:40 20 created or enhanced public safety is questionable only in the  
02:31:44 21 sense that while that might be a specific deterrent for that  
02:31:48 22 particular individual, that he won't peddle or share with his  
02:31:52 23 social circles, I don't know that we've really dented the  
02:31:56 24 criminal enterprise behind the illegal drug traffic, not to  
02:32:01 25 mention the fact that -- and this is a real example that came

02:32:03 1 across my desk -- I had an individual wrote a letter. He was  
02:32:06 2 in his 20th year. I looked him up in our system. We call it  
02:32:11 3 KOMS, Kentucky Offender Management System. He had the offense  
02:32:17 4 lists nine counts trafficking in cocaine.

02:32:20 5 So typically in my prison letters I say, well, here's  
02:32:24 6 another one who's written, you know, the letter. And, of  
02:32:27 7 course, he didn't do it. He was innocent, he was overcharged,  
02:32:30 8 et cetera, and you want to take it with a grain of salt. And  
02:32:33 9 then I start reading the background, I dug into the file a  
02:32:36 10 little bit.

02:32:37 11 It turned out those nine counts came from a situation  
02:32:39 12 where this one individual stood at the same parking lot over a  
02:32:44 13 14-day period, selling two pills a time to an undercover, the  
02:32:49 14 same undercover narcotics officer.

02:32:52 15 So this was not a rocket scientist, but he made for a  
02:32:57 16 very good statistical case: A nine-count indictment and a  
02:33:02 17 20-year sentence, and someone was back on that corner probably  
02:33:05 18 before that individual could make bail, if he did make bail.

02:33:11 19 The drug issue -- and I know this nation has debated  
02:33:14 20 it ever since I was in college in one form or another -- but  
02:33:21 21 what it's doing to our penal systems, both by means of how  
02:33:26 22 much -- you know, the issue is are we mad at them or are we  
02:33:32 23 scared of them?

02:33:33 24 The individuals who peddle, who use, who socially get  
02:33:37 25 involved in this, there's got to be some programmatical

02:33:43 1 approach to intervene, or else they'll continue to do it,  
02:33:45 2 particularly meth, which is really, really a bane in our  
02:33:48 3 state. I'm told it's hundreds of times more potent in the  
02:33:52 4 creation of the dopamine in the brain than cocaine, and it  
02:33:58 5 hooks people right away, as do the prescription drugs. And  
02:34:02 6 without these intervention policies, just simply aligning that  
02:34:06 7 with the scarface image of the crack cocaine or even the  
02:34:10 8 powder cocaine, we wind up with people in prison who won't  
02:34:14 9 break that cycle absent these drug intervention programs, and  
02:34:18 10 then they'll turn around and they'll come back.

02:34:21 11 Parole, I know there's not a parole in the federal  
02:34:26 12 system, which is what has caused a good deal of a debate about  
02:34:30 13 the mandatory sentencing. Some states have tended to want to  
02:34:34 14 go toward that in a law-and-order trend. In fact, in  
02:34:37 15 Kentucky, I believe we have sort of a what I call a *de facto*  
02:34:41 16 determinant sentencing situation, which means that although  
02:34:44 17 parole eligibility may be set by the legislature at a certain  
02:34:49 18 percentage, almost no one gets paroled the first time around  
02:34:53 19 because of the parole board looking at "the seriousness of the  
02:34:57 20 offense."

02:35:01 21 My argument with them all the time is we have a  
02:35:03 22 criminal justice system that's designed to perfectly filter,  
02:35:08 23 as perfect as any system on this earth, what that seriousness  
02:35:12 24 of offense is long before it gets to you. It gets filtered at  
02:35:15 25 arrest. It gets filtered at arraignment. It gets filtered at

02:35:20 1 indictment before the grand jury. It gets filtered by a petit  
02:35:26 2 jury. It gets filtered by a judge of competent jurisdiction.  
02:35:29 3 And then whatever that person winds up in prison for, that's  
02:35:32 4 the charge, and I don't believe it's the parole board's role  
02:35:37 5 to then go back at any one of those stages and say, well, you  
02:35:42 6 know what, the officer should have charged higher or the grand  
02:35:46 7 jury should have indicted for another crime or the sentencing  
02:35:49 8 judge shouldn't have taken that plea and, therefore, we're  
02:35:51 9 going to look at the seriousness of the offense and, no, you  
02:35:54 10 don't make parole when the legislature says you should. So  
02:35:57 11 they create this sort of *de facto* time period for people to  
02:36:00 12 keep serving.

02:36:01 13 I've actually suggested in Kentucky, and, in fact,  
02:36:04 14 the legislature is going to take this up this year, that we  
02:36:08 15 redefine our levels of felonies in Kentucky so that we have --  
02:36:12 16 we now have only four: A, B, C, D. A, obviously, is capital  
02:36:17 17 offense, which would include up to the death penalty. Then  
02:36:22 18 A's and B's are offenses for which you have to serve  
02:36:26 19 85 percent of your sentence. After that, you get down to C's  
02:36:29 20 and D's.

02:36:30 21 The problem is a D felony can be an aggravating  
02:36:33 22 felony for a persistent felony offender charge, as well as an  
02:36:37 23 A. So you'll wind up with someone who has a relatively minor  
02:36:41 24 third felony, and it's sort of like the  
02:36:45 25 three-strikes-and-you're-out situation in California.

02:36:47 1 I personally would like to see it go more to a  
02:36:51 2 situation where you have only serious on serious or most  
02:36:54 3 grievous on most grievous before we can go to the most  
02:36:59 4 heightened form of sentencing without that parole eligibility.

02:37:02 5 And, again, I understand that there is none in the federal  
02:37:05 6 system.

02:37:05 7 The states face this, and, again, you are and can be  
02:37:11 8 a messenger. We like to, I think, and I know because I get  
02:37:16 9 asked when I sit in front of -- at a table like this to  
02:37:19 10 legislators, and they'll say, Mr. Secretary, what are the  
02:37:23 11 federal people doing about this? And what's the federal  
02:37:26 12 sentencing guideline on this? And how many, you know, how  
02:37:32 13 much crack do you have to have for it to be residue enough to  
02:37:36 14 charge under the federal system? You know, what's drug  
02:37:40 15 paraphernalia under the federal system?

02:37:42 16 And we turn to you, much like you were the -- I  
02:37:48 17 guess, the sort of NASA of sentencing stuff, even though I  
02:37:52 18 think we would all agree that any kind of sentencing is sort  
02:37:55 19 of -- it's, you know, it's our best guess and how we go from  
02:38:02 20 some sort of proportional sentencing so we don't just have the  
02:38:06 21 death penalty for everything. Where does it come in at? But  
02:38:11 22 you are looked to.

02:38:13 23 So as you take these testimonies, and I compliment  
02:38:16 24 you for going around the country and doing that, in particular  
02:38:19 25 for talking to states, any opportunity you can through all of

02:38:24 1 the sister agencies, whether it's the National Criminal  
02:38:27 2 Justice Association, Council on State Governments, National  
02:38:31 3 Governor Association, any forum that will help educate folks  
02:38:36 4 like these and the public as to truly what goes on inside the  
02:38:40 5 criminal justice system and the sentences for crimes and any  
02:38:46 6 evidence-based knowledge that we get, what works and what  
02:38:50 7 doesn't work, I not only urge you, I commend you in advance  
02:38:53 8 for putting that forth.

02:38:56 9 Mr. Kennedy.

02:38:57 10 ACTING CHAIR HINOJOSA: Thank you, Mr. Brown.

02:38:58 11 Mr. Kennedy, sir.

02:38:59 12 MR. KENNEDY: I, too, am honored to appear before the  
02:39:03 13 NASA of sentencing.

02:39:07 14 I'm also here with some trepidation because I am  
02:39:11 15 about to strike, I think, a very discordant note in these  
02:39:16 16 polite proceedings.

02:39:18 17 I'm genuinely optimistic. I got into what I do  
02:39:25 18 25 years ago because, with no real intention, I ended up  
02:39:32 19 wandering around in blighted communities in the very first  
02:39:39 20 months of the then-young crack epidemic, and I was absolutely  
02:39:43 21 appalled by what I saw. I was a naive white kid who didn't  
02:39:48 22 think much about this stuff at all and was just horrified by  
02:39:53 23 community conditions in those places.

02:39:56 24 And I still am. I don't care what works. I don't  
02:40:02 25 come from any particular ideological or scholastic background.

02:40:08 1 I have no advanced degrees. It turns out a Swarthmore  
02:40:11 2 undergraduate degree is all you need in the world of  
02:40:14 3 universities.

02:40:14 4           When I got my chair at John Jay, they had to get a  
02:40:18 5 waiver of requirements from CUNY to give me my job, which I'm  
02:40:22 6 happy to say they did, but I am in this for change on the  
02:40:28 7 ground, and for the first time since beginning this 25 years  
02:40:35 8 ago, I feel like we are beginning to get it and that there  
02:40:40 9 are, in fact, things that are within our reach that will make  
02:40:43 10 really large, important, immediate changes in these  
02:40:50 11 communities with respect to the kinds of crimes that Director  
02:40:54 12 Brown was talking about, that we've been talking about today.

02:40:57 13           The discordant note is that those things don't  
02:41:00 14 operate within the frame of the kind of conversations that  
02:41:03 15 we've been having here. And federal judges sit for life, yes?  
02:41:12 16 So I can name names here and not get anybody in trouble?

02:41:16 17           I'm friends out of my Boston work with Judge Nancy  
02:41:20 18 Gertner in Boston, who I expect a lot of you know, and also  
02:41:25 19 through work subsequent to the Boston time with Judge Steve  
02:41:28 20 Robinson, who was U.S. Attorney in Connecticut at the time and  
02:41:32 21 is now a sitting federal judge in [New York]. And Judge  
02:41:36 22 Gertner teaches a sentencing course at Yale and asked me to  
02:41:40 23 come up and sit in on that, which I did about six months ago.

02:41:44 24           It's a day-a-week seminar, so this was six hours in  
02:41:48 25 which she and her class went over two lightly disguised real

02:41:54 1 cases that she had presided over. They were two drug dealers  
02:42:00 2 from Roxbury, which is one of Boston's most dangerous sort of  
02:42:04 3 drug and gang neighborhoods. And it was the kind of  
02:42:08 4 conversation that we've been having today, so what's right and  
02:42:11 5 what about the guidelines and what do the guidelines actually  
02:42:14 6 mean and what's discretion and what do we do post-Brown and  
02:42:17 7 all that kind of thing.

02:42:18 8           And her students, these Yale law school students,  
02:42:23 9 were scary smart. So we had this extremely sophisticated  
02:42:27 10 discussion about this, in which their sentencing suggestions  
02:42:32 11 ranged by more than a factor of ten from the relatively  
02:42:36 12 lenient to the very high. And it came to my part of the day,  
02:42:42 13 which was about hour and a half before we broke, and I said to  
02:42:46 14 Judge Gertner and then to Judge Robinson, so let's say any of  
02:42:52 15 the proposed answers had been followed. Is there any  
02:42:56 16 conceivable answer with regard to sentencing in these two  
02:42:59 17 cases that would make a meaningful difference in public safety  
02:43:05 18 in Roxbury, Massachusetts?

02:43:07 19           And first Nancy said no. And then I turned to Steve,  
02:43:09 20 and Steve said no. And then I turned to the students, and the  
02:43:14 21 students all said no. And at some level, this is an outrage,  
02:43:18 22 right? We had spent the entire day debating two matters which  
02:43:24 23 everybody agreed that no matter what we did, it wasn't going  
02:43:29 24 to change things in Roxbury.

02:43:33 25           And that is our normal experience in law enforcement.



02:43:37 1 It's why the stuff that I'm going to be talking about a little  
02:43:39 2 bit later on has been developed.

02:43:42 3           If our ordinary system activities produced the  
02:43:45 4 results that we wanted, that would be fine, but they don't;  
02:43:49 5 and it is the routine experience of people in law enforcement  
02:43:54 6 that they do their more ordinary work, their traditional work.  
02:44:01 7 And these are my friends. I'm in awe of these people. They  
02:44:05 8 work really hard. They mean it, and at the end of the day,  
02:44:08 9 they may have done a good day's work and they're proud of what  
02:44:11 10 they did, but does it change things in a meaningful way at the  
02:44:16 11 community level? It does not.

02:44:18 12           And I worked with some of your people in San  
02:44:22 13 Francisco who had taken down the worst drug crew in Hunters  
02:44:28 14 Point, San Francisco. They did a beautiful job. This was a  
02:44:31 15 monstrous drug crew. They dismantled it, and Bayview-Hunters  
02:44:38 16 Point is just as dangerous now as it was then. This is the  
02:44:42 17 way our world usually works.

02:44:43 18           There are things -- I was going to say appearing, but  
02:44:46 19 it's better than that -- they have appeared that don't work  
02:44:50 20 like that, and I see fundamentally two bright spots. And one  
02:44:58 21 is this new school of police management that's most  
02:45:04 22 represented in everybody's imagination by what's happened in  
02:45:08 23 New York City, so beginning with Bill Bratton in the mid '90s,  
02:45:12 24 but well after that now, multiple commissioners, multiple  
02:45:15 25 mayors.

02:45:17 1 NYPD has brought homicide in New York City down over  
02:45:21 2 75 percent and with commensurate declines in most other crime  
02:45:26 3 categories. They have done it by changing the culture inside  
02:45:30 4 the police department. This is a police department that goes  
02:45:33 5 to work every day and says we are going to affect crime. We  
02:45:36 6 are going to have strategies. We're going to have tactics.  
02:45:40 7 We're going to have immediate, up-to-date information. We are  
02:45:43 8 going to make plans and deploy our people accordingly; and if  
02:45:46 9 what we're doing doesn't work, we're going to come up with  
02:45:49 10 something that does.

02:45:49 11 And it's incontrovertible to my mind that NYPD is at  
02:45:55 12 the center of good news in New York. That same basic  
02:46:00 13 framework is now being applied all across the country, and  
02:46:03 14 there's a very clear record that when the people who manage  
02:46:07 15 police departments in this way grab these departments in new  
02:46:10 16 places by the scruff of the neck, two years later, things are  
02:46:13 17 really different. And the most recent example of this is,  
02:46:16 18 once again, Bill Bratton in L.A., which is much, much, much  
02:46:21 19 safer than it was just a couple of years ago.

02:46:23 20 The second school is the stuff that I've been  
02:46:28 21 involved with, and it's a set of stand-alone strategies aimed  
02:46:34 22 at group related, including gang violence and at community  
02:46:38 23 drug markets. They're a little bit different, but they're the  
02:46:41 24 same. They bring together partnerships of law enforcement,  
02:46:44 25 community people and service providers. They identify and

02:46:48 1 engage directly with the stand-out offenders that drive gang  
02:46:53 2 violence and populate these street drug markets.

02:46:56 3           The community says you are important people. You are  
02:46:59 4 doing wrong. We need you to stop. The service providers say  
02:47:03 5 we will help you, and law enforcement says we've put together  
02:47:07 6 something new and different, and we absolutely promise to you  
02:47:11 7 that if you cross the line we have just drawn, the house will  
02:47:15 8 fall on your head.

02:47:18 9           That's not ordinary system activities, right? So the  
02:47:23 10 basic trick in the gang work is to say directly to a city full  
02:47:29 11 of gangs the first gang that kills somebody after we have this  
02:47:32 12 conversation, we're going to use existing law to dismantle  
02:47:36 13 your group.

02:47:39 14           The point for this conversation, I think, is it's not  
02:47:42 15 new law. It's not necessarily high-level sanction. There's  
02:47:46 16 usually a little bit of federal enforcement in it, but it's  
02:47:49 17 mostly state. The point turns out to be, and this is sort of  
02:47:55 18 classic deterrence theory, if they know it's coming, if they  
02:47:59 19 know it's credible, if they believe it and if the sanction  
02:48:03 20 rises to a level that they care about, they're not going to do  
02:48:06 21 it. And it turns out in practice that knowing for a fact that  
02:48:11 22 you're going to get a low-level state conviction tomorrow if  
02:48:16 23 you do this thing means more than a three-strikes penalty five  
02:48:21 24 years from now.

02:48:22 25           The trick in the drug work is actually not to

02:48:26 1 prosecute them at all, which seems absolutely inside out; but  
02:48:30 2 it turns out that -- again, this is just using existing tools  
02:48:34 3 in different ways -- if you find all the drug dealers in a  
02:48:38 4 drug market, you get a state case against all of them, you  
02:48:43 5 arrest the violent and instigators and some of those go  
02:48:46 6 federal, but, again, usually the federal enforcement is a  
02:48:49 7 small piece. If you then say I am your mother, your parole  
02:48:56 8 officer, your probation officer, you have to do right. We  
02:48:59 9 have this case hanging over your head. We're going to tell  
02:49:03 10 you ahead of time, and if we know you've gone back out to the  
02:49:06 11 corner, we're going to activate the case, that's enough to  
02:49:09 12 stop almost everybody. And this isn't theoretical. This is  
02:49:12 13 fact. This is, as it turns out, the way this works.

02:49:16 14           So we've got a kind of crystalline example of the  
02:49:21 15 contrast here out of Hempstead, New York. So we've been  
02:49:26 16 working with Kathleen Rice, who's the county district attorney  
02:49:30 17 in Hempstead, for a couple of years now.

02:49:33 18           She came into office, there's a drug market called  
02:49:36 19 Terrace and Bedell which draws injection drug users and others  
02:49:42 20 literally from all over Long Island. It's three blocks in  
02:49:45 21 Hempstead, New York. And it is *Blade Runner*. I mean it was  
02:49:47 22 really bad.

02:49:49 23           And Kathleen instigated something that ended up being  
02:49:54 24 called Family Affair, which was a kind of Swiss watch,  
02:49:58 25 classic, climb-the-ladder drug investigation. It started with

02:50:01 1 two street buys on Hempstead, brought in the DEA, brought in  
02:50:07 2 the Justice Department, Nassau County, Hempstead police, her  
02:50:10 3 office, Eastern District of Manhattan U.S. Attorney's Office.  
02:50:15 4 They followed the chain all the way back to Colombia and ended  
02:50:20 5 up with I've forgotten how many state indictments, but 29  
02:50:24 6 federal indictments, including a bunch of the cartel guys.

02:50:27 7           And the year after Family Affair, drug activity, as  
02:50:32 8 measured by drug arrests, at Terrace and Bedell went up nine  
02:50:37 9 percent, and this is unfortunately the world we usually live  
02:50:40 10 in.

02:50:40 11           They did the High Point thing a year later. There  
02:50:43 12 were about a dozen arrests. They were all state arrests, I  
02:50:47 13 think. I don't think there were any federal prosecutions in  
02:50:50 14 there. The bulk of the dealers got this door number two  
02:50:54 15 option, and drug crime in the area went down 74 percent in the  
02:50:59 16 next year, and year-to-date the last update I got, there have  
02:51:05 17 been to date drug arrests in the area: none.

02:51:11 18           This stuff is doable. It uses existing law. It  
02:51:15 19 uses existing tools outside the framework of the way we have  
02:51:22 20 been thinking about crime control for the last 40 years, so I  
02:51:29 21 always go back to the '67 President's Commission Report, which  
02:51:33 22 I'm sure everybody on this side of the room has read in their  
02:51:36 23 first semester. We all do. And it's got this classic wiring  
02:51:39 24 diagram of the criminal justice system. It spreads over two  
02:51:43 25 pages, and it begins with arrest and processes and all these

02:51:46 1 tributaries.

02:51:48 2           Ever since the '67 report, we have thought, there are  
02:51:53 3 two ways we do crime. We do crime through the criminal  
02:51:56 4 justice system. We need to get the system issues right. That  
02:52:00 5 includes, as first among equals, sentencing and sentencing  
02:52:05 6 policy.

02:52:07 7           Other way we do it is we fix communities. We do root  
02:52:10 8 causes. We eradicate racism and develop the economy. This  
02:52:14 9 new stuff just doesn't operate in that framework. It doesn't  
02:52:18 10 get the system issues right. It doesn't especially focus on  
02:52:22 11 sanction severity. It certainly doesn't fix these communities  
02:52:28 12 in terms of root causes. What it does is hone in on the  
02:52:33 13 center of the problem, which invariably turns out to be a  
02:52:37 14 relatively small number of people whose names we can figure  
02:52:40 15 out and creates around them a kind of structure of service  
02:52:49 16 support and sanctions and community engagement that in  
02:52:52 17 practice, in fact, works.

02:52:56 18           So when I look at the kind of conversation that I  
02:53:03 19 know has been going on at the federal level around sentencing  
02:53:06 20 policy for quite a long while, I have the following concerns:  
02:53:13 21 So, one is that it for the most part is not engaged or  
02:53:19 22 supportive of these things that we now know work. And to the  
02:53:25 23 extent that the Commission can create that bridge and that  
02:53:29 24 conversation, I think that would be enormously valuable.

02:53:33 25           So you're going to have U.S. Attorney Fitzgerald here

02:53:38 1 tomorrow. He has been the mastermind of one of the jewels in  
02:53:43 2 the crown for all of this in Chicago, the Chicago Project Safe  
02:53:47 3 Neighborhoods intervention, which has brought homicide into  
02:53:51 4 Chicago's most dangerous neighborhoods down 37 percent.

02:53:55 5           The enforcement intervention, the federal enforcement  
02:53:58 6 intervention in that is to tell returning parolees coming into  
02:54:03 7 those neighborhoods you are a federally proscribed person.  
02:54:07 8 Please sign this document that you have been put on notice  
02:54:09 9 that you face a five-year mandatory minimum for your next gun  
02:54:12 10 possession.

02:54:13 11           Gun prosecutions haven't gone up. Gun sentences  
02:54:18 12 haven't gone up. They now know what they face, and they are  
02:54:24 13 so changing their behavior that they've had almost 40 percent  
02:54:29 14 reduction in homicide. That is something that is within the  
02:54:32 15 purview of the U.S. Attorneys of the Justice Department to do.  
02:54:37 16 It's not a sentencing guideline. It's not a sentencing  
02:54:40 17 decision. It's a policy and action change, and it's turned  
02:54:45 18 out to be very difficult to engage with the federal apparatus  
02:54:49 19 around those issues, as opposed to these other issues.

02:54:54 20           Another big concern I've got is that federal  
02:55:04 21 enforcement -- unjustly to some extent, but it's still the  
02:55:08 22 fact -- has become identified with the rise in the American  
02:55:13 23 prison population, which is, as we all know, extraordinary.  
02:55:17 24 Now, it's been driven by state enforcement. It's not driven  
02:55:20 25 by federal enforcement. The symbolism, however, is what it

1 is.

02:55:25 2           And in the communities I work in, people are so  
02:55:28 3 outraged by the way they're being policed and the way law  
02:55:35 4 enforcement is engaging with them, that we are observing a  
02:55:41 5 systematic principled withdrawal of these communities from law  
02:55:45 6 enforcement. This gets read from the outside a lot as witness  
02:55:49 7 intimidation, and there is a certain amount of that.

02:55:51 8           My experience is mostly it's not intimidation.  
02:55:54 9 Mostly it's anger, and it's anger at everybody going to  
02:55:58 10 prison, that one in three black men going to prison and  
02:56:02 11 everybody getting violated and going back to prison on  
02:56:09 12 technical offenses. It's the intrusion of supervision into  
02:56:13 13 family life. It's all of these things.

02:56:16 14           But the result of it is that we are seeing what  
02:56:21 15 really reads to me as the collapse of civil society in these  
02:56:25 16 communities. If, in technical philosophical terms, civil  
02:56:32 17 society is the turning over of crime control and coercive  
02:56:36 18 authority to the state, they are taking it back, and we are  
02:56:39 19 seeing homicide clearances go down into single digits in these  
02:56:44 20 communities. People who are shot won't give up any  
02:56:49 21 information. The street rules say you deal with business  
02:56:51 22 yourself. You're getting these Hatfield-and-McCoy vendettas.  
02:56:56 23 It's like Sicily.

02:57:01 24           And federal law enforcement -- rightly or wrongly and  
02:57:04 25 to some extents it's wrongly -- federal law enforcement is



02:57:08 1 identified in that community narrative as at the core of  
02:57:16 2 what's going on, and the issues that were spoken about earlier  
02:57:19 3 in which people who are actually moving and shaking and have  
02:57:22 4 things to give up end up being treated better than low-level  
02:57:25 5 folks who don't have anything to trade is highly, highly  
02:57:28 6 visible at the local level. It inflames people when they see  
02:57:32 7 people -- who I'm thinking back to Judge Simon's story, again,  
02:57:38 8 about his case -- when they see low-level people going to  
02:57:41 9 prison for 18 years on a street crack conviction, they are  
02:57:46 10 angry, and they are voting with their feet about their  
02:57:51 11 engagement with the rest of the culture.

02:57:55 12           And if there were a way for federal law enforcement  
02:57:59 13 and for federal sentencing to reflect more some of these newer  
02:58:04 14 ideas and to back out of some of the things which are  
02:58:10 15 infuriating these already very damaged neighborhoods, it would  
02:58:14 16 be terrific.

02:58:16 17           So I've backed into being a deterrence theorist  
02:58:19 18 through my work. I didn't start out that way. This is just  
02:58:22 19 the stuff that I've been working with, and that's the way it's  
02:58:25 20 gone. But the sort of old, old conversation about deterrence  
02:58:30 21 went: We need to produce deterrence through the routine  
02:58:35 22 workings of the criminal justice system. That's about  
02:58:39 23 observation and apprehension and prosecution and disposition,  
02:58:42 24 and in that system behavior and especially the higher-end  
02:58:48 25 sanctions end up being enormously important. That makes

02:58:52 1 perfect sense.

02:58:54 2           It turns out that it's a lot easier to get deterrence  
02:58:58 3 by going to somebody whose name you know who's tearing the  
02:59:01 4 place up, preferably with his mother -- everybody laughs at  
02:59:06 5 this point, but this is what we're doing; it works -- and say  
02:59:09 6 to them your name's on a list. You're doing wrong. Your  
02:59:14 7 community and your loved ones need you to stop. Here's the  
02:59:17 8 number to call if you get help, and if you don't listen, you  
02:59:21 9 are on a special list at the U.S. Attorney's Office, and  
02:59:25 10 here's what's going to happen to you. And our experience on  
02:59:27 11 this is most of the time, that works.

02:59:30 12           If it doesn't work, you don't need a 20-year hit.  
02:59:34 13 You need something. You need it predictably, transparently,  
02:59:41 14 and briskly. And you get that, you can dial things way back  
02:59:44 15 and get better outcomes.

02:59:46 16           Thank you.

02:59:46 17           ACTING CHAIR HINOJOSA: Thank you, Mr. Kennedy. Any  
02:59:48 18 questions?

02:59:50 19 QUESTION AND ANSWER SESSION

02:59:50 20           COMMISSIONER HOWELL: Yes.

02:59:52 21           Mr. Brown, I found your -- Secretary Brown, I'm  
02:59:57 22 sorry, I found your testimony very interesting, and I think  
03:00:02 23 the statistics that you cited about the number of parolees  
03:00:08 24 going back into the system because of technical violations is  
03:00:12 25 something that we're looking at at the federal level, and how

03:00:17 1 many individuals on supervised release are being put back into  
03:00:22 2 prison because of technical violations with their supervised  
03:00:26 3 release terms.

03:00:27 4           It's a similar kind of study that you've cited, and  
03:00:30 5 we're finding some of the same things, that a substantial  
03:00:32 6 number of -- I don't remember the percentages offhand -- but a  
03:00:36 7 substantial number of people are in prison, in federal custody  
03:00:40 8 right now because of technical violations of their supervised  
03:00:42 9 release terms, which leads me to ask you, Mr. Kennedy,  
03:00:45 10 something that puzzles me about the studies that you've cited,  
03:00:50 11 and the statistics sort of speak for themselves, that if you  
03:00:53 12 bring in a gang member and say we have this, you know, the  
03:00:57 13 house is going to fall down, to use your expression. If you  
03:01:00 14 do something wrong, there will be this immediate prosecution  
03:01:05 15 and risk of long-term incarceration and that helps deter them  
03:01:10 16 from doing it, from further engagement in criminal activity,  
03:01:15 17 or at least they've moved their criminal activity to a  
03:01:19 18 different place -- and that's another question -- but why is  
03:01:21 19 it that it works there and not in a situation where somebody's  
03:01:24 20 on supervised release or parole, where they clearly have this  
03:01:28 21 cudgel over their head if they violate their conditions of  
03:01:31 22 release, that we have so many technical violations that are of  
03:01:36 23 such severity that judges are feeling like you've broken my  
03:01:39 24 trust. I'm sending you to jail. I've warned you before, and  
03:01:42 25 I've got to stick to my word.

03:01:44 1 I can't in my own mind resolve that apparent  
03:01:48 2 conflict.

03:01:49 3 MR. KENNEDY: So which of the six different answers  
03:01:51 4 do you want?

03:01:53 5 COMMISSIONER HOWELL: I'd like to hear all of them.  
03:01:55 6 I don't know if you have working theories about that or not.

03:01:58 7 MR. KENNEDY: Fortunately, we've got better than  
03:02:00 8 that.

03:02:00 9 So there's a bunch of things going on here.

03:02:02 10 In the gang work, what's turned out to be crucial is  
03:02:06 11 dealing with the gang. And this is another thing that's very  
03:02:09 12 hard for traditional law. We deal almost entirely legally  
03:02:16 13 with individuals, absent the RICO and continuing criminal  
03:02:21 14 enterprise cases and things like that which are, in practice,  
03:02:24 15 real outliers. Almost all of our law is with individuals.

03:02:28 16 We don't work like that. We say the group's driving  
03:02:32 17 this. The group's accountable. We know who the group is. We  
03:02:35 18 know who's in the group. We're speaking to the group, and our  
03:02:38 19 message to you is anybody in the group shoots somebody, we're  
03:02:41 20 going to figure out a way to sanction the entire group. You  
03:02:45 21 tell the one guy that he can go forth and sin no more. He's  
03:02:49 22 not going to be able to do that.

03:02:51 23 If you say to him if anybody in your group shoots  
03:02:55 24 somebody, we're going to figure out a way to, for example,  
03:02:58 25 violate you on your next dirty urine. When the kid next to

03:03:03 1 him picks up a gun to do some stupid boyfriend respect  
03:03:06 2 shooting, it turns out that our guy tells his guy to put his  
03:03:11 3 gun down because he's got no stake in his buddy's respect  
03:03:16 4 beef, but he does have a stake in not getting violated the  
03:03:18 5 next time he drops a hot urine.

03:03:21 6           So the gang work works through turning the internal  
03:03:27 7 group dynamic back on itself. And as an empirical question,  
03:03:31 8 it turns out that really works.

03:03:34 9           That said, what -- if you're, outside this stuff  
03:03:41 10 we're talking about, if you're a parolee on ordinary parole  
03:03:46 11 supervision, the time you go back isn't the first time you  
03:03:51 12 violate your conditions. What happens is you violate your  
03:03:53 13 conditions and you get told not to do it, and you violate your  
03:03:55 14 conditions and you get told not to do it, and you violate your  
03:03:59 15 conditions and get told not to do it. And, finally, somebody  
03:04:02 16 gets tired of this and sends you back, at which point with  
03:04:04 17 some justification, you find these guys saying who changed the  
03:04:07 18 rules? Nobody ever did this to me before.

03:04:09 19           You probably know about Project HOPE in Hawaii, which  
03:04:14 20 is former U.S. Attorney now Judge Alm's turning of the same  
03:04:20 21 set of ideas basically back on meth supervision. When he  
03:04:24 22 started sitting probation on these meth users, he saw this  
03:04:28 23 pattern. His agents would bring somebody to him. He'd have  
03:04:32 24 failed his 12th urine analysis, and Judge Alm was being asked  
03:04:38 25 to do something. He said, this is crazy. Why didn't we talk

03:04:41 1 to him the first time?

03:04:42 2 So he's now got this caseload where he's saying to  
03:04:46 3 them the game's changed. You're not going to get 12. The  
03:04:49 4 first time you violate, pack your toothbrush.

03:04:53 5 Normally, his choice is we send you back for the  
03:04:57 6 balance of your sentence, which seems disproportionate which  
03:05:00 7 is why you get 12 before somebody finally does something. He  
03:05:03 8 says we're going to put you back in for two days. Every  
03:05:06 9 single time, two days. They put it in place, and the random  
03:05:10 10 control results on this are about to come out. My information  
03:05:14 11 is that they're seeing 50 percent reductions in offending out  
03:05:18 12 of a meth population. And, again, it's not about sanction, it  
03:05:23 13 turns out. Almost always, it's about the predictability and  
03:05:27 14 transparency and consistency of what's going on. And in  
03:05:32 15 ordinary criminal justice structures, it turns out to be  
03:05:35 16 almost impossible to make that happen, but there are ways that  
03:05:38 17 you can kind of patch it together in a special project kind of  
03:05:42 18 way, and you get hugely different outcomes.

03:05:47 19 COMMISSIONER WROBLEWSKI: But isn't that precisely  
03:05:49 20 what the federal role is often intended to be, this sort of  
03:05:53 21 specialized criminal justice enforcement program, which is  
03:05:57 22 sort of the high impact intervention, you know, what's going  
03:06:02 23 on here in Chicago with gangs and what's going on in other  
03:06:05 24 places, where you bring people in and you have -- because I  
03:06:09 25 think I'm trying to challenge you just a little bit on "the

03:06:12 1 sanction means nothing." I recognize the sanction is not  
03:06:16 2 sufficient based on what you're suggesting, but it's  
03:06:20 3 important.

03:06:21 4 MR. KENNEDY: Yes.

03:06:22 5 COMMISSIONER WROBLEWSKI: It's part of the cause.  
03:06:23 6 You bring people in. You identify the right people. You say,  
03:06:26 7 look, we're watching you, and if you go off track, you,  
03:06:30 8 meaning the gang, we're bringing you all in and you're going  
03:06:34 9 to federal court, and you're going to get a significant, a  
03:06:37 10 very long sentence.

03:06:39 11 And with Project HOPE, it's the first time, you're  
03:06:42 12 going to get something and it's going to be swift and certain.

03:06:45 13 MR. KENNEDY: Right.

03:06:46 14 COMMISSIONER WROBLEWSKI: So the sanction is part of  
03:06:47 15 it.

03:06:48 16 And if the federal government could on the  
03:06:50 17 enforcement side, you know, look to the strategy that's been  
03:06:53 18 successful here and other places, I take it, again, part of  
03:06:58 19 that -- and, again, we're just talking gangs, to some extent  
03:07:02 20 drugs, but largely gangs, violent gangs -- I take it you would  
03:07:06 21 endorse that approach.

22 MR. KENNEDY: Oh, yes.

03:07:08 23 COMMISSIONER WROBLEWSKI: I mean what's going on in  
03:07:10 24 Chicago, you endorse.

03:07:11 25 MR. KENNEDY: What's going on in Chicago is

03:07:12 1 brilliant, but the Chicago sanction is relatively low level.  
03:07:17 2 The felon in possession federal mandatory is five years, and  
03:07:22 3 they're not using it that much, which is the great outcome you  
03:07:26 4 get when you get this stuff right.

03:07:27 5           So I would never say the sanction doesn't matter. It  
03:07:33 6 matters at any level, I think -- I know -- less than the  
03:07:39 7 predictability and the transparency of what's going on.

03:07:42 8           COMMISSIONER WROBLEWSKI: And the intervention.

03:07:45 9           MR. KENNEDY: And the other pieces as well, yeah.  
03:07:48 10 And to some extent, you get individual and community backlash  
03:07:55 11 from the more extreme sanctions, and that's something I think  
03:07:58 12 we should really take seriously.

03:08:00 13           VICE CHAIR CASTILLO: So what your espousing, what  
03:08:02 14 I'm hearing, is an interactive crime control policy by the  
03:08:07 15 police and local law enforcement, much more deferred state  
03:08:11 16 prosecution, very selective federal prosecution, but when it  
03:08:16 17 does occur, it has to be swift and certain.

03:08:20 18           But what you're telling us as a Sentencing Commission  
03:08:22 19 is we can lower the sentences without having different  
03:08:26 20 outcomes.

03:08:27 21           MR. KENNEDY: I believe that's correct, yes.

03:08:29 22           VICE CHAIR CASTILLO: Because what was most  
03:08:30 23 disheartening about your written presentation is when you used  
03:08:34 24 this Hempstead example, where you had this Family Affair drug  
03:08:41 25 indictment, 29 federal indictments going all the way back to



03:08:45 1 Colombia, to the source of the drugs, and what you say in your  
03:08:49 2 written testimony is that drug activity increased after that  
03:08:53 3 indictment. So I take it replacement drug rings just came  
03:08:57 4 into being, and then once this interactive High Point strategy  
03:09:02 5 was used, it finally reduced the market.

03:09:05 6 MR. KENNEDY: Yes. And one of the core dynamics  
03:09:10 7 there is that as part of this work, you go through what's  
03:09:15 8 pretty close to a reconciliation conversation with the  
03:09:18 9 community. These communities are viciously angry at us, and  
03:09:23 10 they are viciously angry at us in a way that is explicitly  
03:09:27 11 racialized.

03:09:29 12 We don't -- none of us are comfortable in engaging in  
03:09:34 13 this. It's scary. We have to take seriously ideas that seem  
03:09:37 14 crazy to us. These are communities that believe that you and  
03:09:41 15 I are part of the conspiracy to bring the drugs into the  
03:09:44 16 country. They really do. And so we have to deal with that.

03:09:47 17 Part of the reason Family Affair didn't work is  
03:09:50 18 because it left behind a community that was still angry and  
03:09:52 19 disengaged. What happened the next time brought both law  
03:09:58 20 enforcement and the community to a place where they stood  
03:10:01 21 together and said here's how we're going to deal with this.  
03:10:04 22 We want the same things. We'd rather not have anybody go to  
03:10:07 23 jail that doesn't have to.

03:10:08 24 If we've put them on the proper kind of notice and  
03:10:10 25 offered them the proper kind of help and they still violate,

03:10:13 1 then we here in the community also think they should go to  
03:10:15 2 jail. We believe in the same things, and, therefore, we're  
03:10:19 3 going to go from here out together.

03:10:22 4           And the next time -- this is a true story. This was  
03:10:26 5 a stop sanction community. The next time somebody used a gun  
03:10:31 6 on the street at Terrace and Bedell, which was about a year  
03:10:36 7 after the intervention, the residents organized a viewing of  
03:10:40 8 the convenience store security camera that happened to have  
03:10:43 9 caught one of these robberies, recognized one of the kids, and  
03:10:47 10 handed him over to the Hempstead police. That's the big  
03:10:50 11 difference.

03:10:51 12           VICE CHAIR CASTILLO: Thank you.

03:10:52 13           VICE CHAIR CARR: Professor Kennedy, something that I  
03:10:54 14 think was implicit in you talking about deterrence but was  
03:10:57 15 clear in your book, actually, is that many of these drug  
03:10:59 16 dealers who are getting arrested federally for the first time  
03:11:02 17 don't really have a clue what they're facing until after the  
03:11:06 18 handcuffs are put on them so that the deterrence just does not  
03:11:09 19 happen simply because we have stiff penalties.

03:11:12 20           Could you address that a little more clearly?

03:11:14 21           MR. KENNEDY: That's right.

03:11:15 22           There's an ATF study of armed career criminal felons.  
03:11:26 23 So this was a survey of guys already locked up on 15-year ACC  
03:11:33 24 penalties, a substantial portion of whom didn't believe that  
03:11:37 25 they were going to serve out their sentences. They had

03:11:39 1 already been sentenced and locked up, and they still didn't  
03:11:42 2 understand the law.

03:11:45 3           On the street what you get is people don't understand  
03:11:48 4 the federal law in the first place. They've never been in  
03:11:52 5 this room. They see their friends picked up all the time for  
03:11:57 6 stuff that is in fact -- they're exposed to federal sanctions.  
03:12:03 7 They've been picked up. None of them ever go federal. I mean  
03:12:07 8 the federal prosecutorial employment in this kind of street  
03:12:11 9 crime is still very low relative to everything that's going  
03:12:15 10 on.

03:12:15 11           So they have no idea, a lot of them, what the law is,  
03:12:21 12 what their exposures are, what triggers it, and especially  
03:12:25 13 they don't know, and oftentimes they can't know, what's going  
03:12:28 14 to move them from being of interest to the state authorities  
03:12:32 15 to being of interest to the federal authorities. And you're  
03:12:35 16 exactly right. The moment they find out is when they go to a  
03:12:38 17 different holding cell, at which point they collapse -- I mean  
03:12:42 18 they literally collapse in tears; but it's too late at that  
03:12:45 19 point.

03:12:45 20           And this is why what Pat Fitzgerald is doing is  
03:12:51 21 working so well. All he's doing is saying here's your  
03:12:57 22 exposure, but the fact is that even in gang circles in  
03:13:01 23 Chicago, many, maybe most of those guys, didn't know that.  
03:13:04 24 We're taking a next step in some of our cities and saying you  
03:13:10 25 are ACC eligible. There's a system that's been put in place

03:13:15 1 so that if you are picked up with a gun, you will be reviewed  
03:13:18 2 by the U.S. Attorney. Here's a statement from the U.S.  
03:13:21 3 Attorney saying if you're picked up, I will so prosecute you.  
03:13:26 4 Don't worry about what's happened to your friends. It's going  
03:13:28 5 to happen to you, and we're seeing, not surprisingly at this  
03:13:34 6 point, a massive chilling impact out of that.

03:13:36 7 VICE CHAIR CARR: And to follow up on Commissioner  
03:13:39 8 Howell's question about why all these probation and parole end  
03:13:42 9 up getting their technical violations, it's my understanding  
03:13:45 10 that one of the problems with people on probation and parole  
03:13:49 11 around the country is their probation and parole officers are  
03:13:49 12 spread so thin that really all they're doing is a policing  
03:13:53 13 function, and they're not doing much of the counseling  
03:13:55 14 function, whereas the people in the programs that you're  
03:13:58 15 describing not only get told you are going to get caught, you  
03:14:01 16 are going to go to jail if you misbehave, but you've put in  
03:14:05 17 structure the other kinds of support groups from the  
03:14:08 18 community.

03:14:09 19 MR. KENNEDY: Right. That's correct.

03:14:14 20 VICE CHAIR SESSIONS: Can I just ask about that  
03:14:16 21 knowledge in the community? I know that you're talking about  
03:14:19 22 drug defendants within poor urban communities, but we've been  
03:14:25 23 told of examples, for instance in alien smuggling, when  
03:14:29 24 organized groups know the guidelines so well that they know  
03:14:32 25 they should be taking five people at a time as opposed to six.

03:14:36 1 MR. KENNEDY: Yeah. No --

03:14:38 2 VICE CHAIR SESSIONS: I mean is that -- is it a  
03:14:40 3 universal situation in which people are just totally unknowing  
03:14:45 4 in regard to these penalties?

03:14:48 5 MR. KENNEDY: What we see is that they know the  
03:14:50 6 things that they most routinely have to worry about, and so  
03:14:55 7 this was human trafficking or something that you were just  
03:14:59 8 referring to?

03:15:00 9 VICE CHAIR SESSIONS: Alien smuggling.

03:15:02 10 MR. KENNEDY: Yeah. That's not anything I know about  
03:15:04 11 personally, but my guess is, and this would be consistent with  
03:15:07 12 what we see in other settings, so when I did work in  
03:15:11 13 Baltimore, there was a policy in the State's Attorney's Office  
03:15:14 14 that they wouldn't take any crack cases that didn't rise to 21  
03:15:20 15 rocks. And it was just a filter, you know. It was a demand  
03:15:27 16 management problem. And everybody on the street knew that,  
03:15:30 17 right? So they would carry 19 pieces. I mean it was very  
03:15:33 18 predictable.

03:15:34 19 The link between these conversations is even though  
03:15:40 20 there was an active and is an active U.S. Attorney's Office in  
03:15:44 21 Baltimore, on the street engaging with federal law enforcement  
03:15:48 22 was like getting hit by lightning. It hardly ever happened.  
03:15:52 23 And so they didn't understand either what the law was or what  
03:15:55 24 would trigger it.

03:15:56 25 I think probably what's going on in your example is

03:15:59 1 that they are routinely dealing with the border authorities  
03:16:03 2 and the federal structure. They need to know and they do  
03:16:10 3 know.

03:16:10 4 ACTING CHAIR HINOJOSA: Thank you all very much. We  
03:16:12 5 appreciate your thoughts and your comments and appreciate your  
03:16:17 6 time. Thank you.

03:16:19 7 We'll take a very short three- to five-minute break  
03:16:22 8 before we go on with the next panel.

03:16:34 9 (Recess from 3:16 to 3:24 p.m.)

03:25:44 10 PANEL V. VIEW FROM THE APPELLATE BENCH

03:25:44 11 ACTING CHAIR HINOJOSA: We welcome the next panel and  
03:25:46 12 the last panel for the day because a lot of times they have  
03:25:50 13 the last word in their real jobs.

03:25:53 14 We have a distinguished group of appellate judges  
03:25:57 15 next. We have the Honorable Danny J. Boggs, who has been the  
03:26:00 16 chief judge of the United States Circuit Court of Appeals of  
03:26:04 17 the Sixth Circuit since the year 2003, and he's been serving on  
03:26:08 18 that court since 1986.

03:26:10 19 Among his many professional accomplishments have been  
03:26:14 20 he was a special assistant to the President in the Executive  
03:26:17 21 Office of the President from 1981 to 1983, and he was an  
03:26:22 22 assistant to the chairman of the Federal Power Commission from  
03:26:26 23 '75 to '77. He was also an assistant to the U.S. solicitor  
03:26:31 24 general of the U.S. Department of Justice from '73 to '75 and  
03:26:35 25 also has, at various parts of his career, engaged in the

03:26:39 1 private practice of law. He's got his bachelor's degree from  
03:26:42 2 Harvard and his law degree from the University of Chicago.

03:26:46 3 The Honorable Frank H. Easterbrook has been the chief  
03:26:50 4 judge of the United States Court of Appeals for the Seventh Circuit  
03:26:52 5 since the year 2006, and has been on that court since 1985.  
03:26:57 6 He also has served as an assistant to the U.S. solicitor  
03:27:01 7 general for the Department of Justice from '74 to '77 and as a  
03:27:04 8 deputy U.S. solicitor general from '78 through '79. He also  
03:27:08 9 has been an assistant professor of law at the University of  
03:27:12 10 Chicago from '78 to '81 and a professor of law there from '81  
03:27:16 11 to '85. His bachelor's degree is from Swarthmore and his law  
03:27:21 12 degree from the University of Chicago.

03:27:23 13 Then we also have the Honorable Jeffrey S. Sutton who  
03:27:27 14 has been a circuit judge on the U.S. Circuit Court of Appeals  
03:27:31 15 for the Sixth Circuit since the year 2003. He served as a law  
03:27:36 16 clerk to Justice Powell and Justice Scalia. He was also  
03:27:40 17 engaged in the practice of law in Ohio and was the state  
03:27:43 18 solicitor of Ohio from '95 through '98 and has been an adjunct  
03:27:47 19 professor of law at Ohio State. He received his bachelor's  
03:27:50 20 degree from Williams and his law degree from Ohio State.

03:27:53 21 And we'll start with Judge Boggs.

03:27:57 22 JUDGE BOGGS: We have changed the order.

23 ACTING CHAIR HINOJOSA: You're going to start with  
24 Judge Easterbrook?

03:28:00 25 JUDGE BOGGS: We're going to start with our

03:28:01 1 host here.

03:28:03 2 ACTING CHAIR HINOJOSA: You all are the only panel

03:28:05 3 that can tell us what to do --

4 (Laughter.)

03:28:07 5 ACTING CHAIR HINOJOSA: -- but you are the appellate

03:28:09 6 judges, and we will proceed in that fashion.

03:28:09 7 CHIEF JUDGE EASTERBROOK: Thank you, Judge Hinojosa.

03:28:13 8 The sentencing guidelines were designed a generation

03:28:16 9 ago to carry out a legislative policy of determinant sentences

03:28:20 10 with a minimum of judicial discretion. The Supreme Court's

03:28:23 11 decisions in *Booker*, *Kimbrough* and *Spears*, which make the

03:28:25 12 guidelines advisory, call for a change in their structure.

03:28:29 13 Every system of regulations ought to be matched to its

03:28:33 14 purpose, yet the Commission hasn't revised the general

03:28:35 15 structure of the guidelines since *Booker*, and it seems to me

03:28:38 16 that doing this is the most important current task.

03:28:41 17 If the Supreme Court had just eliminated the

03:28:45 18 guidelines from the list of things the district judges are

03:28:48 19 obliged to do at sentencing, as some justices contended that

03:28:53 20 should happen, then a structural revision wouldn't be

03:28:56 21 important. The Commission could maintain the guidelines in

03:28:58 22 any form they wanted as recommendations to the district

03:29:03 23 judges. But what the court has held is that district judges

03:29:06 24 must calculate the guideline range correctly, after which they

03:29:11 25 can impose any reasonable sentence. And the court of appeals



03:29:16 1 then must review the district judges' guideline calculations,  
03:29:20 2 as well as the reasonableness of the sentence, and many a case  
03:29:24 3 these days is being reversed with the observation that the  
03:29:26 4 district court didn't calculate the guidelines correctly. The  
03:29:29 5 sentence may well be perfectly fine, but go try again.

03:29:33 6           This means that both the district courts and the  
03:29:38 7 court of appeals may be required to carry out an exercise that  
03:29:42 8 has a limited, if any, effect on the sentence. It's a  
03:29:45 9 make-work prescription; but if work is to be made, there  
03:29:48 10 should be less rather than more, and that will conserve  
03:29:51 11 judicial time for more pressing tasks and the other litigants  
03:29:55 12 in a very long queue.

03:29:57 13           The guidelines ought to be designed so that they  
03:30:00 14 provide information to district judges about how comparable  
03:30:02 15 cases are handled across the nation. That fulfills their  
03:30:05 16 principal function of curtailing unwarranted disparities  
03:30:09 17 without engaging in a needless level of detail.

03:30:12 18           When the guidelines were mandatory, detail was vital,  
03:30:16 19 and the statute called for ranges to be no more than  
03:30:18 20 25 percent from top to bottom. Now that the guidelines are  
03:30:22 21 advisory, two principal changes can and should be made:

03:30:28 22           One, the ranges should exceed 25 percent.

03:30:32 23           Second, the overlap in the ranges should be  
03:30:36 24 increased.

03:30:37 25           Those two changes together will reduce the need to

03:30:39 1 make precise findings that don't affect the outcome and, thus,  
03:30:44 2 save time for both district and appellate judges without  
03:30:46 3 sacrificing any of the statutory goals.

03:30:50 4           Current doctrine -- this, by the way, was something  
03:30:54 5 that Judge Breyer said in defense of the guidelines right at  
03:30:58 6 the outset, that we were going to design things with overlaps  
03:31:01 7 and avoid these problems -- but current doctrine has it that  
03:31:04 8 unless the district judge formally says on the record  
03:31:07 9 something like my sentence is unaffected by how I resolve X,  
03:31:12 10 and the sentence is within a range that is generated no matter  
03:31:18 11 how X was resolved, unless both of those things are true, then  
03:31:23 12 the court of appeals has to determine whether X got resolved  
03:31:27 13 correctly.

03:31:28 14           After *Booker*, there's little point to that  
03:31:31 15 fastidiousness, and the Commission can end it at a stroke by  
03:31:35 16 adopting a presumption that the resolution of any issue is  
03:31:38 17 irrelevant when the sentence is within an area where the  
03:31:41 18 ranges overlap no matter how that issue is resolved. That,  
03:31:45 19 plus somewhat wider ranges, would do a great deal to avoid  
03:31:49 20 wastes of lawyers' and judges' time.

03:31:53 21           My court has recommended that judges practice  
03:31:55 22 self-help in the interim. We've urged them to say that  
03:31:58 23 resolving one or another disputed point just doesn't matter to  
03:32:02 24 the final sentence, not only when the ranges overlap, but also  
03:32:06 25 when they don't and they've decided to use their discretion

03:32:09 1 under *Booker* and its successors to give a particular sentence.  
03:32:12 2 That advice was directed to district judges, but its spirit is  
03:32:16 3 equally applicable to guideline design.

03:32:18 4 Let me give you an example. It's prompted by a case  
03:32:21 5 now under advisement in my court. I won't mention the name of  
03:32:24 6 the case or the precise details, since the opinion hasn't been  
03:32:26 7 released, but it illustrates a kind of problem that's common,  
03:32:30 8 yet avoidable.

03:32:32 9 Smith, I'll call him, is charged with distributing  
03:32:37 10 drugs, and his principal customer is Jones. The evidence at  
03:32:40 11 trial shows that Smith has been a commercial distributor for  
03:32:43 12 at least a year and has many customers in addition to Jones.  
03:32:47 13 The district court needs to determine Smith's relevant conduct  
03:32:51 14 in order to decide how many offense levels to add under the  
03:32:54 15 drug quantity table in Section 2D1.1.

03:32:57 16 The judge takes testimony from Jones and two other  
03:33:00 17 customers, all cooperating as part of plea bargains. The  
03:33:04 18 judge has to decide whether they're to be believed and, if  
03:33:07 19 they're telling the truth, whether their memories are  
03:33:11 20 accurate.

03:33:11 21 Let's suppose that the three customers together  
03:33:14 22 narrate sales that come to 1.95 kilograms of cocaine. The  
03:33:19 23 drug quantity table distinguishes between 2 kilograms or  
03:33:23 24 more -- that's level 26 -- and 500 to 1,999 grams. That's  
03:33:31 25 level 24. That's not a statutory breakpoint. The statutory

03:33:35 1 breakpoint is at 5 kilograms, but the prosecutor wants the  
03:33:38 2 higher offense level, so he introduces evidence that when  
03:33:42 3 Smith was arrested, he was carrying \$3,000. The prosecutor  
03:33:47 4 argues that the money must have come from drugs, which should  
03:33:51 5 be converted to a cocaine equivalent, which will push Smith  
03:33:54 6 over the two-kilo threshold.

03:33:57 7           The need to resolve this argument about the source of  
03:34:00 8 funds requires a two-day hearing in the district court, and  
03:34:03 9 it's the subject of an appeal and potentially a remand to do  
03:34:06 10 it over.

03:34:07 11           The question I have is why should we have a set of  
03:34:11 12 guidelines under which this thing can be at issue in the first  
03:34:13 13 place? The reason why that hearing was held is because two  
03:34:19 14 levels, two offense levels, can mean several extra years in  
03:34:23 15 prison. But why draw the distinction? A dealer whose  
03:34:27 16 business entails 2,000 grams is no different in social  
03:34:31 17 dangerousness from one whose business entailed 1,999 grams.  
03:34:37 18 Indeed, as a practical matter, there's little reason to  
03:34:40 19 distinguish 2,500 grams from 1,500 grams. Not only is the  
03:34:45 20 dangerousness about the same, but the measurement error in  
03:34:49 21 these cases is so great that the court's effort to separate  
03:34:53 22 them is not reliable.

03:34:54 23           It's not simply are the witnesses honest. It's did  
03:34:58 24 they remember accurately? People don't document their illegal  
03:35:01 25 transactions with the detail that Merck keeps records of its

03:35:05 1 pharmaceuticals. The guidelines need to recognize that  
03:35:09 2 approximations are inevitable. I think a court is lucky if it  
03:35:13 3 gets quantity correct within a factor of five.

03:35:17 4           And if approximations are inevitable, lines like the  
03:35:21 5 one I'm just describing need to be blurred. That implies  
03:35:25 6 overlapping the quantity tables, overlapping the sentencing  
03:35:28 7 ranges derived from those tables, or both. The goal should be  
03:35:32 8 a reasonable approximation, rather than an illusory  
03:35:37 9 exactitude.

03:35:37 10           The example I've given also illustrates another  
03:35:40 11 problem, a quest to measure with precision what appears to be  
03:35:44 12 measurable at the expense of a larger picture. If we want to  
03:35:49 13 know how bad an offender Smith is, we need to know what he  
03:35:53 14 sold to all of his customers over the course of his business,  
03:35:56 15 not what he sold to the three customers who can be persuaded  
03:35:59 16 to testify. Trying to make precise decisions about a subset  
03:36:04 17 of the defendant's business means devoting days of judicial  
03:36:07 18 time to the wrong question.

03:36:10 19           Guidelines should urge district judges to stop  
03:36:13 20 pretending that the social concern with crime stops with the  
03:36:17 21 person on the witness stand and to start making estimates of  
03:36:20 22 the defendant's whole business. Those estimates will, of  
03:36:22 23 course, be imprecise, maybe even worse than a factor of five;  
03:36:27 24 but imprecision is less important the wider the ranges are and  
03:36:31 25 the more they overlap.

03:36:33 1           My point is, to be short, that the guidelines should  
03:36:37 2 urge district judges, to stop urging district judges to  
03:36:41 3 measure what they think they can measure with live witnesses  
03:36:44 4 and to make approximations of what really matters to the  
03:36:47 5 dangerousness of the offense behavior.

03:36:50 6           Now, let me move from drugs and other crimes that  
03:36:54 7 come within the relevant conduct rules to recidivist  
03:36:58 8 sentencing. Congress required the Commission to provide that  
03:37:01 9 repeat offenders who have three convictions for violent crimes  
03:37:04 10 or serious drug offenses must be sentenced at or near the  
03:37:08 11 statutory maximum. That's 28 U.S.C. 994(h). The Commission's  
03:37:13 12 career offender guideline, 4B1.1, which was devised to fulfill  
03:37:18 13 that mandate, goes beyond the statutory list. That has  
03:37:22 14 certain consequences that my court's at *Knox* opinion  
03:37:28 15 discusses. I, for one, am not troubled by the Commission's  
03:37:31 16 decision to establish its own list of prior offenses that  
03:37:33 17 justify recidivist treatment. My concern, rather, is that the  
03:37:37 18 Commission didn't do enough to establish its own list.

03:37:41 19           Instead of producing its own definition of violent  
03:37:44 20 felony or serious drug offense, the Commission copied language  
03:37:48 21 from the Armed Career Criminal Act, 18 U.S.C. 924(e). That  
03:37:53 22 act of copying has led my circuit and most others to hold that  
03:37:57 23 the guidelines must be understood in the same way as the  
03:38:01 24 Supreme Court has understood 924(e) and a similar definition  
03:38:05 25 in 18 U.S.C. § 16, and that definition has needlessly

03:38:10 1 complicated sentencing.

03:38:12 2           But there are two sources of complication. First,  
03:38:15 3 the Supreme Court has adopted what it calls a modified  
03:38:18 4 categorical approach under which a court looks at the  
03:38:21 5 statutory definition of a prior conviction in order to  
03:38:24 6 classify it as violent or a serious drug offense. When one  
03:38:30 7 state statute covers multiple offenses, which is fairly  
03:38:35 8 common, the court may examine the charging papers and plea  
03:38:39 9 colloquy but nothing else. Police reports are out.

03:38:42 10           Second, the guideline, like the statutes, has a  
03:38:45 11 residual category under which certain crimes that are  
03:38:48 12 dangerous in fact count as violent felonies even if the  
03:38:51 13 elements of that offense don't include an aggressive act. The  
03:38:55 14 Supreme Court's decision last year in *Begay* has made  
03:38:58 15 application of that residual category substantially more  
03:39:02 16 difficult. I won't get into the tedious details, though my  
03:39:06 17 circuit's opinion in the last couple of months in *Woods* and  
03:39:10 18 *Evans* explore them at great length.

03:39:12 19           But I can't think of any reason why all the  
03:39:15 20 complexities of the statutes, which set mandatory minimum  
03:39:19 21 sentences and dramatically raise maximum sentences, should  
03:39:23 22 apply to calculations under the guidelines which affect  
03:39:27 23 neither minimum nor maximum sentences.

03:39:31 24           My circuit said in *Woods* that a district judge, after  
03:39:34 25 applying 4B1.1, is free to use the discretion he enjoys under

03:39:39 1 *Booker* and its successors to raise the sentence to reflect the  
03:39:43 2 defendant's real conduct, even if it turns out that one of the  
03:39:47 3 prior offenses was not technically classified as a violent  
03:39:50 4 felony.

03:39:52 5           This means that the judge must first ignore the  
03:39:55 6 actual conduct underlying the prior convictions, classify the  
03:40:00 7 offense under an absolutely rococo system, and then come back,  
03:40:07 8 look at what's actually going on, and then make his real  
03:40:10 9 decision. It's a layer cake of decisions.

03:40:13 10           I say take Ockham's razor and slice off the  
03:40:17 11 complexity. If the judge is eventually at the discretionary  
03:40:20 12 stage authorized to look at the actual facts of the prior  
03:40:24 13 offense behavior, then the guidelines should allow that at the  
03:40:27 14 outset, rather than requiring this cascade of decisions. In  
03:40:30 15 other words, the guidelines should say that the modified  
03:40:33 16 categorical approach just doesn't apply to 4B1.1.

03:40:38 17           Second, the guidelines should get rid of the residual  
03:40:41 18 category of violent or dangerous offenses with all the  
03:40:45 19 difficulties that *Begay* has introduced. It can easily be  
03:40:50 20 replaced with a list of crimes that the Commission thinks as  
03:40:53 21 so dangerous that they justify a special recidivist  
03:40:56 22 enhancement, or it can be replaced with discretion, permitting  
03:41:00 23 the district judge to use the pre-*Begay* approach to  
03:41:04 24 determining a prior crime's dangerousness.

03:41:07 25           Now, I happen to prefer the list. A list is always



03:41:10 1 simpler, and it curtails dispute. And, of course, lists have  
03:41:13 2 loopholes and oversights, but so be it. After *Booker*, the  
03:41:17 3 judge remains free to impose a reasonable sentence even if the  
03:41:20 4 guidelines have lacunae.

03:41:23 5           Instead of trying to perfect -- this is my basic  
03:41:26 6 message: Instead of trying to perfect the guidelines to cover  
03:41:30 7 every contingency, the Commission should simplify the  
03:41:34 8 guidelines to get the main themes right and rely on sound  
03:41:37 9 discretion in the district courts to address unusual details.  
03:41:41 10 I could go on, but I think I've given enough illustrations to  
03:41:44 11 make my point.

03:41:46 12           After *Booker*, simplification is much to be desired.  
03:41:49 13 It yields gains for litigants, for judges, and for society at  
03:41:53 14 large.

03:41:54 15           Thank you.

03:41:55 16           ACTING CHAIR HINOJOSA: Thank you, Judge Easterbrook.  
03:41:58 17 What's the next?

03:42:01 18           Judge Sutton.

03:42:02 19           JUDGE SUTTON: Thank you, Judge Hinojosa, and thank  
03:42:06 20 you for hearing from the perspective of a non-chief judge. I  
03:42:10 21 appreciate that. Let me make two comments about Chief Judge  
03:42:13 22 Easterbrook's remarks and then make a remark of my own.

03:42:16 23           I'd like to echo the point about crimes of violence.  
03:42:20 24 This is a disaster. It's not your problem, at least -- well,  
03:42:24 25 there may be a solution, and I'm not sure I can blame the

03:42:27 1 court, the Supreme Court. It's very difficult figuring out  
03:42:30 2 how to do this.

03:42:31 3 The categorical approach makes some sense, right?  
03:42:34 4 They wanted to avoid district courts having to do mini-trials  
03:42:38 5 about every prior crime. That makes some sense.

03:42:40 6 On the other hand, what you get into is this problem  
03:42:43 7 of deciding as a matter of federal law what these different  
03:42:47 8 categories of state laws mean. It's ridiculously complicated.  
03:42:52 9 To give you one example, Michigan has a fleeing and eluding  
03:42:57 10 offense, and that one statute has generated four appeals in my  
03:43:01 11 circuit, the most recent leading to an effort by two of my  
03:43:05 12 colleagues to overrule the second of those cases. So we not  
03:43:09 13 only get four different cases trying to figure out what parts  
03:43:13 14 of fleeing and eluding under Michigan law are crimes of  
03:43:16 15 violence, we're now changing our minds after seven years  
03:43:19 16 because of *Begay* and *Chambers*.

03:43:22 17 Anything the Commission can do to bring a little  
03:43:25 18 sanity to this would be very helpful. The stakes are very  
03:43:28 19 high. I mean that's why people are appealing these things.  
03:43:30 20 The stakes are very high as to whether you fall under ACCA or  
03:43:35 21 under the guidelines. And my view, and I'm increasingly  
03:43:38 22 coming to this view, is that there are real notice, fairness,  
03:43:41 23 rule of lenity problems right now. I could really see a court  
03:43:46 24 saying enough is enough. This has gotten so confusing, it's  
03:43:49 25 getting so arbitrary as to whether we're calling, labeling

03:43:52 1 something after a fact a crime of violence. As far as we're  
03:43:55 2 concerned, if there's any ambiguity at all, it is not a crime  
03:43:59 3 of violence. I mean at this point, it's beginning to seem to  
03:44:01 4 me that's really the way to look at it.

03:44:03 5 But the broader point is there's got to be something,  
03:44:07 6 this Commission, Congress, someone's got to figure something  
03:44:10 7 out. Until I read Chief Judge Easterbrook's comments a few  
03:44:14 8 minutes ago, it hadn't even occurred to me that you could lead  
03:44:16 9 by example here.

03:44:18 10 You know, I will say I have a slightly negative  
03:44:20 11 reaction to that initially. I mean it would seem to be a lot  
03:44:23 12 better to solve the whole problem, see if you can convince  
03:44:26 13 Congress to either get rid of the categorical approach. I  
03:44:30 14 agree with Chief Judge Easterbrook. I'd much prefer do it  
03:44:33 15 like RICO, just name all the predicate offenses, do the best  
03:44:37 16 you can, don't have a residual category. If you haven't named  
03:44:40 17 them, there's no such thing. You can amend the rule later on.

03:44:44 18 I really think it would be a lot better if you could  
03:44:48 19 find a way to do this both through Congress and the  
03:44:49 20 Commission; but if you can't do that, I think the Commission  
03:44:51 21 should lead by example. I think it's a great idea.

03:44:54 22 I'm not sure I've totally processed Chief Judge  
03:44:57 23 Easterbrook's first point because I'm not sure I frankly  
03:45:00 24 understand the overlapping ranges point, but I guess I'd  
03:45:03 25 respond with a question, which was something I was wondering

03:45:06 1 about in thinking about my comments today. And the Second Circuit  
03:45:12 2 did this recently in a case, and my first reaction was that  
03:45:15 3 this was improper, and now I'm wondering about that.

03:45:18 4           What the Second Circuit did recently in a case with Judge  
03:45:21 5 Calabresi and Judge Parker -- I think Judge, now Justice,  
03:45:23 6 Sotomayor had been on the panel -- but the two of them agreed,  
03:45:26 7 so they went ahead and released it, and I think it was a money  
03:45:30 8 laundering case. Their basic idea was if you find yourself as  
03:45:34 9 a district court judge facing a very difficult factual  
03:45:37 10 assessment, quantity of drugs, even legal assessment, and in  
03:45:42 11 you, the district court judge's mind, it's not going to make a  
03:45:45 12 difference to the sentence. In other words, under calculation  
03:45:48 13 A, you get a bottom of the range being 120 months; calculation  
03:45:51 14 B, the bottom of the range is 170 months. You, the district  
03:45:54 15 court judge, you've looked at all these factors, you've  
03:45:56 16 thought about those possible ranges and to you it's just not  
03:45:59 17 going to be make a difference. You think it should be 100  
03:46:04 18 either way or you think it ought to be 130 either way.

19           I don't know whether that's a role the Commission  
03:46:06 20 has. It seems to me like a partial answer to what Chief Judge  
03:46:09 21 Easterbrook is saying, and maybe it's something the courts of  
03:46:12 22 appeal should be thinking about.

03:46:13 23           My first instinct to it, my first reaction to it when  
03:46:15 24 I read the Second Circuit opinion was to think how wrong it was,  
03:46:18 25 that that's a starting point. *Gall* says that's a starting

03:46:21 1 point, and how can you accurately consider all these factors,  
03:46:24 2 all 3553 factors, if you're not starting with a guideline  
03:46:29 3 recommendation?

03:46:30 4 But I'm with Chief Judge Easterbrook. I mean we're  
03:46:32 5 spending an awful lot of time, having a two-day hearing about  
03:46:35 6 quantity, where the judge is going to decide to look and act,  
03:46:41 7 what's really going on here, makes some sense to me. So I'm  
03:46:44 8 wondering if that's not a partial answer to the problem.

03:46:46 9 Now to my comments, which certainly have a  
03:46:50 10 provocative title, and I'm looking for guidance from you  
03:46:51 11 all -- by the way, nothing I say here today will ever affect a  
03:46:54 12 ruling. These are just thoughts.

03:46:56 13 Is appellate review of criminal sentences worth it?  
03:47:02 14 I'm really starting to wonder. There's one sense in which  
03:47:06 15 there's clearly still a yes answer. That's in what we've come  
03:47:10 16 to call procedural reasonableness, and the first and most  
03:47:14 17 important part of that is figuring out whether the sentence  
03:47:17 18 has been calculated correctly and figuring out most  
03:47:20 19 importantly from the court of appeals perspective whether the  
03:47:23 20 guidelines have been interpreted correctly. So still there's  
03:47:25 21 obviously a very important role there to be played. That was  
03:47:29 22 true pre-*Booker*. I think it's still true today.

03:47:32 23 Much of the rest of procedural reasonableness review  
03:47:35 24 has become either irrelevant or academic in my view. I mean  
03:47:38 25 the notion that there's a district court judge out there that

03:47:41 1 doesn't know he or she has discretion, that's no longer  
03:47:44 2 something to talk about. This whole mentioning each of the  
03:47:48 3 factors has gotten a little silly, but anyway they've learned  
03:47:51 4 how to do it, so we don't worry about that. We probably tend  
03:47:54 5 to fight the most these days about whether the district court  
03:47:57 6 judge mentioned every single one of the -- in other words,  
03:48:02 7 responded to every single one of the arguments usually for a  
03:48:05 8 downward variance made by the defendant.

03:48:08 9 I think the court of appeals are providing a fairly  
03:48:12 10 important check just to make sure as a matter of process this  
03:48:15 11 is a good idea. It seems to ignore what's really going on.  
03:48:19 12 I've sat by designation once and sentenced four people, and I  
03:48:22 13 can tell you I did read the 3553(a) factors, I did know what  
03:48:27 14 they were, I did mention them. It wasn't what I was doing.  
03:48:31 15 You know, what I was doing was I was looking at that range you  
03:48:34 16 all suggested, and I was asking myself is this a real  
03:48:37 17 candidate for rehabilitation or not?

03:48:40 18 But I was doing things that were sizing the person  
03:48:43 19 up. I didn't have a lot of experience, but most district  
03:48:45 20 court judges that do, that's, of course, what's really going  
03:48:48 21 on, and trying to reduce it to this formula and magic words I  
03:48:52 22 don't have a lot of tolerance for. But I will say on  
03:48:57 23 procedural reasonableness, there is this important function  
03:49:00 24 we're still providing, which is whether the guidelines were  
03:49:03 25 interpreted correctly and, in most cases, whether the

03:49:05 1 calculation was accurate.

03:49:06 2           The second point, substantive reasonableness review,  
03:49:09 3 is very complicated, and I'm quite concerned. As you all  
03:49:14 4 know, the whole debate here is between individualized  
03:49:16 5 sentencing on the one hand and avoiding needless disparities,  
03:49:19 6 having some consistency on the other. It's a very difficult  
03:49:23 7 needle to thread.

03:49:24 8           *Booker* arguably does some good things as a matter of  
03:49:27 9 policy in terms of giving district court judges a little more  
03:49:30 10 discretion. I must say I'm being close to a loss, however, in  
03:49:35 11 what I as a court of appeals judge should be doing when it  
03:49:38 12 comes to reviewing sentences for substantive reasonableness,  
03:49:41 13 which is another way of saying is the sentence too low or is  
03:49:44 14 it too high?

03:49:44 15           There are three types of sentences as far as I'm  
03:49:47 16 concerned: There's the within-guideline sentence, there's the  
03:49:49 17 slight variance, and there's the significant variance. The  
03:49:52 18 within-guideline sentence, I just don't understand how I sit  
03:49:55 19 in a place where I can second-guess the judgment of two bodies  
03:49:59 20 who know a little -- a lot more about this than I do.

03:50:02 21           If the Commission has agreed that this is the right  
03:50:04 22 range and the district court judge sentences within that  
03:50:07 23 range, you've got two people who have spent a lot of time with  
03:50:10 24 this, one in a macro, one very micro, looking at this  
03:50:14 25 individual. They're saying this range is appropriate. I'm

03:50:16 1 hard pressed to see a role for substantive reasonableness  
03:50:19 2 review in that setting.

03:50:20 3           So then you ask yourself about the slight variances,  
03:50:24 4 slightly up, slightly down. There there's not too much to  
03:50:27 5 worry about when it comes to disparities in consistency  
03:50:30 6 because you're not that far off the ranges. So I'm kind of  
03:50:32 7 back to where I was on the first point. It's essentially like  
03:50:36 8 the within-guideline sentence. It's off by maybe a year, four  
03:50:41 9 months, it depends on what the range happened to be.

03:50:44 10           I'm just very hard pressed to see how a court of  
03:50:48 11 appeals can say no, no, no, you had to stick within the range,  
03:50:50 12 or you somehow had to go further down. That's difficult  
03:50:53 13 because the judgment of the Commission and the district court  
03:50:55 14 is so close at that point, and our biggest concern, the court  
03:50:59 15 of appeals' biggest concern, outside making sure the  
03:51:00 16 guidelines are interpreted correctly, is one of disparities,  
03:51:03 17 and that's not implicated by that problem.

03:51:06 18           So that leaves you with what I think is the biggest  
03:51:08 19 problem for disparities, 3553(a)(6), one of the key missions  
03:51:14 20 of the guidelines, and so now you have a -- well, a child porn  
03:51:19 21 case is a pretty good example -- 120-month recommendation,  
03:51:24 22 70-month recommendation bottom of the guidelines, and you get  
03:51:26 23 a one-day sentence. You know, many judges are going to have,  
03:51:31 24 court of appeals judges are going to have visceral reactions,  
03:51:35 25 wow, that's really disrespecting the Commission's work, that's



03:51:39 1 really disrespecting the guidelines. I'll say that's usually  
03:51:42 2 my first reaction when I review a sentence like that.

03:51:44 3           Then I say, okay, now let's talk about writing the  
03:51:47 4 opinion. How am I going to do this? I know as a matter of  
03:51:51 5 logic that if the guidelines are advisory, there is such a  
03:51:54 6 thing as one-day sentences that are permissible that are  
03:51:57 7 reasonable. That has to be true.

03:52:00 8           So there's this range between one day and 70 months,  
03:52:05 9 100 months, whatever it is, and I'm now supposed to write an  
03:52:08 10 opinion that explains why this is not one of the one-day  
03:52:12 11 cases, and how do I do that? How do I -- what lines do I  
03:52:16 12 draw? And even if I'm clever enough to write it in a way  
03:52:19 13 that's satisfactory to me that makes me feel like it's  
03:52:22 14 meaningful, I'm drawing meaningful distinctions, I'm hard  
03:52:26 15 pressed to see why that precedent is still nothing more than a  
03:52:30 16 take a good for one train and one train only, when the next  
03:52:34 17 court of appeals panel faces another one-day sentence and even  
03:52:38 18 in a child porn case or the next district court judge sees  
03:52:42 19 that. We know every individual's unique. The facts are going  
03:52:45 20 to be different. I suppose if it's the exact same defendant,  
03:52:48 21 but then, of course, it would be completely inexplicable that  
03:52:52 22 we'd do another one-day sentence. But the point is it's going  
03:52:55 23 to be very easy to distinguish whatever line I try to draw.

03:52:59 24           So I'm quite concerned that appellate judges really  
03:53:04 25 don't have the tools to perform substantive reasonableness

03:53:08 1 review in the one area where it seems to matter, significant  
03:53:13 2 variances upward or downward. I don't know whether it's  
03:53:17 3 something the Commission can help us with, whether it's  
03:53:21 4 gathering information. I suppose the more one knows that  
03:53:25 5 there have been lots of -- the statistics show that there are  
03:53:29 6 lots of substantial downward variances, let's say, in child  
03:53:32 7 porn crimes, I suppose that would give appellate judges more  
03:53:35 8 comfort in continuing to affirm them or primarily affirming  
03:53:39 9 them.

03:53:39 10 But it's something I've struggled with quite a bit in  
03:53:44 11 quite a few opinions, and I haven't come up with much of an  
03:53:47 12 answer. We're essentially engaged in abuse-of-discretion  
03:53:50 13 review. We can't treat it as a math problem, *Gall* reminds us,  
03:53:54 14 and even if we do engage in semi-proportionality review, it's  
03:54:00 15 very difficult to draw distinctions between and among  
03:54:04 16 defendants, particularly when we're not the ones who  
03:54:06 17 eye-balled the defendant. We're not the ones who were at the  
03:54:09 18 hearing. We're not the ones who heard the allocution. We're  
03:54:12 19 not the ones that heard any other evidence.

03:54:14 20 So I wish I had -- I hate to come with just a problem  
03:54:18 21 without a recommendation, but maybe there's something the  
03:54:21 22 Commission can provide some tools for that. But I am worried  
03:54:23 23 about it for the long term, that there's going to be a real  
03:54:28 24 tendency here to return to these disparities problems.

03:54:31 25 The district court judges can't do this because they

03:54:35 1 don't see a whole circuit, much less a whole country. We're  
03:54:38 2 in a position to do it because we see a whole circuit. We can  
03:54:41 3 try to preserve consistency within the circuit, but I'm at  
03:54:45 4 something of a loss in drawing meaningful lines between and  
03:54:48 5 among defendants.

03:54:49 6 Thank you.

03:54:50 7 ACTING CHAIR HINOJOSA: Thank you, Judge Sutton, and  
03:54:52 8 I take it you're next, Chief Judge Boggs?

03:54:56 9 JUDGE BOGGS: Well, I slightly arranged this,  
03:54:57 10 but partly it's like a composition. My colleagues have  
03:55:02 11 provided the lyrics with some very good specifics. I'm just  
03:55:06 12 going to provide some overall fugue or musical theme because  
03:55:12 13 when I was invited -- since, I suppose, as appellate judge you  
03:55:17 14 just don't do this every day, you're seeing the guidelines at  
03:55:22 15 a level of review -- what I thought I would first just give  
03:55:27 16 you a couple of observations that are, as the usual criticism  
03:55:34 17 of circuit judges, it's while we're outside the battle and  
03:55:37 18 then just come down and shoot the wounded.

03:55:40 19 The first is that an enormous amount of the struggle  
03:55:46 20 over the adequacy and the direction of the guidelines and  
03:55:51 21 guidelines versus discretion to me is driven by the level at  
03:55:56 22 which the guidelines were set. There are lots of reasons they  
03:56:01 23 were set at that level, but if you took the guidelines and  
03:56:04 24 divided all of the numbers by three, I am quite confident that  
03:56:09 25 the supporters of the guidelines and the critics of the

03:56:11 1 guidelines would change uniforms almost immediately. The  
03:56:16 2 people who were criticizing the guidelines root and branch  
03:56:20 3 would think the guidelines were great, and the people who were  
03:56:23 4 trying to defend the guidelines against downward departures  
03:56:26 5 would want all sorts of upward departures. So that's simply  
03:56:32 6 an observation that I have about where the allegedly  
03:56:36 7 intellectual struggle over guidelines is.

03:56:38 8           The second thing I would say is that there's a very  
03:56:44 9 interesting dynamic about being a federal appellate judge in  
03:56:48 10 sentencing, and I say this as one who came on the federal  
03:56:51 11 bench without federal criminal experience except a little bit  
03:56:56 12 through the Solicitor General's Office just before the  
03:57:00 13 guidelines came in.

03:57:02 14           And so I was sitting there, fat and happy with the  
03:57:05 15 notion that we couldn't review anything. And as the  
03:57:09 16 guidelines came in, frankly, there was a lot of talk, table  
03:57:14 17 talk from the older hands that, yes, these guidelines are  
03:57:17 18 going to come in and, you know, we really don't like them  
03:57:21 19 much, but, you know, whatever the district judges do is going  
03:57:23 20 to be all right.

03:57:25 21           And then it was interesting to observe as the  
03:57:28 22 opinions began to come down, there's something about the  
03:57:32 23 dynamic of appellate judging that kept that from happening;  
03:57:38 24 that when there is a rule that we don't review, we can hold  
03:57:43 25 that line, but when there is a reviewing process to be done,

03:57:50 1 appellate judges will tend to say, well, sometimes it's yes  
03:57:53 2 and sometimes it's no, which means you are going to be digging  
03:57:58 3 into the meat of it.

03:58:00 4           And, of course, that is what happened, that even the  
03:58:03 5 judges, the old hands who confidently said, you know, we're  
03:58:07 6 going to let the district judges do whatever they want, found  
03:58:10 7 that they had to dig in and make decisions which made that  
03:58:16 8 review quite stringent.

03:58:18 9           Well, in a sense, after *Booker*, we're at something of  
03:58:23 10 the same stage. We're starting over again with something of a  
03:58:27 11 mandate for leniency, and I think Judge Sutton has said some  
03:58:33 12 very wise things on that, and yet I think you are seeing, it  
03:58:37 13 may be a smaller number, but judges are trying to  
03:58:41 14 conscientiously apply this reasonableness standard that the  
03:58:45 15 Supreme Court has given us. And when you conscientiously  
03:58:54 16 apply a standard, sometimes you're going to say yes, sometimes  
03:58:54 17 you're going to say no.

03:58:54 18           So, again, we, almost by hydraulic pressure, end up  
03:59:00 19 meddling perhaps more than we think we're going to. And from  
03:59:08 20 that, I segue to the task that we perform day-to-day, and I  
03:59:18 21 take Judge Sutton's example as a case that I have before me  
03:59:18 22 right now. We have a child pornography defendant with a  
03:59:21 23 significant sentence, a few years, who was given a one-day  
03:59:25 24 sentence, and we have two precedential cases, not binding, but  
03:59:35 25 I think Judge Sutton is right, it wouldn't make much

03:59:50 1 difference if it were "binding." And in one of them, a panel  
03:59:50 2 upheld the one-day sentence and in the other one, the panel  
03:59:50 3 didn't.

03:59:50 4           So our panel is dutifully doing our appellate job and  
03:59:50 5 thrashing through and trying to see what the factors on the  
04:00:02 6 one hand, the factors on the other were. And as I say at the  
04:00:02 7 appellate level, the simple standard of reasonableness I don't  
04:00:23 8 think does the job. It doesn't give us guidance. We'll do  
04:00:23 9 our best with it, but I think that to me, the crux of its lack  
04:00:23 10 of guidance is that it doesn't address the "unwarranted  
04:00:23 11 disparities" item, that that phrase was in many ways the  
04:00:27 12 driving force for starting the guidelines. And everyone still  
04:00:32 13 says they're against unwarranted disparities, but that must  
04:00:36 14 mean that they must think warranted disparities are all right.  
04:00:41 15 And in a sense, our task of trying to sort the unwarranted  
04:00:48 16 disparities from the warranted disparities is one that to this  
04:00:53 17 stage, the Supreme Court nor the guidelines nor the Congress  
04:00:58 18 have given us an enormous degree of guidance.

04:01:01 19           So, as I say, I don't have recommendations for you.  
04:01:07 20 I guess I do think that if you try to go back to Congress for  
04:01:12 21 significant changes every time you start over, you lose a vast  
04:01:17 22 amount. So I'm not recommending that, but I'm just throwing  
04:01:22 23 out these as considerations to think about.

04:01:25 24           The final thing I would say, and perhaps this  
04:01:28 25 reflects the fact that at one point in my misspent youth I had

04:01:33 1 some mathematical background, the phrase in 3553 about a  
04:01:38 2 sentence sufficient but not greater than necessary sentence.  
04:01:43 3 This is sometimes referred to, I don't know who first coined  
04:01:46 4 it, as the rule of parsimony, but if you apply mathematical or  
04:01:51 5 logical analysis, that phrase implies that there is only one  
04:01:56 6 correct sentence --

04:02:00 7 CHIEF JUDGE EASTERBROOK: Uh-huh.

04:02:02 8 JUDGE BOGGS: -- because if there is a sentence  
04:02:03 9 and the next one is higher, either the first one isn't  
04:02:06 10 sufficient, or the second one is greater than necessary. I  
04:02:11 11 don't know if some commentary that the guidelines or the  
04:02:15 12 statute doesn't mean what it says because it seems to me that  
04:02:18 13 that statutory phrase is in direct contradiction to the notion  
04:02:26 14 of a wide range of permissible sentences, and this has been  
04:02:30 15 argued before our court. We have never bought it, but  
04:02:35 16 nevertheless it has a great deal of logical force. So I put  
04:02:40 17 that factor out as well.

04:02:42 18 Thank you for the opportunity to appear.

04:02:44 19 ACTING CHAIR HINOJOSA: Thank you, Judge Boggs.

04:02:47 20 QUESTION AND ANSWER SESSION

04:02:47 21 VICE CHAIR SESSIONS: Judge Sutton, it's great to see  
04:02:50 22 you again, and I appreciate the fact that you don't have any  
04:02:53 23 answers, but I'm going to ask you a question for which I hope  
04:02:55 24 you have the answer.

04:02:57 25 JUDGE SUTTON: I think you taught me the guidelines.

04:02:59 1 Didn't you teach me the guidelines?

04:03:01 2 VICE CHAIR SESSIONS: I did, absolutely, yes.

04:03:03 3 You talk about the Second Circuit case.

04:03:06 4 JUDGE SUTTON: Yes.

04:03:07 5 VICE CHAIR SESSIONS: And the Second Circuit case  
04:03:09 6 generally from the perspective of district court judges in the  
04:03:13 7 Second Circuit suggests that, well, if there's any kind of  
04:03:15 8 confusion regard to applying the guidelines, well, you just  
04:03:18 9 forget it and you just go to 3553(a) factors. You short  
04:03:25 10 circuit the guidelines.

04:03:26 11 And, of course, what that means from the perspective  
04:03:29 12 of the Sentencing Commission, frankly, is that that's a  
04:03:32 13 slippery slope.

04:03:34 14 So when does it happen then that every judge just  
04:03:37 15 says, well, even though *Booker* said you're supposed to go  
04:03:41 16 through the guidelines and make a literal application,  
04:03:45 17 whenever we do that, there's going to be procedural review by  
04:03:48 18 the court of appeals, why don't we just forget that. And as a  
04:03:53 19 result, we then go to 3553(a) factors, and then we're home  
04:03:56 20 free.

04:03:58 21 And I guess the ultimate question is, and Judge  
04:04:01 22 Easterbrook, I think, raised the question about what we should  
04:04:04 23 do from the guidelines perspective, from our Commission's  
04:04:08 24 perspective to change the guidelines in such a way as to make  
04:04:11 25 them sufficiently credible that everybody would go to the



04:04:15 1 guidelines and everybody would go through the process, and we  
04:04:19 2 wouldn't have that short circuiting of, you know, the  
04:04:24 3 procedural steps that the Supreme Court requires in *Booker*.

04:04:28 4 He suggested, I think, I read what I think you're  
04:04:32 5 saying is that we simplify, broaden and simplify the  
04:04:36 6 guidelines in that kind of way. And I'm interested to know if  
04:04:38 7 you think that that's something we should do.

04:04:41 8 JUDGE SUTTON: I couldn't agree more with it.

04:04:44 9 The other thing it does, just to go back to the  
04:04:46 10 problem with that approach, is it disrespects the common law  
04:04:50 11 approach to how we clarify things. I mean what you should  
04:04:54 12 want to do, when it's not clear how the guidelines work in a  
04:04:57 13 given case, is have someone figure it out, if need be have it  
04:05:02 14 appealed, have the answer provided, and then the next district  
04:05:05 15 court judge or district court judges have some guidance.

04:05:08 16 The reason I have some sympathy with Chief Judge  
04:05:11 17 Easterbrook's point is there are so many places for  
04:05:14 18 refinement, it just can go on and on and on, and that's where  
04:05:17 19 simplicity seems to be the answer.

04:05:19 20 I love the idea of broader ranges. You know, the  
04:05:22 21 problem I think with most government initiatives is refinement  
04:05:27 22 rarely breeds simplicity. I mean the old joke at the U.S.  
04:05:32 23 Supreme Court was they'd take a case to resolve a circuit  
04:05:34 24 split, and they'd create three splits. And I think there's a  
04:05:38 25 real risk when you try to refine some of these things.

04:05:41 1           But I think if you're going the other direction of  
04:05:44 2 asking the district court judges to do less so that there's  
04:05:47 3 not a complicated task for them to do, you're saying instead  
04:05:50 4 of three tasks, perform one. Do this one task, get this  
04:05:54 5 general reaction to what happened, I think -- if I hear Chief  
04:05:58 6 Judge Easterbrook correctly, I think that's the direction he's  
04:06:01 7 going, and that seems to me to make a whole lot more sense.  
04:06:04 8 And it makes particular sense after *Booker*, and the whole idea  
04:06:07 9 here was to let the district court judges be judges. Size up  
04:06:10 10 what's going on, size up the individual, size up the crime,  
04:06:13 11 the consequences of the crime. But you're right, you should  
04:06:16 12 want district court judges to want to perform the guidelines  
04:06:19 13 calculation.

04:06:19 14           I will tell you even when you have a very difficult  
04:06:23 15 guidelines calculation or problem, quantity issue, I think  
04:06:26 16 most district court judges still want to do it because I think  
04:06:29 17 they like knowing what the Commission thinks. I think there's  
04:06:34 18 still a very strong instinct to start there.

04:06:37 19           ACTING CHAIR HINOJOSA: I have a follow-up question  
04:06:40 20 to that.

04:06:41 21           To me, the Second Circuit opinion that you refer to,  
04:06:45 22 what's the difference between saying that about one of the  
04:06:48 23 seven factors and if a district court judge says, well, I find  
04:06:53 24 these 3553(a)(2) factors too complex in this particular case,  
04:06:57 25 so I'm just not going to figure them out and I'll give a rough

04:07:01 1 estimate, but I'm just really not going to go ahead and go  
04:07:04 2 through the whole thing.

04:07:07 3           Would the outcome have to be the same? It's just one  
04:07:09 4 of the seven factors, like consideration of the guidelines, or  
04:07:13 5 is there a different standard because they're the guidelines,  
04:07:17 6 as opposed to one of the other seven factors and somebody  
04:07:20 7 saying, well, I find that too complex to apply to this  
04:07:23 8 particular case. I'm just not going to do it. I'll just  
04:07:27 9 leave that one out.

04:07:28 10           JUDGE SUTTON: I think it's a problem. I think if I  
04:07:31 11 were a district court judge doing that, I'd want to be sure  
04:07:34 12 that the court of appeals was going to have the same reaction  
04:07:37 13 to the complexity of the problem that the district court judge  
04:07:40 14 did. I think the court of appeals panel that saw the problem  
04:07:43 15 said, are you kidding me? That doesn't give me much  
04:07:47 16 discretion.

04:07:47 17           ACTING CHAIR HINOJOSA: I guess that's my point in  
04:07:49 18 the form of a question, frankly. Shouldn't the reaction be  
04:07:51 19 the same to when you say I find the guidelines too complex?  
04:07:54 20 It is one of the seven factors, and if you look at the  
04:07:57 21 statutory scheme, it was an important factor, just like all  
04:08:01 22 the other six would be as far as being important.

04:08:05 23           JUDGE SUTTON: I think you're at the bottom of the  
04:08:07 24 slope. I would go a little higher up on the slope, and I  
04:08:10 25 would say the sand on the slope is, you know, if there are six

04:08:13 1 things that one needs to do to figure out what the guideline  
04:08:16 2 range is and the district court judge has done four or five of  
04:08:20 3 them, there's one left and option A creates one range, option  
04:08:25 4 B creates another range, and it's either very complicated  
04:08:28 5 figuring out how to do the guidelines or it's close to  
04:08:31 6 unknowable as a matter of fact as to what the right answer  
04:08:34 7 should be, I'm simply making the point, as I think the Second  
04:08:39 8 Circuit is, that I'm not sure it's a disastrous thing for a  
04:08:42 9 district court judge to say at that point, it doesn't make a  
04:08:45 10 difference to me if that's true.

04:08:46 11           Now, if it does make a difference to the district  
04:08:49 12 court judge what the range is, the district court judge has to  
04:08:51 13 make a call. But that's up at the top of the slope. You took  
04:08:56 14 me all the way to the bottom, and we're still sledding, where  
04:09:00 15 they don't do anything. I don't think too many courts of  
04:09:02 16 appeals judges will be amenable to that, but I haven't seen  
04:09:07 17 that case.

04:09:09 18           I want to hear what Chief Judge Easterbrook says,  
04:09:11 19 though, about this.

04:09:13 20           CHIEF JUDGE EASTERBROOK: About which aspect?

04:09:17 21           To the extent you're asking can a district court just  
04:09:25 22 say, well, Congress told us to consider seven things. I  
04:09:29 23 disagree with Congress. I think we should consider six  
04:09:33 24 things, it's just a one-sentence reversal. It's not a  
04:09:37 25 complicated problem at all.

04:09:38 1           To the extent the question is Congress told us to  
04:09:42 2 consider seven things. I'm doing seven things, but one of  
04:09:46 3 them, one of those seven things, is terminally indeterminate.  
04:09:51 4 All right? I've given thought to number six or number seven.  
04:09:56 5 It just doesn't weigh one way or the other, so it doesn't have  
04:10:00 6 any consequence in this case.

04:10:02 7           That's perfectly normal. And so depending on how one  
04:10:06 8 understands the question you framed, it's either a  
04:10:10 9 one-sentence reversible error or the kind of thing district  
04:10:13 10 judges do all the time; and it's, therefore, hard to have a  
04:10:16 11 general reaction about whether it's good or bad when one needs  
04:10:19 12 to be a little more concrete, I think.

04:10:22 13           ACTING CHAIR HINOJOSA: Well, I guess my point is  
04:10:23 14 it's not a serious question, but my point is even though it  
04:10:27 15 may be hard to determine the guideline, you'll be able to do  
04:10:30 16 it. We certainly did it under the mandatory system, so it  
04:10:33 17 would be no different under the advisory system.

04:10:36 18           Shortcutting it and saying, well, you don't have to  
04:10:38 19 spend your time doing it is another issue, but as opposed to  
04:10:43 20 saying it's a difficult question, well, in some certain cases  
04:10:48 21 it may be a difficult question, but it can be done.

04:10:51 22           JUDGE BOGGS: Although isn't part of it how,  
04:10:53 23 let's say, confident or honest you are in what you are doing?  
04:10:57 24 It seems to me that the logical import, and I'm not familiar  
04:11:01 25 with the Second Circuit opinion by name, but the logical import,

04:11:06 1 if I'm getting it right, would be the following:

04:11:08 2 Under the guidelines, I am required to say A or B.

04:11:13 3 If I said A, the advice would be 100 months. I look at that

04:11:18 4 advice, and I think I'm going to give him 80. If I said B, it

04:11:23 5 would be 60 months, and I've looked at that advice, and I'm

04:11:27 6 still going to give him 80.

04:11:29 7 If you go through that as logical matter, then what's

04:11:33 8 wrong with it? If you have affirmatively said I've looked at

04:11:37 9 that advice, and like, you know, I have two children, and they

04:11:40 10 each give me advice and after I've heard them both, I've said

04:11:44 11 whichever one of you I believed, I would still do what I want.

04:11:48 12 It's if you short circuit that process and kind of wave your

04:11:53 13 hands and say I'm not even going to tell you what I'm thinking

04:11:56 14 that it's a problem. But if you did it as explicitly as I

04:11:59 15 just said, I don't see where the problem is under *Booker*.

04:12:02 16 CHIEF JUDGE EASTERBROOK: Of course, that's what I

04:12:03 17 was talking about to begin with, and that's why I referred to

04:12:07 18 Justice Breyer. When Judge Breyer, as he then was, wrote his

04:12:12 19 article describing the genesis of the first version of the

04:12:17 20 guidelines, the 1987 version, he said one of the major

04:12:22 21 objections to the 1987 version, the original draft, had been

04:12:27 22 that it required unnecessary detail, to which Judge Breyer

04:12:32 23 said it doesn't require unnecessary detail because the

04:12:35 24 Commission has been very careful about providing reasonably

04:12:39 25 wide and overlapping ranges so that judges can do exactly what

04:12:44 1 Judge Boggs just suggested. To say if I do, if I resolve X  
04:12:50 2 one way, the Sentencing Commission is recommending this range.  
04:12:53 3 If I resolve X the other way, it's recommending the other  
04:12:56 4 range. There's an area of overlap in these two ranges. I'm  
04:13:00 5 going to give a sentence in the overlap, and it, therefore,  
04:13:03 6 doesn't matter which way I resolve it.

04:13:05 7 That was, according to Judge Breyer, an integral part  
04:13:08 8 of the structure of the original guidelines, and I still think  
04:13:12 9 Judge Breyer was right. My recommendation is that, given  
04:13:18 10 *Booker*, the width of the sentencing ranges and those  
04:13:22 11 circumstances in which there is an overlap should be  
04:13:25 12 increased. Judge Breyer was right, and *Booker* makes him more  
04:13:28 13 so. That was the gist of the first half of my presentation.

04:13:34 14 VICE CHAIR CASTILLO: I appreciate the honesty that  
04:13:36 15 all of you have given us in testifying, but I want to pick up,  
04:13:42 16 Judge Easterbrook, where you left off, which is Judge Breyer  
04:13:45 17 who, after all, got us into all of this, the Advisory  
04:13:50 18 Sentencing Guidelines, and then what I look at what we're all  
04:13:53 19 trying to do in honest fashion is apply Supreme Court  
04:13:57 20 precedent.

04:13:57 21 And Judge Breyer says in *Rita* that there's a  
04:14:01 22 three-step process to sentencing of first calculating the  
04:14:05 23 guidelines, which, of course, we already have figured out that  
04:14:08 24 Judge Calabresi in the Second Circuit believes you can just duck  
04:14:12 25 that.

04:14:14 1 CHIEF JUDGE EASTERBROOK: Yeah, well --

04:14:16 2 VICE CHAIR CASTILLO: He second of all says in *Rita*  
04:14:18 3 that you should figure out if there are any valid departures  
04:14:21 4 under the guidelines, and we know, Judge Easterbrook, that the  
04:14:25 5 Seventh Circuit has said that departures are obsolete. So I think  
04:14:30 6 there is sort of a disservice of *Rita* right there. And the  
04:14:34 7 other circuits, they're all enforcing departures. In fact,  
04:14:38 8 the Third Circuit has aggressively remanded cases back to the  
04:14:42 9 district court for failure to rule on departures.

04:14:46 10 So I'm looking at it as a Sentencing Commissioner,  
04:14:52 11 and I'm wondering what do we do about this disparity that's  
04:14:55 12 arising from different circuits taking different positions?

04:15:00 13 And the last one I'll bring up, and then I'll give  
04:15:02 14 you the last word, Frank, is just what manual to apply. You  
04:15:06 15 say we should be revising the manual. The Seventh Circuit says  
04:15:11 16 there's no *ex post facto* problem with applying a newer version  
04:15:17 17 of the guidelines even though the crime might have been  
04:15:19 18 committed before that version was even written. The First  
04:15:23 19 Circuit says otherwise.

04:15:24 20 So what do we do with those circuits' [inaudible]?

04:15:27 21 CHIEF JUDGE EASTERBROOK: I don't think you do  
04:15:28 22 anything with them. It's not your task as a Commission to  
04:15:31 23 worry about what the courts are going to do with them. I  
04:15:35 24 think it's your task as a Commission to come up with the best  
04:15:38 25 set of guidelines you can in light of *Booker*.



04:15:41 1           *Rita* and *Gall* and the rest of them say that the  
04:15:45 2 judge, district judge, has to start by applying the  
04:15:48 3 guidelines, but they don't say that the guidelines have to be  
04:15:50 4 as complex as they now are; that is, you can make the task  
04:15:56 5 easier by simplifying the guidelines in the way I suggested,  
04:16:01 6 by having a list instead of the residual category for the  
04:16:05 7 career offender enhancement.

04:16:08 8           There are all sorts of simplifications. They aren't  
04:16:11 9 inconsistent with *Rita* and *Gall*. They take advantage of the  
04:16:15 10 fact that the justices say start with the guidelines.

04:16:17 11           Now, on the departures question, I don't know what  
04:16:21 12 the Third Circuit is saying. Have they read the fact that the  
04:16:23 13 Supreme Court itself said last spring that there's no such  
04:16:27 14 thing as departures? It isn't just the Seventh Circuit that said  
04:16:31 15 that. The Supreme Court had the question what to do with the  
04:16:33 16 part of Rule 32(d) which says that district judges have to  
04:16:38 17 notify defendants about potential departures in advance of the  
04:16:42 18 sentencing hearing. The Supreme Court said no notice is now  
04:16:45 19 required because there are no more departures, period.  
04:16:50 20 They're gone.

04:16:52 21           If the Third Circuit hasn't read that opinion of the  
04:16:54 22 Supreme Court, I suggest giving them a copy.

04:16:57 23           VICE CHAIR CASTILLO: Well, the only problem there,  
04:16:58 24 and we could debate this, is it seems to me the Supreme Court  
04:17:02 25 itself has misused language in terms of categorizing what is a

04:17:08 1 departure versus what is a variance, and just with that --

04:17:13 2 CHIEF JUDGE EASTERBROOK: Yeah.

04:17:14 3 VICE CHAIR CASTILLO: -- misuse of terminology, it is  
04:17:17 4 confusing people, but when you say --

04:17:18 5 CHIEF JUDGE EASTERBROOK: They used to, but I think  
04:17:20 6 they cleared it up last spring in that Rule 32(d) case.

04:17:23 7 VICE CHAIR CASTILLO: You think they did.

04:17:26 8 CHIEF JUDGE EASTERBROOK: Yes.

9 JUDGE BOGGS: I think they were clear.

04:17:27 10 CHIEF JUDGE EASTERBROOK: I think it's clear. We'll  
04:17:28 11 see.

12 VICE CHAIR CASTILLO: Okay.

04:17:28 13 CHIEF JUDGE EASTERBROOK: We'll see. But on your  
04:17:29 14 final --

04:17:31 15 JUDGE SUTTON: Speaking for the Sixth Circuit, I didn't  
04:17:33 16 read it quite that way.

04:17:36 17 JUDGE BOGGS: We have a two-to-one majority.

04:17:38 18 VICE CHAIR CASTILLO: I'd like to know what the Sixth  
04:17:40 19 Circuit judges think about departures. Should judges rule on  
04:17:44 20 departures, or should we just throw them to the wayside?

04:17:47 21 JUDGE BOGGS: Well, I would say, and, you know,  
04:17:50 22 this is an advisory opinion in a sense that it hasn't come  
04:17:52 23 before me in a formal case, but certainly in my thinking and  
04:17:57 24 in my chambers, I -- first thing I guess I almost do when the  
04:18:02 25 clerks come in is teach them the difference, I thought,

04:18:04 1 between departures and variances.

04:18:07 2 Frank may have said that that's now unnecessary, but

04:18:11 3 that I always thought departures were part of the guideline

04:18:16 4 system that had to be looked at on their own merits because

04:18:21 5 they had to be justified under the guidelines. And

04:18:25 6 then there's an overlap because you might easily say

04:18:32 7 Mr. Attorney on either side, you're asking for a departure.

04:18:35 8 You know, can't I do the same thing with a variance, and the

04:18:39 9 lawyer then might give you a different answer, but as a

04:18:42 10 general matter, I have maintained that distinction. As I say,

04:18:46 11 I haven't had it come up in a case.

04:18:48 12 Let me throw one thing in about the overlapping

04:18:50 13 ranges because there's a Sixth Circuit case called Barnett from

04:18:55 14 eight or ten years ago, where the issue was, and I just

04:18:59 15 thought of it this minute so I can't give you every fact, but

04:19:03 16 was where there was a range that the judge had given a

04:19:08 17 sentence in the middle of the range or not at the end of the

04:19:12 18 range and there was some change, was it all right?

04:19:19 19 And over my dissent, the court there held that even

04:19:24 20 if the judge wasn't bound by the range, if the range should

04:19:28 21 have been lower or higher, we had to remand; that is, I argued

04:19:34 22 if the judge wasn't up against either end of it, presumably

04:19:38 23 the judge gave a sentence because that was the sentence he

04:19:41 24 wanted. And a majority of my colleagues said, no, no. You're

04:19:47 25 dynamically affected by where that range is.

04:19:51 1           So while I actually agree with Frank about widening  
04:19:54 2 the ranges, increasing the overlaps, I would at least look at  
04:19:59 3 whether our circuit or other circuits were going to say that  
04:20:02 4 still doesn't solve the problem.

04:20:05 5           ACTING CHAIR HINOJOSA: A point --

04:20:07 6           CHIEF JUDGE EASTERBROOK: Could I come back to Judge  
04:20:09 7 Castillo's final question about *ex post facto*?

04:20:11 8           It's another thing I don't think you can do anything  
04:20:14 9 about. The statute calls on district judges to use the manual  
04:20:20 10 that's in force on the date of sentencing, and there's  
04:20:23 11 obviously a disagreement among the court of appeals on whether  
04:20:27 12 that statute is constitutional or not, but I don't see that it  
04:20:30 13 leaves a task for the Commission. The Commission already has  
04:20:32 14 done what I think is the only sensible thing it can do, which  
04:20:37 15 is to apply the whole manual rule.

04:20:39 16           Right after this conflict develops, the Commission  
04:20:41 17 adopts the whole manual rule and says either apply the whole  
04:20:46 18 manual as of the day of sentencing or, if circuit law requires  
04:20:49 19 it, the whole manual as of some other date. But I don't think  
04:20:52 20 there's anything else you can do other than say -- other than  
04:20:57 21 keep the whole manual rule in force.

04:21:00 22           ACTING CHAIR HINOJOSA: I would like to make a point  
04:21:01 23 about the enumerated offenses in relationship to crime of  
04:21:05 24 violence.

04:21:05 25           We have enumerated offenses in the illegal re-entry

04:21:09 1 guideline, and I have to tell you if you look at Fifth and Ninth  
04:21:14 2 Circuit case law, it is no easier with regards to enumerated  
04:21:17 3 offenses as opposed to other definitions of crimes of  
04:21:20 4 violence, whether we adopt a statute or not because the  
04:21:22 5 litigation that goes on, first of all, at the district court  
04:21:26 6 level and then at the appellate level as to whether it fits  
04:21:29 7 that particular description as far as an enumerated offense is  
04:21:33 8 just as complicated as it is with regards to the others, and a  
04:21:38 9 lot of it has to do with the fact that we have 51  
04:21:40 10 jurisdictions that have sentenced people, whether it's the 50  
04:21:43 11 states or the federal government, with regards to what those  
04:21:47 12 individual statutes say about, for example, sexual abuse of a  
04:21:51 13 minor or rape or any of the other enumerated offenses. So  
04:21:55 14 that also can be just as complicated, and a lot of it is  
04:22:00 15 created by the way the statutes are written.

04:22:02 16 CHIEF JUDGE EASTERBROOK: Uh-huh. Well, my -- I  
04:22:04 17 didn't pretend that a list would be a surefire solution, and  
04:22:08 18 it's actually even worse than that. It's something like 55  
04:22:13 19 jurisdictions.

04:22:14 20 Our current President said he campaigned in all 55  
04:22:17 21 states, and he was correct because there's the District of  
04:22:19 22 Columbia and Puerto Rico and Guam and the Virgin Islands.  
04:22:27 23 We've got all of those as producers of predicate offenses.

04:22:30 24 You can't solve all the problems, but my suggestion  
04:22:36 25 was that a list is better than the residual category,

04:22:42 1 especially after *Begay*, with the proviso that there are going  
04:22:46 2 to be a lot of things where the list is not dispositive, but  
04:22:49 3 all of our district judges are intelligent, and they can make  
04:22:53 4 suitable approximations. And, of course, *Booker* and *Kimbrough*  
04:22:58 5 allow that.

04:23:00 6           It's only when one has the sense that if you've put  
04:23:04 7 in a list or if there is a residual category, there is one  
04:23:07 8 uniquely right answer which we have to find. I began by  
04:23:13 9 saying we've got problems that amount to trying to stuff round  
04:23:16 10 pegs in square holes. The district courts are, I think, well  
04:23:22 11 aware of the fact that our states are sufficiently disparate  
04:23:24 12 that the holes the Commission makes won't always have pegs  
04:23:29 13 that fit, but the guidelines should be written with sufficient  
04:23:32 14 latitude to allow the judge to recognize that and behave  
04:23:36 15 appropriately, rather than either classify uniquely this  
04:23:41 16 conviction or find uniquely whether it's 2,001 grams versus  
04:23:47 17 1,999 grams and so on.

04:23:50 18           The more flexibility there is and the more we  
04:23:53 19 recognize that for many categories of disputes, there is no  
04:23:57 20 one right answer, I think the easier and the more rational it  
04:24:03 21 will be to carry out this program.

04:24:06 22           JUDGE SUTTON: Judge Hinojosa, could I also respond  
04:24:09 23 to that? I agree with you, it's not going to solve all the  
04:24:09 24 problems, but ACCA actually illustrates the two layers of  
04:24:13 25 complexity. So that's a statute that does give lists, then

04:24:17 1 has the residual clause.

04:24:19 2           So the first problem interpreting that was, oh, okay,  
04:24:22 3 they say burglary, but now we have these different types.

04:24:25 4 Florida has this. Massachusetts, burglary of a boat. So then  
04:24:29 5 they had to come up with this generic versus non-generic  
04:24:33 6 category. So I think there's no avoiding that.

04:24:34 7           I assume that's what the Fifth and Ninth Circuit cases are  
04:24:37 8 all fighting about on the immigration front. I don't know how  
04:24:41 9 we avoid that. But the problem that has come up with the  
04:24:44 10 residual clause is just a whole other layer of complexity on  
04:24:49 11 top of that, figuring out what categories they are, dividing  
04:24:52 12 them up, all these state law offenses as a matter of federal  
04:24:56 13 law. That's just doubling the work. So that's why I think  
04:24:57 14 they're both bad, but it seems to me like the list is a little  
04:25:01 15 bit less worse.

04:25:04 16           COMMISSIONER WROBLEWSKI: First of all, thank you all  
04:25:05 17 for being here. It's been a fascinating discussion, and it's  
04:25:11 18 been especially important because you've touched on a number  
04:25:14 19 of issues that the Commission has put on its agenda for the  
04:25:17 20 coming year, this question of departures versus variances, the  
04:25:20 21 question of crime of violence and so forth.

04:25:23 22           My one question is if we go ahead and really look at  
04:25:27 23 the crime of violence, should we look at it first from the  
04:25:31 24 guidelines lens and try to do something there first? Should  
04:25:34 25 we try to attack ACCA and make them parallel the guidelines in

04:25:39 1 ACCA and make a proposal to Congress to make a change? Should  
04:25:43 2 we do that at once? Should we do it separately? Should we  
04:25:44 3 experiment with the guidelines and see how it works?

04:25:46 4 Do you have any opinion about that?

04:25:49 5 CHIEF JUDGE EASTERBROOK: My suggestion was expressly  
04:25:50 6 that you do the best you can with the guidelines. Trying to  
04:25:56 7 make proposals to Congress leaves me usually in mind of Edmund  
04:26:01 8 Burke's famous phrase, "Don't talk to me about reform. Things  
04:26:05 9 are bad enough as they are."

04:26:06 10 It's easy to see how this could get worse. It's  
04:26:12 11 easier to see how a legislative proposal might be better if  
04:26:16 12 the Commission already had in place a workable set of rules  
04:26:19 13 for its own house. So my suggestion is do the best you can  
04:26:23 14 with recidivist sentencing, with a career offender guideline,  
04:26:28 15 and then if Congress can be persuaded to emulate it, so much  
04:26:31 16 the better.

04:26:32 17 COMMISSIONER WROBLEWSKI: Thank you.

04:26:35 18 COMMISSIONER FRIEDRICH: Judge Sutton, you posed the  
04:26:37 19 problem of the difficulty in trying to draw meaningful lines  
04:26:40 20 in determining whether a sentence is substantively reasonable.  
04:26:43 21 You posed a problem and not a solution.

04:26:45 22 One of your colleagues has proposed that the  
04:26:48 23 Commission could actually use its delegated authority and  
04:26:50 24 define in the manual itself what substantive reasonableness  
04:26:55 25 means. I question whether --



04:26:58 1           ACTING CHAIR HINOJOSA: Not from your circuit.

04:27:00 2           COMMISSIONER FRIEDRICH: -- whether that would  
04:27:01 3 withstand judicial scrutiny, and I'm interested in your  
04:27:04 4 perspectives on that; but, secondly, putting that aside,  
04:27:06 5 certainly the Commission could recommend to Congress that  
04:27:10 6 Congress take some of the steps Judge Easterbrook has  
04:27:14 7 recommended and simplify the guidelines greatly, perhaps  
04:27:17 8 require the government to prove certain key sentencing  
04:27:20 9 enhancements, and create a binding constitutional system that  
04:27:25 10 then would have a more stringent level of appellate review.

04:27:28 11           JUDGE SUTTON: Yeah, I haven't -- I guess I don't --  
04:27:33 12 I'm not sure I have an allergic -- I mean reasonableness  
04:27:36 13 appears in the statute, right? So I guess I don't have an  
04:27:39 14 allergic reaction to the notion that you don't have -- why  
04:27:44 15 wouldn't you have some authority to put some teeth on that?

04:27:46 16           I would also say good luck. I think you'll be  
04:27:54 17 between saying things that are too general and aren't really  
04:27:57 18 adding anything to it or so specific you can't possibly mean  
04:28:00 19 what you're saying in some situations. So it seems like a  
04:28:03 20 very tough task, but I don't have a visceral reaction against  
04:28:06 21 the notion that you could try.

04:28:10 22           When I think of the tools you can provide, it does  
04:28:12 23 seem to me, I've always thought there's a bit of a status quo  
04:28:19 24 bias with the Commission, partly because I've never quite  
04:28:20 25 investigated how it seems to have this descriptive part to it,

04:28:22 1 where we just gather what everyone does and we say those are  
04:28:26 2 the ranges because that's what everyone's doing, and then I'm  
04:28:29 3 told, well, it also has this normative part of it, we're also  
04:28:32 4 saying what the sentences should be. I've never quite figured  
04:28:35 5 out how that works, but I have to believe however you do that,  
04:28:39 6 it has to be very helpful to get information sooner rather  
04:28:43 7 than later about variances, up or down.

04:28:46 8           And it seems to me the more you're getting that out  
04:28:49 9 to the judges, everyone in general, but I could imagine courts  
04:28:54 10 of appeals using that as a tool either to justify significant  
04:28:59 11 variances. You know, they're calling, the government says  
04:29:01 12 this is a significant variance. Well, no, it isn't. Thirty  
04:29:07 13 percent of child porn sentences are downward variances, and  
04:29:11 14 15 percent are by a very significant margin. And then you  
04:29:15 15 have another case that comes along, and it turns out no one's  
04:29:18 16 done it. This is the first case in the country, and yet it's  
04:29:21 17 a case where there are many of them and no one's doing it.

04:29:25 18           So whether that would persuade me, I can't honestly  
04:29:28 19 say. I think it might persuade some, though, and it would  
04:29:31 20 certainly give you something objective to look at. It still  
04:29:35 21 has some question-bating qualities to me. I mean just because  
04:29:40 22 people are or are not doing something, I don't know why that  
04:29:43 23 proves it's reasonable. So I think it's a really important  
04:29:48 24 project because there is a risk we're going to go back to  
04:29:51 25 where we were.

04:29:52 1 I do think individualized sentencing is great,  
04:29:54 2 though. I must say putting to one side how the court got  
04:29:58 3 there and whether that was right, the solution as a matter of  
04:30:04 4 policy seems to be a positive one in many respects, as far as  
04:30:07 5 I'm concerned. But I don't know how we preserve uniformity.

04:30:13 6 Of course, the other answer to that is whoever  
04:30:15 7 thought you were going to have uniformity when you decided to  
04:30:18 8 federalize all this stuff. I mean the minute Congress makes  
04:30:21 9 the choice to federalize an area of crime, don't come talking  
04:30:24 10 to me about uniformity. You want uniformity, leave it to the  
04:30:28 11 State of Ohio with 14 million people, one state supreme court,  
04:30:31 12 and you're going to get a fairly uniform system. But if you  
04:30:34 13 want uniformity for 300 million people, I'll stick with 51  
04:30:37 14 jurisdictions, it's maybe chasing the wind.

04:30:45 15 ACTING CHAIR HINOJOSA: Judge Sutton, I think  
04:30:47 16 reasonableness is not in the statute. It may have appeared in  
04:30:50 17 *Booker* first.

04:30:51 18 JUDGE SUTTON: But I thought they pulled it out of  
04:30:53 19 one -- it certainly wasn't something that said you review  
04:30:55 20 sentences for reasonableness, but I thought there was  
04:30:57 21 something -- oh, in the probation area.

04:31:00 22 ACTING CHAIR HINOJOSA: Actually, they struck down  
04:31:01 23 the appellate review section of the statute. That was the  
04:31:04 24 only other one that they struck down besides the mandatory  
04:31:07 25 nature. I mean they may have taken out a part of it, but I

04:31:13 1 don't know that that wasn't something that --

04:31:15 2 CHIEF JUDGE EASTERBROOK: Can I speak to this

04:31:18 3 briefly?

04:31:18 4 It would be very nice to have some definition of  
04:31:20 5 reasonableness, but I tend to agree with Jeff Sutton that it's  
04:31:26 6 elusive. I doubt very much that anything the Commission could  
04:31:30 7 do would be binding because, of course, *Kimbrough* says that  
04:31:33 8 anything that's in the guidelines judges can disagree with.

04:31:38 9 I agree, though, with Danny Boggs that the single  
04:31:45 10 most important thing in the Sentencing Reform Act of 1984 was  
04:31:49 11 3553(a)(6), the prohibition on unreasonable or unjustified  
04:31:55 12 disparities in sentencing; that the Act, the only thing that  
04:31:59 13 could get Senator Kennedy and Senator Thurmond to agree on  
04:32:02 14 that Act was the desire to curtail the discretion of both  
04:32:08 15 *Bleeding Heart J*, who was giving probationary sentences for  
04:32:14 16 bank robbers, and, on the other hand, the judge who always  
04:32:17 17 gave the maximum for all the crimes he didn't like. And both  
04:32:20 18 sets of judges were to be forced into the middle.

04:32:24 19 And 3553(a)(6) designed to do that and give the  
04:32:29 20 Sentencing Commission authority to do it, and it's difficult  
04:32:32 21 to see if the role of the Commission is reduced, as *Booker*  
04:32:35 22 does, that there's anybody in the federal system who can do  
04:32:39 23 that except the court of appeals because we're the only ones  
04:32:43 24 who see both the sentence imposed by *Bleeding Heart J* and  
04:32:46 25 *Maximum John J*, all right?

04:32:50 1           So it would be nice to have some algorithm to carry  
04:32:55 2 that out; but, of course, the best algorithm that's ever been  
04:32:58 3 designed to carry that out was the original set of sentencing  
04:33:01 4 guidelines, and that's what *Booker* said wasn't conclusive. So  
04:33:08 5 I wish the project could be accomplished, but I wonder whether  
04:33:11 6 after *Booker* it's feasible.

04:33:15 7           JUDGE BOGGS: I just want to chime in in  
04:33:18 8 support of that, having defended bank robbers before a federal  
04:33:22 9 district judge in the old days who, once the guilty verdict  
04:33:24 10 came in, the sentence was always 25 years. So the  
04:33:28 11 pre-guidelines "discretion" was not the best way, and we do  
04:33:32 12 need to keep that in mind.

04:33:37 13           JUDGE SUTTON: I will say one other thing, not to be  
04:33:39 14 too discouraging about this problem of substantive  
04:33:42 15 reasonableness. I wasn't around pre-guidelines -- I wasn't  
04:33:45 16 out of college -- but I don't see too many sentences, even  
04:33:49 17 ones where I say to myself, wow, my first reaction is wow.  
04:33:54 18 When I read the whole thing, there are not too many of them  
04:33:57 19 where I say, okay, you know, I [can't] understand why they're  
04:33:59 20 doing that.

04:34:02 21           So I guess my point is most judges in our circuit, I  
04:34:07 22 feel like they're paying a lot of attention to the guideline  
04:34:10 23 recommendations and when they're not following them, they're  
04:34:13 24 thinking pretty hard about it, and there's usually a pretty  
04:34:15 25 exceptional set of circumstances.

04:34:17 1 CHIEF JUDGE EASTERBROOK: Well, maybe.

04:34:20 2 (Laughter.)

04:34:21 3 CHIEF JUDGE EASTERBROOK: You always hope.

04:34:22 4 JUDGE SUTTON: I always try to end on a happy note.

04:34:26 5 JUDGE BOGGS: That's the Sixth Circuit, Frank.

04:34:29 6 CHIEF JUDGE EASTERBROOK: When I pick up the first  
04:34:31 7 set of briefs for a day and it's an armed bank robbery and the  
04:34:35 8 sentence is ten months, and the second set of briefs for the  
04:34:37 9 day and it's downloading child porn from the Internet and the  
04:34:40 10 sentence is 480 months, one wonders whether we aren't facing  
04:34:43 11 some unreasonable and unjustified disparities.

04:34:48 12 ACTING CHAIR HINOJOSA: On that note, I think we'll  
04:34:51 13 end for the day. Thank you all very much.

04:34:56 14 (Proceedings adjourned at 4:34 p.m.)

08:15:56 15 \* \* \* \* \*

08:15:56 16 Thursday, September 10, 2009, 9:05 a.m.

09:05:47 17 ACTING CHAIR HINOJOSA: Good morning. This is the  
09:05:49 18 second day of our fourth public hearing that we're having  
09:05:53 19 across the country with regards to the 25th anniversary of the  
09:05:58 20 passage of the bipartisan Sentencing Reform Act. It has been  
09:06:05 21 a great experience for the Commission to have gone around  
09:06:10 22 different parts of the country and heard different viewpoints  
09:06:12 23 of judges, both the district and appellate level, from  
09:06:16 24 practitioners, both on the prosecution side as well as the  
09:06:21 25 defense side, and then from individuals who are interested in

09:06:23 1 federal criminal justice policy, including obviously  
09:06:26 2 sentencing. And so, therefore, I do again thank everyone who  
09:06:30 3 has participated in these hearings as a presenter and we know  
09:06:35 4 that everyone that is here has other things that they do with  
09:06:40 5 the rest of their jobs and that this is a sacrifice with  
09:06:43 6 regards to time and certainly I hope that you understand how  
09:06:48 7 much the Commission appreciates your giving of your time and  
09:06:52 8 your thoughts and also want to emphasize how helpful  
09:06:54 9 everything that we have heard and will continue to hear as we  
09:06:57 10 continue the rest of the hearings in other parts of the  
09:07:01 11 country has helped the Commission.

09:07:03 12           This morning the first panel we have is a view from  
09:07:06 13 the Executive Branch, and we have two individuals. We have  
09:07:10 14 Mr. Patrick J. Fitzgerald who was appointed as U.S. Attorney  
09:07:14 15 for the Northern District of Illinois in 2001. He previously  
09:07:18 16 served as an assistant U.S. attorney in Manhattan from '88 to  
09:07:23 17 2001, where he directed the Organized Crime and Terrorism  
09:07:27 18 Unit. Mr. Fitzgerald received his bachelor's degree from  
09:07:30 19 Amherst and graduated from Harvard Law School.

09:07:33 20           We also have Mr. Edward M. Yarbrough who was  
09:07:39 21 appointed as the U.S. Attorney for the Middle District of  
09:07:42 22 Tennessee in October of 2007. Prior to assuming that post, he  
09:07:44 23 was a partner in a Nashville law firm, and before entering  
09:07:48 24 private practice, Mr. Yarbrough served as a state prosecutor  
09:07:52 25 in Nashville. Mr. Yarbrough received his bachelor's degree

09:07:53 1 from [Rhodes] College and his law degree from Vanderbilt.

09:07:56 2 And we will start with Mr. Fitzgerald.

09:07:59 3 PANEL VI. VIEW FROM THE EXECUTIVE BRANCH

09:07:59 4 MR. FITZGERALD: Thank you, Judge, and thank you to  
09:08:01 5 the Commission. You thanked us for our sacrifice of being  
09:08:04 6 here, but we want to thank you for the opportunity to speak to  
09:08:06 7 you. The work you have to do is extremely important, and the  
09:08:09 8 more points of view that we can bring to bear on these issues  
09:08:13 9 is important.

09:08:13 10 I'd like to read my statement, but I'll make some  
09:08:16 11 ad-lib comments from that. Truly we're grateful for the  
09:08:19 12 opportunity to speak before you on the important topic of  
09:08:21 13 federal sentencing policy and the guidelines in particular.  
09:08:24 14 As you know, while this Commission continues its critical work  
09:08:28 15 studying and seeking to improve the sentencing guidelines, the  
09:08:31 16 Department of Justice is undertaking its own fairly  
09:08:34 17 comprehensive review of sentencing policy internally, and I  
09:08:37 18 know that this Commission has been a valuable resource for  
09:08:42 19 information in that process. And those of us working in those  
09:08:45 20 working groups are very, very grateful.

09:08:47 21 As a result of the ongoing Department of Justice  
09:08:49 22 efforts, I just want to note up front that I'm not in a  
09:08:52 23 position to advocate for particular changes to the federal  
09:08:57 24 sentencing guidelines, as I participate in that working group  
09:08:59 25 studying the matter because we'll be preparing a report for



09:09:03 1 the deputy attorney general and, through him, the Attorney  
09:09:05 2 General, but I will say that in speaking to you, I also don't  
09:09:10 3 want to give the false impression that any thoughts I share  
09:09:13 4 with you or suggestions may reflect anything approaching a  
09:09:16 5 consensus among my colleagues among the working group or  
09:09:20 6 predict how the Department of Justice will come out.

09:09:23 7 Thus my remarks should not be viewed as anything  
09:09:26 8 approaching an official view of the Department, but what I can  
09:09:27 9 provide is a view from the field of how sentencing has changed  
09:09:30 10 on the ground in the Northern District of Illinois in the wake  
09:09:33 11 of the Supreme Court ruling in *Booker* and its progeny. And I  
09:09:36 12 wanted to talk about a few topics that I think merit special  
09:09:38 13 attention which I will discuss in a moment and from what I  
09:09:42 14 heard about from the hearings yesterday, I think other people  
09:09:45 15 have commented on those topics.

09:09:47 16 The first thing I would like to discuss is how  
09:09:50 17 sentencing has changed in the district court in Chicago in the  
09:09:51 18 post-*Booker* world. *Booker* has required the prosecutors to  
09:09:54 19 refocus their sentencing advocacy on the factors described in  
09:09:58 20 title 18, United States Code, § 3553(a), which requires  
09:10:01 21 us to include a justification in the context of particular  
09:10:04 22 cases of the reasoning behind many of the specific offense  
09:10:08 23 characteristics, as well as favored and disfavored departures  
09:10:13 24 covered by the guidelines. That substantial change has  
09:10:15 25 resulted in both advantages and disadvantages.

09:10:17 1           On the positive side, the government is required to  
09:10:20 2 make a fuller record of why a particular recommendation of  
09:10:24 3 incarceration is warranted beyond proving the separate facts  
09:10:26 4 that support the proffered guidelines range calculation. In  
09:10:30 5 fact, Judge Castillo, I know, has lectured in the Chicago area  
09:10:33 6 once *Booker* came out about how important it is for advocates  
09:10:36 7 on both sides to address the 3553(a) factors more fully. I  
09:10:42 8 think that's very true.

09:10:43 9           Prior to the guidelines, people went into court and  
09:10:45 10 they argued why sentences made particular sense. I think we  
09:10:48 11 lapsed a little bit before *Booker* and people dwelled  
09:10:52 12 particularly on the particular calculations and didn't step  
09:10:55 13 back and give the broader view. I think that some of that has  
09:11:00 14 changed post-*Booker*, and that's been a good thing.

09:11:02 15           And there are no doubt cases where the appearance of  
09:11:03 16 substantive fairness is easier to achieve because the  
09:11:06 17 sentencing judge is not constrained by the sentencing  
09:11:09 18 guidelines. And it's true that as a matter of perception,  
09:11:12 19 both defendants and victims may well view and are likely to  
09:11:14 20 perceive that the sentencing process is fair, gives greater  
09:11:16 21 emphasis on the facts specific to an individual defendant and  
09:11:20 22 a specific offense.

09:11:21 23           Having said that, there's a flip side to the *Booker*  
09:11:23 24 decision. And the benefits of advisory rather than mandatory  
09:11:26 25 guidelines do come at the serious expense of other fundamental

09:11:30 1 sentencing principles, specifically similar treatment for  
09:11:34 2 similarly situated defendants and certainty of punishment. I  
09:11:37 3 venture to say that *Booker* has reintroduced into federal  
09:11:40 4 sentencing both substantial district-to-district variations  
09:11:42 5 and substantial judge-to-judge variations. In many ways,  
09:11:45 6 we're experiencing sentencing variations on a district level  
09:11:48 7 similar to what occurred post-*Booker* on a nationwide basis.

09:11:52 8           And in my written statement, I go through some of the  
09:11:54 9 statistics which I think have been covered, but in the  
09:11:57 10 Northern District between the issuance of *Gall* and the end of  
09:12:00 11 fiscal year 2008, around 42 percent of the contested  
09:12:04 12 sentencings resulted in below-range sentences. In comparison  
09:12:08 13 nationwide, only 19 percent of contested sentences were below  
09:12:11 14 range. And I noted in my statement, and I mean it sincerely,  
09:12:15 15 I'm not, of course, labeling below-range sentences as  
09:12:18 16 unreasonable but instead pointing out that significant  
09:12:21 17 disparity does exist between districts, and one of the  
09:12:24 18 comments I'd like to make clear is that when we talk about the  
09:12:26 19 balancing of scale between uniformity and allowing for the  
09:12:30 20 discretion to deal with individual cases, they're both  
09:12:34 21 important values that we have to balance. And I think my role  
09:12:36 22 here as a witness is to describe what's happening on the  
09:12:39 23 ground and to leave to others to make the judgments about how  
09:12:43 24 to balance those two competing values.

09:12:45 25           There are anecdotal reports of substantial variation

09:12:49 1 in sentences from judge to judge. That is not at all  
09:12:52 2 surprising, as discretion is a two-edged sword. The more  
09:12:55 3 freedom any given judge is provided to impose a sentence, the  
09:12:59 4 more likely he or she will use a different perspective to  
09:13:02 5 impose, different judges may use different perspectives to  
09:13:06 6 impose dissimilar sentences in similar situations. And the  
09:13:09 7 concern is that any perception that punishment heavily depends  
09:13:12 8 on where one is prosecuted or which judge is assigned to the  
09:13:15 9 case undermines the fairness and perceived fairness of the  
09:13:18 10 system.

09:13:19 11 *Booker* has certainly undercut the certainty of  
09:13:22 12 punishment. By that, I mean not only the length of  
09:13:25 13 imprisonment but also whether any amount of imprisonment is  
09:13:28 14 part of the sentence. One of the Commission's initial  
09:13:31 15 findings under the Sentencing Reform Act is that courts  
09:13:34 16 sentenced to probation an inappropriately high percentage of  
09:13:36 17 offenders guilty of certain economic crimes, such as theft,  
09:13:39 18 tax evasion, antitrust offenses, insider trading, fraud and  
09:13:43 19 embezzlement, and there is reason to believe that *Booker* has  
09:13:46 20 started a trend returning to that type of leniency in some  
09:13:50 21 economic crime cases.

09:13:51 22 In fiscal year 2003, the Commission's statistics show  
09:13:55 23 that 26.7 percent of offenders in the fraud category received  
09:13:58 24 entirely non-prison sentences, whereas in fiscal year 2008,  
09:14:02 25 that percentage increased to 32.4 percent. In other words,

09:14:06 1 non-prison sentences in the fraud category have increased by  
09:14:10 2 20 percent in the last full year before *Blakely/Booker* versus  
09:14:15 3 the last fiscal year. Again, leniency may have been  
09:14:17 4 well-deserved in particular cases, but the enforcement of a  
09:14:18 5 uniform sentencing policy is more difficult in the post-*Booker*  
09:14:22 6 era.

09:14:23 7           Two points about the effect of *Booker* on our practice  
09:14:26 8 in my office in this district. First, as discussed before,  
09:14:30 9 our prosecutors must pay close attention to the 3553(a)  
09:14:33 10 factors in each individual case rather than reflexively object  
09:14:37 11 to a non-guideline sentence. To be sure, the advisory  
09:14:40 12 guidelines continue to be extremely important. They remain  
09:14:43 13 for us the one uniform reference point in the sentencing  
09:14:46 14 regime that is subject to geographic and judicial variation.  
09:14:49 15 For that reason, we generally seek a within-range sentence  
09:14:52 16 rather than introduce yet another point of disparity, namely,  
09:14:55 17 the subjective sentencing philosophies of individual AUSAs.

09:15:00 18           In particular cases, however, we have authorized  
09:15:02 19 prosecutors to advocate for a deviation from the advisory  
09:15:05 20 range, both upward and downward. We have a centralized  
09:15:08 21 approval process in place for such requests so that, as an  
09:15:11 22 office, we maintain some uniformity in how we treat defendants  
09:15:14 23 across cases, while at the same time making allowances where  
09:15:17 24 case-specific circumstances warrant sentences outside the  
09:15:20 25 advisory guidelines range.

09:15:21 1           Second, our practice of entering into cooperation  
09:15:25 2 agreements has changed to some extent. It has been our office  
09:15:27 3 practice to have supervisory review of cooperation agreements  
09:15:30 4 to ensure that similar defendants receive similar deals within  
09:15:33 5 the district. In my office, cooperation agreements and 5K  
09:15:38 6 letters are all approved by the criminal chief, so that in  
09:15:40 7 most cases, you have an assistant, reviewed by a deputy chief  
09:15:44 8 of a section, a chief of a section, and then the criminal  
09:15:46 9 chief. The section review is designed to make sure that we're  
09:15:49 10 being consistent in, say, drug cases with having treated  
09:15:53 11 cooperation. In a fraud case, that other section reviews it  
09:15:55 12 for consistency. And the criminal chief reviews all  
09:15:59 13 cooperation agreements, all 5K agreements, so that he can make  
09:16:02 14 sure that as an office we try to be consistent in how we treat  
09:16:05 15 people across different cases.

09:16:06 16           We are seeing now that after *Booker*, more defense  
09:16:10 17 counsel are resistant to entering into such agreements with us  
09:16:13 18 on behalf of their clients in the hope that they can receive  
09:16:16 19 more of a break at sentencing by making a direct pitch to the  
09:16:19 20 sentencing judge. The bottom line is that there's inevitable  
09:16:23 21 trade-off between the discretion afforded individual judges to  
09:16:26 22 render justice as they see fit in an individual case and the  
09:16:29 23 ability of the judicial system to minimize disparities in  
09:16:33 24 sentencing similarly situated defendants who will be before  
09:16:36 25 different judges in different districts for similar conduct.

09:16:39 1 Rightly or wrongly, *Booker* has swung the balance more heavily  
09:16:43 2 in favor of judicial discretion at the expense of consistency  
09:16:46 3 in sentencing and certainty of punishment.

09:16:48 4           Let me turn for a moment briefly to our appellate  
09:16:51 5 practice. In the Seventh Circuit, appellate review is extremely  
09:16:55 6 deferential. That is not surprising in light of the Supreme  
09:16:57 7 Court's emphasis on the discretion that district judges now  
09:16:59 8 enjoy in applying 3553(a) factors in each particular case.  
09:17:03 9 Although the government has successfully appealed  
09:17:06 10 non-custodial sentences or exceedingly short prison sentences  
09:17:10 11 in certain serious cases, appellate review is light. Indeed,  
09:17:13 12 recognizing the deferential standard of review, very few of  
09:17:17 13 the below-range sentences are appealed in the Northern  
09:17:20 14 District of Illinois or, as I understand it, elsewhere. In  
09:17:22 15 light of that substantive discretion, however, the Seventh Circuit  
09:17:24 16 has imposed on district judges a corresponding procedural  
09:17:28 17 responsibility to explain adequately the reasons for selecting  
09:17:31 18 the sentence in each case. The duty to explain a sentencing  
09:17:34 19 decision promotes better decision-making and gives defendants,  
09:17:38 20 law enforcement and victims more confidence in the fairness of  
09:17:41 21 the sentencing process, even if a particular party disagrees  
09:17:45 22 with the sentence itself.

09:17:46 23           Finally, let me comment on two types of cases that  
09:17:50 24 are brought with increasing frequency in our district as in so  
09:17:53 25 many others: One, cases involving drugs, guns and gangs, and,

09:17:58 1 two, cases involving child pornography and child exploitation.

09:18:00 2 In the drug and gun context, the guidelines, and  
09:18:04 3 mandatory minimum sentences more particularly, have often been  
09:18:06 4 criticized as being too harsh. In that regard, I would offer  
09:18:10 5 the following comments. Mandatory minimum sentences have been  
09:18:13 6 a very effective tool in prosecuting particularly violent  
09:18:16 7 offenders. The threat of a mandatory minimum sentence has  
09:18:19 8 caused many persons charged with these offenses to become  
09:18:22 9 cooperative witnesses, often testifying against persons with  
09:18:25 10 greater responsibility in the drug or gang organization. And  
09:18:28 11 the threat of mandatory minimum sentences also has caused some  
09:18:31 12 people not to commit such offenses and, thus, not to go to  
09:18:34 13 jail at all.

09:18:35 14 A scholarly study has shown that released offenders  
09:18:38 15 who attend a one-hour forum where they are advised of such  
09:18:43 16 penalties are 30 percent less likely to re-offend. In each  
09:18:48 17 case where recidivism is deterred, we have the benefit of both  
09:18:48 18 less crime and less incarceration.

09:18:50 19 One thing I might add there is I think there's a  
09:18:52 20 perception sometimes in the public that prosecutors may be  
09:18:56 21 driven by the metrics of how many people we arrest, and I've  
22 seen a great change in the way law enforcement goes about the  
09:19:01 23 way it does business, from the police to federal agencies to  
09:19:03 24 the prosecutors' offices. It is far more intelligence driven.  
09:19:07 25 The metrics are far less how many arrests did it make, and the



09:19:10 1 metrics are far more how much violence is reduced.

09:19:14 2           And in situations such as where we've seen a forum  
09:19:17 3 where a person attends for one hour as one of 30 people, if we  
09:19:21 4 can reduce the likelihood that they will re-offend for by  
09:19:26 5 30 percent, that is a far more effective method of law  
09:19:29 6 enforcement than prosecuting, incarcerating and sending people  
09:19:31 7 to jail. The human cost is far less, the financial cost is  
09:19:33 8 far less. And what we do do is try to focus our law  
09:19:36 9 enforcement efforts at prosecution, incarceration on those  
09:19:40 10 most dangerous offenders, while advertising what we do to  
09:19:43 11 discourage others.

09:19:44 12           On the other hand, in recognition of the fact that  
09:19:47 13 some offenders who get involved in drug and gun offenses may  
09:19:50 14 not have a lot of information to offer, may not pose the same  
09:19:53 15 threat as more hardened offenders, Congress enacted the safety  
09:19:57 16 valve provision, 18 U.S.C. 3553(f) in 1994. We have not seen  
09:20:03 17 the safety valve provision as a serious impediment to law  
09:20:06 18 enforcement in Chicago. We actually think it is a good relief  
09:20:10 19 valve that ameliorates the harshness of mandatory minimum  
09:20:13 20 sentences where the offender does not have an extensive  
09:20:16 21 criminal history.

09:20:17 22           In fact, in my office no one has any heartburn about  
09:20:19 23 the safety valve, and we've actually looked at it and we're  
09:20:22 24 sometimes concerned that when you look at the Criminal History  
09:20:24 25 Category requirement having one criminal history point, in

09:20:28 1 some cases, that criminal history point or if they have two  
09:20:32 2 may not indicate that this person is not -- should not be  
09:20:35 3 eligible for some leniency. And in some cases, we feel  
09:20:41 4 comfortable if a person doesn't qualify for a 5K motion and  
09:20:44 5 doesn't qualify for the safety valve that, in some  
09:20:46 6 circumstances, we think we can do it consistently with DOJ  
09:20:51 7 policy, plead people to lesser offenses to avoid the harshness  
09:20:55 8 of a mandatory minimum if we don't think they're the most  
09:20:58 9 serious offender in the case.

09:21:00 10 Turning to the area of child pornography and child  
09:21:03 11 exploitation, there seems to be a striking dissonance between  
09:21:06 12 the perspective of some district judges on the one hand and  
09:21:09 13 prosecutors who handle those cases on the other. Stated as  
09:21:13 14 neutrally as possible, this subject area is one where district  
09:21:16 15 judges seem to vary the most and seem to get most frustrated  
09:21:20 16 with the government seeking a sentence within the guideline  
09:21:21 17 range.

09:21:22 18 It is also the same area where the AUSAs handling  
09:21:25 19 these cases privately express the most frustration with the  
09:21:28 20 views of sentencing judges. One could posit that perhaps the  
09:21:31 21 judges are more lenient because they have less personal  
09:21:34 22 contact with the victims and see things more through the lens  
09:21:37 23 of the defendant standing before the judge for sentencing.

09:21:38 24 Alternatively, one could posit that AUSAs may seek  
09:21:42 25 harsh sentences because they see the case most heavily through

09:21:45 1 the lens of the victims, who have suffered much and to whom  
09:21:48 2 they have become very close. Along those lines, the  
09:21:49 3 prosecutors have little or no interaction with the defendant.  
09:21:52 4 Without taking an advocate's view of it, it is plain as day  
09:21:55 5 that there's a deep disconnect. I respectfully suggest that  
09:21:57 6 this is an area of sentencing that warrants further study and  
09:22:00 7 further education of all involved.

09:22:01 8           When I say not taking an advocate's view of it, I  
09:22:06 9 mean that not to pay lip service or to be polite. I think  
09:22:08 10 anyone practicing in the area who listens to the AUSAs who  
09:22:12 11 come back from sentencings in this area and listens to the  
09:22:15 12 judges' remarks in this area, the disconnect is plain as day.  
09:22:18 13 And whatever the right answer is, I think we could use further  
09:22:23 14 study, further input from the Commission, and further  
09:22:25 15 education to all people involved as to what the harms are and  
09:22:29 16 are not from child pornography and exploitation, the  
09:22:32 17 seriousness of what those harms are, the likelihood of  
09:22:35 18 recidivism in those cases so that we can not have a situation  
09:22:37 19 where a number of people who sit on the bench who do it in  
09:22:43 20 good faith, earnestly believe that the penalties are too  
09:22:46 21 harsh; and there are people who practice and represent the  
09:22:48 22 government in good faith believe that the penalties should be  
09:22:52 23 enforced or that certainly should be a cry, a loud call for  
09:22:57 24 people to study this and see what conclusions people can draw  
09:23:00 25 because it's plain that there's an issue there.

09:23:03 1           On a practical level, the *Booker* decision has  
09:23:06 2 aggravated the situation concerning child pornography. The  
09:23:09 3 mandatory minimum sentences imposed for certain child  
09:23:11 4 pornography offenses are certainly strict. However, a  
09:23:14 5 prosecutor has some discretion not to charge a mandatory  
09:23:17 6 minimum sentence or to charge a lesser mandatory minimum  
09:23:20 7 sentence where the guidelines range is below the otherwise  
09:23:22 8 applicable mandatory minimum sentence.

09:23:24 9           And I note in my remarks that the line between  
09:23:27 10 possession and receipt of child pornography which impose  
09:23:30 11 different penalties is exceptionally thin, and that's my  
09:23:33 12 polite way of saying I've never understood how you can possess  
09:23:36 13 something without receiving it. It just doesn't appear there.  
09:23:39 14 And so whatever we think about the overall horror of child  
09:23:45 15 pornography, it just strikes someone as odd that we have a  
09:23:49 16 sentence that punishes possession and receipt in very  
09:23:53 17 different fashions.

09:23:54 18           Anecdotal experience suggests that when given  
09:23:57 19 discretion in this area, district judges often vary quite  
09:24:00 20 substantially from the guidelines range, and this Commission's  
09:24:02 21 statistics seem to support those anecdotal observations. But  
09:24:07 22 put in simple terms, a prosecutor is far less willing to forgo  
09:24:09 23 charging a mandatory minimum sentence when prior experience  
09:24:13 24 shows that the defendant will ultimately be sentenced to a  
09:24:15 25 mere fraction of what the guidelines range is.

09:24:17 1           When we've seen experiences where we thought a  
09:24:19 2 mandatory minimum sentence might be too harsh, that a  
09:24:21 3 guidelines range sentence might be more appropriate and then  
09:24:24 4 when we forgo the mandatory minimum sentence, instead of  
09:24:27 5 getting a guideline sentence, we may get little or no sentence  
09:24:29 6 at all. And, again, without saying what the right answer is,  
09:24:33 7 when we honestly believe that a guideline sentence is called  
09:24:36 8 for, we're less likely to forgo a mandatory minimum if we  
09:24:40 9 think the result may end up being probation or a light  
09:24:43 10 sentence. And, again, if we could clarify the thinking on the  
09:24:46 11 area of child pornography, that would be greatly important.

09:24:48 12           I will close by, again, thanking the Commission for  
09:24:50 13 undertaking work that is important as it is difficult. The  
09:24:53 14 tension between providing a sentencing judge the ability to  
09:24:56 15 impose a sentence he or she believes to be just based upon the  
09:25:00 16 facts concerning the particular offense and particular  
09:25:02 17 offender before him or her and the need at the same time to  
09:25:05 18 eliminate unwarranted disparity between sentences imposed upon  
09:25:09 19 people for similar offenses before different judges in  
09:25:11 20 different areas does not lend itself to an easy solution. The  
09:25:15 21 Commission's insights can be enormously helpful to the process  
09:25:18 22 going forward.

09:25:19 23           Thank you.

09:25:20 24           ACTING CHAIR HINOJOSA: Thank you, Mr. Fitzgerald.

09:25:22 25           Mr. Yarbrough, sir?

09:25:23 1 MR. YARBROUGH: Thank you very much, Mr. Chairman,  
09:25:24 2 and good morning, ladies and gentlemen. It's certainly a  
09:25:27 3 privilege for me to be here before you, and I want to say at  
09:25:30 4 the beginning that it's also an honor to be here with  
09:25:32 5 Mr. Fitzgerald. I came into the department in 2007, as the  
09:25:36 6 chairman noted, and I found out pretty quickly who the most  
09:25:42 7 respected United States Attorneys in the group of 93 were at  
09:25:46 8 that time, and Pat is certainly at the very top of that, and  
09:25:49 9 I'm honored to be here with him today.

09:25:51 10 Having worked in the American criminal justice system  
09:25:55 11 for over 36 years as both a prosecutor and defense lawyer, I  
09:25:59 12 bring long-term perspective to this subject, but I have no  
09:26:03 13 illusions that experience is any substitute for expertise.  
09:26:07 14 And when I say that, I have to, I guess, allude a little bit  
09:26:12 15 to my advanced age by noting that I remember when the  
09:26:15 16 guidelines came into the federal system, and I didn't have an  
09:26:19 17 extensive federal practice, but I had enough to understand  
09:26:22 18 that that changed the game a bit for those of us who were  
09:26:26 19 defending cases at that time, and I think it was perceived by  
09:26:30 20 the defense bar as an effort to increase the sentences, and it  
09:26:34 21 was perceived by some of our judges as an effort to invade  
09:26:37 22 their province. And I think a lot of those hard feelings in  
09:26:41 23 the early days have actually been overcome by what's happened  
09:26:45 24 since then, particularly in the development of the law in that  
09:26:47 25 area.

09:26:48 1           My current position as United States Attorney for the  
09:26:50 2 Middle District of Tennessee has taught me that sound federal  
09:26:53 3 sentencing policy is essential to the safety of our nation,  
09:26:57 4 yet currently federal sentencing presents many vexing issues  
09:27:02 5 to judges, prosecutors, and all those whose task it is to  
09:27:05 6 fashion proper sentences in serious cases.

09:27:07 7           In my early years as a state prosecutor, I was  
09:27:10 8 surprised to learn how much of the sentencing decision-making  
09:27:13 9 fell to young assistant D.A.s as a result of plea bargaining.  
09:27:17 10 In those days, the trial court had very little control over  
09:27:20 11 sentences because sentences were fixed by juries in all cases  
09:27:23 12 that went to trial without the benefit of a separate hearing  
09:27:26 13 and by prosecutors in all cases that were settled.

09:27:29 14           Later, as judge-imposed sentencing was implemented in  
09:27:32 15 Tennessee by statute and as I began my practice in federal  
09:27:35 16 court, the issue of disparity of sentences emerged, and that  
09:27:39 17 issue, I'm sure, is what drove the implementation of the  
09:27:43 18 guidelines initially, and I guess we have learned that that's  
09:27:47 19 a struggle we may have in the justice system for a long time  
09:27:51 20 to come.

09:27:52 21           One of the principal purposes underlying the U.S.  
09:27:55 22 sentencing guidelines is to limit unfair disparity of  
09:27:57 23 sentences among defendants with similar records in federal  
09:28:00 24 courts nationwide. However, however well one may think this  
09:28:05 25 goal has been attained under the presumptive guidelines, the

09:28:09 1 *Booker* case and its progeny have significantly muddied the  
09:28:12 2 water and many have questioned whether the present system can  
09:28:15 3 and should be saved. My hope is to provide some information  
09:28:18 4 to the Commission from my experience that may aid you in  
09:28:20 5 meeting the challenges of this new and evolving era of  
09:28:27 6 sentencing.

09:28:27 7           Just a short comment or two on the role of the  
09:28:31 8 guidelines in what we call now the post-*Booker* world, I  
09:28:33 9 suppose. Some have suggested that advisory guidelines are not  
09:28:35 10 necessary any longer and that unless the guidelines can be  
09:28:40 11 made mandatory again, a totally new system should be devised.  
09:28:45 12 Others have suggested keeping the advisory guidelines but  
09:28:47 13 limiting or eliminating mandatory minimum sentencing statutes.

09:28:53 14           As you know, a few months ago, the Attorney General  
09:28:55 15 created a Sentencing and Corrections Working Group within the  
09:28:59 16 department to study these and other policy options. The  
09:29:02 17 working group has been reviewing the available research,  
09:29:06 18 surveying the U.S. Attorney community, meeting with outside  
09:29:10 19 stakeholders, and reviewing the relevant literature all in  
09:29:13 20 hope of giving the Attorney General all the information he  
09:29:15 21 needs to develop a new sentencing policy for the  
09:29:18 22 administration.

09:29:20 23           Policy options under review will build on nearly  
09:29:24 24 25 years of experience under the guidelines. No reasonable  
09:29:26 25 expert could argue that the science of criminal punishment has



09:29:31 1 not been furthered by the experience under the guidelines.  
09:29:34 2 When I say that, you know, every case is obviously an  
09:29:40 3 individual case, and every person who comes before the court  
09:29:42 4 has individual experiences and needs, and the effort sometimes  
09:29:47 5 to fashion the guidelines in such a way that they can be used  
09:29:52 6 as a grid to decide matters on any individual case may be more  
09:29:59 7 ambitious than it should have been in the beginning.

09:30:01 8           But I think what we've seen from the use of the  
09:30:05 9 guidelines and the law that's developed in their use is  
09:30:09 10 extremely useful. It helps prosecutors do their job, it helps  
09:30:14 11 the court to be more fair, and it also gives a certain level  
09:30:19 12 of certainty and deterrence to the potential offender.

09:30:24 13           As you know, judges are now free to both vary and  
09:30:27 14 depart from the sentences suggested by the guidelines. Our  
09:30:30 15 experience has been that appellate review is a costly,  
09:30:33 16 time-consuming and now fairly ineffective remedy for any  
09:30:37 17 perceived incorrect sentences. The Sixth Circuit has affirmed a  
09:30:40 18 wide range of decisions, sometimes approving a total rejection  
09:30:43 19 to the methodology, basis and objectives underlying the ranges  
09:30:46 20 provided by the guidelines for certain offenses, such as for  
09:30:49 21 crack cocaine and immigration violations.

09:30:52 22           Whether the Commission or Congress can address some  
09:30:56 23 of this decisional law, without violating the underlying  
09:31:00 24 principle of *Booker*, remains to be seen. My early mentor,  
09:31:04 25 Criminal Judge Raymond H. Leathers, often was heard to opine

09:31:09 1 that it is not the length of the sentence but the certainty of  
09:31:11 2 punishment that deters crime. Now, when he said that in the  
09:31:14 3 1970s, he was dealing in a system that had jury sentencing,  
09:31:19 4 and the jury came back with a sentence at the same time they  
09:31:21 5 came back with the verdict of guilt or innocence, a system  
09:31:26 6 that we now view as being quite bizarre, but it was something  
09:31:29 7 that existed in Tennessee and many other states at that time.

09:31:33 8           And it was, I have to, I guess, confess a little bit  
09:31:39 9 sometimes the prosecutors perhaps got a little overzealous in  
09:31:43 10 their effort to get a large sentence from a jury in the way  
09:31:47 11 they proved the case on the issue of guilt or innocence, and  
09:31:51 12 we look at that system now as being quite arcane, and I know  
09:31:56 13 know nobody wants to go back to that. But that developed a  
09:31:58 14 disparity of sentences that would make the federal disparity  
09:32:02 15 look mild by comparison.

09:32:04 16           He was not fond, Judge Leathers was not fond of  
09:32:08 17 sentencing and decided to retire when Tennessee enacted a  
09:32:13 18 judicial sentencing law in 1982. Jury sentencing had produced  
09:32:16 19 a sad history of wildly disparate punishments for crime, but  
09:32:19 20 he wanted no part of the remedy even though he was a stern  
09:32:23 21 judge and demanded strict enforcement of the law. Eventually,  
09:32:26 22 Tennessee developed a grid and loosely structured guidelines  
09:32:29 23 to address some issues of enhancement and mitigation such that  
09:32:33 24 sentencing is now relatively uniform within the state.

09:32:36 25           Could the federal courts use a more relaxed system of

09:32:40 1 guidelines like that in Tennessee or accomplish uniformity  
09:32:42 2 without violence to defendants' rights under *Booker*? That is  
09:32:45 3 what the Sentencing and Corrections Working Group is  
09:32:48 4 exploring. Some have suggested that guidelines with broader  
09:32:51 5 sentencing ranges that allow judges to use sound discretion  
09:32:55 6 within a consistent paradigm would combine the virtues of the  
09:32:59 7 wisdom gained in 25 years of research with case-by-case  
09:33:02 8 analysis typically done in the courtroom. It is worth  
09:33:05 9 considering, and the Justice Department is doing just that.

09:33:09 10           Recent decisions from the U.S. Supreme Court still  
09:33:12 11 stress the need for nationwide consistency and commend the  
09:33:15 12 guidelines as a starting point and initial benchmark for  
09:33:20 13 sentencing. So it is obvious that the court values the  
09:33:22 14 importance of federal sentencing guidelines in the post-  
09:33:25 15 *Booker* era.

09:33:26 16           However, the ability of a defendant to appeal his  
09:33:30 17 sentence for lack of reasonableness has generated a huge  
09:33:33 18 appellate caseload where the issues have no bearing on the  
09:33:36 19 issue of guilt or innocence and, in my experience, this kind  
09:33:39 20 of deferential appellate review has not been an effective  
09:33:42 21 mechanism for the review of district court sentencing  
09:33:45 22 decisions.

09:33:46 23           Now a few observations from Middle Tennessee. The  
09:33:50 24 Middle District consists of 32 counties and contains the  
09:33:53 25 capital city of Nashville, Tennessee's largest metropolitan

09:33:57 1 area. Federal crimes that have been recently prosecuted  
09:33:59 2 within the district include a RICO prosecution against 14  
09:34:04 3 members of MS-13 gang.

09:34:07 4 A little history on that. We had a police chief in  
09:34:09 5 Nashville only a few years ago who was very fond of saying  
09:34:12 6 that we had no gangs in Nashville. I think he was concerned  
09:34:16 7 about alarming the populace. The truth of the matter is gangs  
09:34:23 8 are everywhere, and I'm sure the Commission is well aware of  
09:34:26 9 that,

09:34:26 10 Multiple cases of investor fraud involving millions  
09:34:29 11 of dollars in loss to victims; scores of felon in possession  
09:34:31 12 of firearms cases, including the individual who allegedly  
09:34:34 13 provided the gun that killed former NFL football star Steve  
09:34:39 14 McNair; many immigration cases generated, in part, by an  
09:34:41 15 aggressive 287(g) program being run by the local sheriff;  
09:34:45 16 multi-defendant drug cases involving cocaine, heroin,  
09:34:48 17 marijuana and methamphetamine, as well as the typical array of  
09:34:51 18 crimes common to districts throughout the country.

09:34:54 19 When I came into office almost two years ago, I  
09:34:58 20 implemented a special unit for what we call the PSN program,  
09:35:03 21 the felons with guns prosecution because it was my view that a  
09:35:07 22 robust PSN program in the U.S. Attorney's Office not only has  
09:35:11 23 the capacity to take people off the street who are dangerous  
09:35:14 24 offenders and that are in possession of firearms, but it also  
09:35:17 25 sends a very loud message to the community that this type of

09:35:21 1 offense will be taken seriously by the Justice Department, and  
09:35:25 2 I think it does have some deterrent effect.

09:35:26 3           We hear a lot of anecdotal evidence on the jail calls  
09:35:31 4 and other information that we get that indicates that the idea  
09:35:34 5 of going federal is not a popular thing with street criminals,  
09:35:38 6 and we think that's a good deterrent effect.

09:35:41 7           Overall, the guidelines have worked well and continue  
09:35:43 8 to work well in our district. Judges continue to give careful  
09:35:46 9 attention to the calculation of ranges and consistently apply  
09:35:50 10 the various mitigating and enhancing factors, yet a trend has  
09:35:54 11 developed to treat the top end of the range as the maximum,  
09:35:57 12 while departures and variances to the down side are not  
09:36:00 13 uncommon. A notable exception to this trend is a recent case  
09:36:04 14 that received national attention as a TARP-related mini-Madoff  
09:36:09 15 case in which investors lost their life savings to a Ponzi  
09:36:14 16 scheme. This individual, and this case has been concluded,  
09:36:18 17 talk about it a little, but this individual had promised some  
09:36:20 18 of his investors toward the end of the scheme when he was  
09:36:24 19 about to be exposed that even if they lost money in their  
09:36:27 20 investments that the Troubled Asset Relief Program would come  
09:36:31 21 along and cover their losses. And, obviously, nothing like  
09:36:34 22 that existed in the federal system and it was a scam from  
09:36:39 23 start to finish, but because he invoked those words, our  
09:36:42 24 Special Inspector General for TARP did come in and help us  
09:36:46 25 with that case.

09:36:46 1           This defendant entered a quick plea of guilty,  
09:36:49 2 attempted to gain favorable consideration by cooperating with  
09:36:52 3 investigators. He did not qualify for a departure under  
09:36:56 4 Section 5K1 of the guidelines but argued for a low sentence  
09:37:00 5 anyway. My assistant called a number of victims to the stand  
09:37:04 6 to relate their stories of deceit, fraud and avarice to the  
09:37:07 7 judge, and the result was a sentence substantially above the  
09:37:10 8 guideline range and a speech from the judge regarding the  
09:37:13 9 defendant's callous treatment of his victims.

09:37:15 10           This example demonstrates both the value of  
09:37:17 11 guidelines and their limitations, I believe. While a term of  
09:37:20 12 imprisonment was clearly warranted and the  
09:37:23 13 multi-million-dollar loss figure netted a guideline range that  
09:37:26 14 called for incarceration, the judge weighed the human cost and  
09:37:29 15 rendered a rare upward departure that might have been more  
09:37:32 16 appealable when the guidelines were mandatory. We obviously  
09:37:36 17 agree with the sentence, but it might not have occurred before  
09:37:39 18 the *Booker* decision.

09:37:40 19           Just last week in another case like this with bigger  
09:37:45 20 numbers, however, a judge departed downward because he felt  
09:37:48 21 that the enhancement caused by the unusual loss numbers was  
09:37:52 22 disproportionate to the punishment needed in that individual  
09:37:55 23 case. And even though this particular Ponzi schemer had taken  
09:38:02 24 millions more, the sentence was only two-and-a-half years  
09:38:05 25 greater than the one I just referred to.

09:38:08 1           As federal prosecutors, one of our highest  
09:38:10 2 responsibilities is to give clear voice to the concerns of  
09:38:12 3 victims of crime. While vulnerability and loss are taken into  
09:38:16 4 account by the guidelines, only specific testimony from actual  
09:38:18 5 victims can convey the depth of feeling many victims have  
09:38:22 6 concerning their damages. These damages often include  
09:38:26 7 physical injury, loss of loved ones, financial ruin,  
09:38:29 8 destruction of life, and other consequences caused by a  
09:38:32 9 defendant's action.

09:38:35 10           The opposing view has merit as well. Sometimes the  
09:38:38 11 valid ends of justice would be better served by probation or  
09:38:41 12 other forms of alternative sentence. In drug cases  
09:38:44 13 particularly, we often see defendants who need treatment as  
09:38:47 14 well as incarceration, but sometimes no workable accommodation  
09:38:50 15 is available to the court.

09:38:51 16           The department is considering providing for greater  
09:38:54 17 flexibility in certain areas to open the door to more creative  
09:38:58 18 use of treatment alternatives without losing sight of the  
09:39:02 19 legitimate ends of justice and indeed for punishment and  
09:39:05 20 deterrence.

09:39:05 21           Where do we go from here? Most of us would probably  
09:39:09 22 agree that one of the dangers of being a rule maker is we  
09:39:12 23 might make too many rules. No one wants the manual that  
09:39:16 24 contains the U.S. sentencing guidelines to become another  
09:39:19 25 Internal Revenue Code. Since the *Booker* decision has placed a

09:39:22 1 significant limitation on the power to enact mandatory  
09:39:25 2 sentencing guidelines, it would seem prudent to review all the  
09:39:28 3 various options so that we could construct a system that  
09:39:31 4 provides a level of structure and guidance to eliminate  
09:39:34 5 unwarranted disparity, provide appropriate certainty and  
09:39:37 6 fairness in judgment, and does all of that without impinging  
09:39:43 7 on the Sixth Amendment right to trial by jury.

09:39:46 8           One way to do this might be to add to the mandatory  
09:39:48 9 minimum sentencing statutes already present in federal code.  
09:39:53 10 However, the Commission and others have suggested in the past  
09:39:57 11 that this may not be the best way to achieving the goals and  
09:40:00 12 the purposes of sentencing. Mandatory minimums have had a  
09:40:03 13 place in the federal criminal justice system for some time.  
09:40:06 14 Traditionally, though, mandatory minimums have been reserved  
09:40:09 15 for offenses that pose particularized threats to public safety  
09:40:13 16 and for which incarceration is seen as a necessary punishment.

09:40:16 17           If we retain the existing guidelines as presently  
09:40:21 18 promulgated, one reform worth considering might be placing  
09:40:24 19 some reasonable restrictions on the appellate process. In  
09:40:26 20 Middle Tennessee, we find that close to half of all appeals  
09:40:29 21 relate to sentences, and the trend is increasing since the  
09:40:32 22 *Booker* decision. Litigation over guideline calculations and  
09:40:35 23 actual sentences now consume a significant portion of court  
09:40:38 24 time whereas this was not the case in the pre-guidelines era.  
09:40:42 25 Perhaps some statutory changes could remedy this. And



09:40:46 1 obviously that's something that Congress and the Commission  
09:40:50 2 and many others will have to consider.

09:40:51 3 In closing, the Department of Justice is committed to  
09:40:55 4 a system of sentencing jurisprudence that protects the public,  
09:40:59 5 is fair to both victims and defendants, eliminates unwarranted  
09:41:03 6 disparities and prison terms and reduces recidivism. It is my  
09:41:07 7 hope that these lofty goals can be obtained without  
09:41:11 8 sacrificing the body of laws surrounding the U.S. sentencing  
09:41:16 9 guidelines and without placing undue burdens on the court  
09:41:18 10 system in our country. Certainly my office stands ready to  
09:41:22 11 assist the Commission in its important work, as we all strive  
09:41:25 12 to create a strategy that best serves the people whom we are  
09:41:28 13 sworn to protect.

09:41:29 14 Thank you.

09:41:30 15 ACTING CHAIR HINOJOSA: Thank you, Mr. Yarbrough, and  
09:41:32 16 we'll open it up for questions.

09:41:35 17 QUESTION AND ANSWER SESSION

09:41:35 18 VICE CHAIR CASTILLO: Good morning. Thank you for  
09:41:36 19 your testimony. I think it's fair to say the Commission looks  
09:41:40 20 forward to working with the working groups at the Department  
09:41:44 21 of Justice.

09:41:44 22 My question, of course, would be for Mr. Fitzgerald.  
09:41:48 23 As a member of our court, the Northern District of Illinois,  
09:41:53 24 what caught my attention was your written testimony, your oral  
09:41:58 25 testimony, 42 percent of contested sentencings resulting in

09:42:02 1 below-range sentences, that, coupled with the fact that you  
09:42:07 2 said, Patrick, you have anecdotal testimony or knowledge of  
09:42:13 3 substantial variations. But wouldn't you say, as I suspect is  
09:42:19 4 true, that most of these 42 percent of below-range sentences  
09:42:25 5 are rather slight variations from the low end of the  
09:42:29 6 guidelines?

09:42:30 7 What's your thought on that?

09:42:32 8 MR. FITZGERALD: I don't think -- I can't give you  
09:42:37 9 numbers. I don't want -- I don't want to -- I'm not prepared  
09:42:43 10 to disagree with you or agree with you because I haven't  
09:42:46 11 looked at the numbers about how far off they are.

09:42:49 12 VICE CHAIR CASTILLO: So you haven't tried to track  
09:42:51 13 it.

09:42:52 14 MR. FITZGERALD: I think people in my office may or  
09:42:54 15 may not. I could get back to the Commission, but I couldn't  
09:42:56 16 tell you how many of those are six months below the range  
09:42:59 17 versus --

09:43:00 18 VICE CHAIR CASTILLO: Right.

09:43:02 19 MR. FITZGERALD: -- eight years down to zero.

09:43:05 20 VICE CHAIR CASTILLO: But wouldn't you suspect just  
09:43:07 21 that it would be intuitive, if 42 percent were substantial  
09:43:08 22 variations, that would be pretty big news that would make its  
09:43:11 23 way not only out of Chicago but make its way all the way back  
09:43:14 24 to D.C. if we had a district that 42 percent of the judges  
09:43:20 25 were substantially varying from the low end of the guidelines?

09:43:25 1 MR. FITZGERALD: What I would say is I would hear --  
09:43:26 2 I hear more anecdotally the larger departures. I'll make it  
09:43:31 3 concrete, not speaking about a case, but if someone has an 8-  
09:43:35 4 to 10-year range, if someone departed down to 7-and-a-half  
09:43:38 5 years, they will tell the appellate chief that there was a  
09:43:41 6 variance. That wouldn't even be a thought in my mind. Unless  
09:43:44 7 there was something radically wrong from our perception in the  
09:43:49 8 process or ruling, we wouldn't even think about departure.  
09:43:52 9 I'm more likely to hear from an 8- to 10-year range that we  
09:43:56 10 got probation --

09:43:57 11 VICE CHAIR CASTILLO: Right.

09:43:58 12 MR. FITZGERALD: -- or that we had one year or  
09:44:00 13 two years, where people might talk about whether we want to  
09:44:03 14 have -- take an appeal. I have heard anecdotal reports, you  
09:44:08 15 know, including quite recently, of sentences where people  
09:44:12 16 receive, you know, far below or receive probation on a higher  
09:44:17 17 range. But I couldn't sit here and quantify how many times  
09:44:20 18 I've heard that as a percentage.

09:44:22 19 VICE CHAIR CASTILLO: Right. I understand that. I  
09:44:23 20 won't quibble with you about that.

09:44:24 21 As to the substantial variations that you do hear  
09:44:27 22 about where it's difficult for an assistant to really come  
09:44:31 23 down and need to talk to people about that, how hard is it to  
09:44:34 24 get approval from the Department of Justice to appeal that  
09:44:38 25 sentence?

09:44:40 1 MR. FITZGERALD: My sense is we take a high threshold  
09:44:45 2 to take that appeal. Recognizing that the law allows for  
09:44:49 3 substantial deference to the district court judge, we would  
09:44:52 4 look at it and say it's got to be something that we really  
09:44:56 5 think we have a chance of winning an appeal. We don't want to  
09:45:00 6 lose an appeal. We don't want to make bad law. Also, if  
09:45:04 7 there's a remand on appeal if we think it's procedural, we're  
09:45:07 8 going to end up to the same place. Because you go back [to] the  
09:45:08 9 judge and if the judge's view of the case is clear and we're  
09:45:10 10 going through a sort of exercise that it gets sent back to the  
09:45:13 11 same judge who may impose the same sentence with a different  
09:45:19 12 effort to apply a different procedure, that's not worth it.

09:45:22 13 When we think we should appeal, then we have to go to  
09:45:24 14 the Solicitor General's Office, who obviously have a broad  
09:45:27 15 view of the law. I can't give you exact numbers, but the  
09:45:29 16 number of times we appeal is far less than one percent of the  
09:45:33 17 sentences, putting aside cross appeals when the defendant  
09:45:37 18 does. So I think we have a high threshold. When we do seek  
09:45:41 19 to appeal as an office, I think perhaps because our appellate  
09:45:44 20 chief, Ed Chang, has a good sense of where the Solicitor  
09:45:48 21 General's Office is, I think we'd probably get authorized  
09:45:51 22 because we know a fair amount because we know where the  
09:45:53 23 threshold is.

09:45:54 24 VICE CHAIR CASTILLO: Thank you.

09:45:56 25 ACTING CHAIR HINOJOSA: Mr. Fitzgerald, follow-up on

09:45:57 1 the 42 percent. What do you mean by contested hearing and who  
09:46:02 2 keeps the record as far as the number of contested hearings?

09:46:07 3 MR. FITZGERALD: My understanding is the 42 percent  
09:46:09 4 excludes a 5K agreement, motions where it's agreed. I think  
09:46:15 5 those numbers, I thought they came from --

09:46:19 6 VICE CHAIR CASTILLO: From us.

09:46:21 7 MR. FITZGERALD: -- the Commission.

09:46:26 8 VICE CHAIR SESSIONS: Could I just follow up with  
09:46:28 9 that. Mr. Fitzgerald, I really appreciate you coming and  
09:46:32 10 testifying today.

09:46:33 11 Nationally, the statistics indicate that when there's  
09:46:38 12 a departure pursuant to 5K1 based on cooperation, the level of  
09:46:42 13 departure basically is double what a departure ordinarily  
09:46:47 14 would result in from a variance or from a variance based upon  
09:46:51 15 a provisional. So I'd be interested to see if, in fact,  
09:46:54 16 there's some difference now, so if you get back to us.

09:46:58 17 But I also found it interesting, your conversation  
09:47:02 18 about the safety valve. The prosecutors do not -- I think  
09:47:08 19 your expression was do not have heartburn over the safety  
09:47:12 20 valve. Initially there were some concerns that that might  
09:47:16 21 impact the frequency of cooperation.

09:47:19 22 My question is do you have, in light of your  
09:47:21 23 statement about perhaps two criminal history points, we should  
09:47:26 24 reconsider that? Do you have any strong feeling as to whether  
09:47:30 25 or not the safety valve should be expanded in some

09:47:33 1 circumstances to perhaps persons who have Criminal History  
09:47:40 2 Category II?

09:47:40 3 MR. FITZGERALD: What I would simply say is I don't  
09:47:42 4 want to advocate, take a position advocating what a member of  
09:47:46 5 the department or the department that is studying things.  
09:47:50 6 What I would say is there's a debate about mandatory minimums,  
09:47:52 7 and I think the debate has often been do we keep mandatory  
09:47:56 8 minimums, or do we get rid of mandatory minimums? And I think  
09:47:58 9 that is largely a binary option where there are other options.

09:48:02 10 I do think that if you have your intelligence drive  
09:48:06 11 who you're prosecuting, if you're going after a particular  
09:48:09 12 gang, that can have a devastating impact on a neighborhood  
09:48:13 13 that having that mandatory minimum when you get the leader of  
09:48:16 14 the gang in that neighborhood who both deserves to be  
09:48:18 15 incapacitated if he's causing violence, where the mandatory  
09:48:21 16 minimum can help drive cooperation is very important.

09:48:24 17 I also recognize that when you have very large cases  
09:48:28 18 that we end up arresting 60 defendants, we have a very good  
09:48:32 19 relationship with the state's attorney's office where we can  
09:48:34 20 say why don't you take 40 of them and we'll take 20 of them,  
09:48:39 21 the ones we think are more appropriate for state prosecution,  
09:48:39 22 but in smaller cases, if you arrest four defendants and two of  
09:48:42 23 them were leaders of the gang that you knew had been involved  
09:48:46 24 in violence and thought it very, very important to the safety  
09:48:50 25 of that neighborhood that they be prosecuted, whether tied up

09:48:53 1 in conspiracy with other people who may be worthy of federal  
09:48:56 2 prosecution who are not people independently that you would  
09:48:58 3 select for the mandatory minimums, the relief valves -- there  
09:49:02 4 are three of them. One of them is there's a 5K motion. If  
09:49:06 5 one of those people cooperates and testifies against their  
09:49:09 6 boss, their sentence can avoid the mandatory minimums.

09:49:12 7           The second relief valve is the safety valve, and if  
09:49:16 8 they don't have a Criminal History Category beyond one  
09:49:21 9 criminal history point, they qualify, they can avoid the  
09:49:24 10 mandatory minimum.

09:49:24 11           Our third way of dealing with that is we view it as  
09:49:27 12 consistent with the *U.S. Attorneys' Manual* that we can  
09:49:31 13 exercise the discretion to offer phone counts if we think  
09:49:34 14 these people warrant it.

09:49:35 15           So my sense is that it's not just should we have  
09:49:38 16 mandatory minimums exactly as they are, should we get rid of  
09:49:41 17 them completely, which I think would have a devastating impact  
09:49:44 18 on the ability to enforce the law, or should we also just bear  
09:49:47 19 in mind that one other option is to say you keep the mandatory  
09:49:50 20 minimums in place, but one of the things you look at is how is  
09:49:53 21 the safety valve working. And in some cases I see in an urban  
09:49:57 22 environment a criminal history point might be for something  
09:50:00 23 that's dated, you might also see that a criminal history  
09:50:03 24 point, one of the things you see in particularly urban drug  
09:50:07 25 dealing is the people who are on the street are more likely to

09:50:09 1 be arrested than the people who run the operation who insulate  
09:50:12 2 themselves from drug sales. And that's why in some cases  
09:50:15 3 often we may not file prior felony information if we think the  
09:50:19 4 person with the prior record isn't the worst person in the  
09:50:22 5 conspiracy. The boss has never been arrested because he has  
09:50:25 6 those other people out doing street sales.

09:50:26 7           And so to me one criminal history point, in some  
09:50:31 8 cases people with more than that, may not be people who are so  
09:50:34 9 dangerous that you couldn't avail of that; and without  
09:50:37 10 advocating a view, what I'd simply say is I think in looking  
09:50:40 11 at options, there's an in-between option between keeping  
09:50:43 12 things exactly as they are, throwing out the mandatory  
09:50:46 13 minimums, or looking at saying is there a way that we can keep  
09:50:49 14 the what I believe are the positive effects of mandatory  
09:50:52 15 minimums that allow us to enforce the law while allowing a bit  
09:50:56 16 more discretion to allow some people out from the harshness of  
09:51:01 17 those sentences.

09:51:02 18           VICE CHAIR SESSIONS: Before I pass on,  
09:51:05 19 Mr. Yarbrough, you made a really interesting observation based  
09:51:11 20 on your experience with a judge, and that is, that judge felt  
09:51:12 21 certainty of punishment as opposed to length of punishment is  
09:51:15 22 most important.

09:51:16 23           MR. YARBROUGH: Absolutely.

09:51:18 24           VICE CHAIR SESSIONS: To what extent can you meld  
09:51:20 25 that together with a system by which you develop alternatives



09:51:24 1 to imprisonment?

09:51:26 2 MR. YARBROUGH: Well, I think the other slogan that  
09:51:28 3 we all probably love to quote is the punishment should fit the  
09:51:31 4 crime, and when you start fashioning these alternatives, of  
09:51:36 5 course, you have to be careful, I think, because if we start  
09:51:40 6 to in any way depreciate the whole idea of punishment for  
09:51:45 7 crime by creating alternatives that the street people see as a  
09:51:50 8 slap on the wrist, then you're going to I think pay for that  
09:51:53 9 down the road in terms of behavior.

09:51:56 10 The overall feeling, and I'm not sure I'm supposed to  
09:52:02 11 give personal views here because I'm speaking for the  
09:52:04 12 department, but certainly those of us with long experience in  
09:52:09 13 this -- and I think I heard Mr. Fitzgerald say this a moment  
09:52:13 14 ago also -- there is certainly room in what we are doing as  
09:52:16 15 prosecutors for alternative sentencing, as long as it's done  
09:52:20 16 reasonably and prudently. And it's not something that we  
09:52:24 17 ought to just open a door and suddenly rush into a lot of  
09:52:28 18 alternative sentencing that will perhaps not work and not  
09:52:31 19 achieve the desired result.

09:52:33 20 By the same token, I don't believe we fear it. I  
09:52:36 21 don't hear any fear in my colleague's voice, and I certainly  
09:52:40 22 don't have any on the idea. But we need to proceed with  
09:52:44 23 caution. That's why the working group is certainly a good  
09:52:46 24 idea and why the considered opinion of the entire department  
09:52:51 25 represented by the Attorney General would be something I would

09:52:54 1 have full confidence in after the study is done and the  
09:52:58 2 examination is done because the disparity on the crack  
09:53:02 3 sentences has shown us that there is some unrest, and I think  
09:53:07 4 unrest in a judicial system is never good. So I'm hoping that  
09:53:12 5 the working group will strike a good balance and come up with  
09:53:16 6 something that we can all live with.

09:53:21 7 COMMISSIONER HOWELL: Thank you.

09:53:22 8 Mr. Fitzgerald, I want to tell you that I appreciate  
09:53:27 9 your remarks about the child pornography guidelines. The  
09:53:31 10 disconnect that you note between judges' sentencing and  
09:53:36 11 prosecutors' positions on child pornography sentencing is  
09:53:40 12 something that we on the Commission have certainly noticed,  
09:53:43 13 given the significant rate of non-government-sponsored  
09:53:48 14 downward departures in the child pornography area. It's  
09:53:53 15 something that is on our priority list to look at in the  
09:53:55 16 upcoming year, to take a whole look at the child pornography  
09:53:58 17 guidelines, look at the departures under those guidelines to  
09:54:01 18 see if additional refinement of those guidelines would be  
09:54:04 19 appropriate.

09:54:05 20 I happen to fully agree with you that education is  
09:54:08 21 the key component of what is also needed here. The  
09:54:16 22 Commission, you know, does have this unique position in  
09:54:18 23 communicating a lot with Congress, in particular in the child  
09:54:22 24 pornography context. The Commission, you know, has had a very  
09:54:27 25 dynamic conversation, as we do formally with amendments and

09:54:32 1 directives from the Congress, in terms of what the appropriate  
09:54:34 2 sentence should be and particularly the child pornography  
09:54:39 3 possession, and that conversation I'm sure will continue  
09:54:44 4 apace.

09:54:44 5           As we are looking at our role in educating the  
09:54:50 6 judiciary and the policymakers about child pornography, I  
09:54:55 7 wondered if you could elaborate a little bit more about what  
09:55:00 8 kind of educational efforts for policymakers and sentencing  
09:55:03 9 judges you think would be helpful.

09:55:06 10           MR. FITZGERALD: I think the issues that I see that  
09:55:11 11 are important to driving what's an appropriate sentence for  
09:55:13 12 child pornography and/or child exploitation I would break into  
09:55:16 13 probably three areas.

09:55:19 14           Some people espouse the view that the possession of  
09:55:22 15 child pornography is not a predictor of whether or not people  
09:55:25 16 will exploit children and, therefore, I think they take the  
09:55:27 17 view that the sentences are definitely too high.

09:55:30 18           I've also heard other people say that there's studies  
09:55:33 19 that suggest that there's a stronger correlation between  
09:55:35 20 possessing child pornography and exploiting children. And  
09:55:39 21 having, you know, my sense of the studies and the social  
09:55:43 22 sciences is as in many areas, there's not agreement on this,  
09:55:46 23 but a sense of the correlation between whether or not a person  
09:55:49 24 possesses child pornography, whether or not that correlates  
09:55:52 25 with a likelihood that they're abusing children, does that

09:55:55 1 depend on whether they possess it at all? Does it depend on  
09:55:59 2 the amount they possess? Does it depend on the type of child  
09:56:02 3 pornography they possess? And if they have very young  
09:56:04 4 children and very, very horrible acts are depicted, what does  
09:56:08 5 that indicate about their dangerousness? Because I do, when I  
09:56:11 6 look at sentences and plea agreements, worry about future  
09:56:17 7 harm.

09:56:17 8           The second part of that, and I don't know that  
09:56:19 9 there's a consensus on that and my guess is if you polled both  
09:56:24 10 prosecutors and judges, I think there's a disconnect as to  
09:56:27 11 what people believe is the correlation between possession of  
09:56:30 12 child pornography and abuse.

09:56:32 13           The second part of that is in actual abuse cases, I  
09:56:37 14 am operating under the belief that I believe that there's a  
09:56:40 15 strong recidivism rate among people who actually abuse  
09:56:43 16 children, and I think a lot of people have said that people  
09:56:47 17 who are violent often get aged out of that. When you're  
09:56:50 18 25 years, you may be part of a violent gang. Twenty years  
09:56:54 19 later, the likelihood of recidivism may drop. I've heard a  
09:56:55 20 number of people say that when it comes to child exploitation,  
09:56:59 21 people do not age out. And there's something very, very  
09:57:01 22 horrid about a person who has been involved in a serious  
09:57:05 23 abuse, and they come in and they say do I have to undergo a  
09:57:08 24 25-year mandatory minimum or 25-year guideline range, would it  
09:57:11 25 really hurt the world if I got out in 20 years? Then you

09:57:13 1 think, well, what is going to happen in 20 years?

09:57:16 2           If in that period between 20 and 25 there were some  
09:57:19 3 people who are going to be abused that we can't identify now,  
09:57:22 4 then while your human compassion says 20 years is an awfully  
09:57:27 5 long time, you do not want to give that person a five-year  
09:57:30 6 break that's going to visit harm on someone else. But knowing  
09:57:34 7 what the recidivism rate is and how age does or does not  
09:57:37 8 affect it for people who are abused would be important.

09:57:39 9           The third thing is understanding the harm in making  
09:57:42 10 the market for child pornography. If people possess something  
09:57:46 11 that's particularly vile, how much are they creating a market  
09:57:51 12 which some other people are making these images to produce?  
09:57:56 13 And those are very, very real harms.

09:58:00 14           I guess I would add a fourth piece which is what is  
09:58:02 15 the damage to people who are in those photographs knowing that  
09:58:05 16 people possessed them? NCMEC, the National Center For Missing  
09:58:09 17 and Exploited Children, keeps, I guess, a registry of these  
09:58:13 18 photos. And my understanding is if a photo of a victim or a  
09:58:16 19 video of a victim is found with someone, is identified to be  
09:58:21 20 one of their photos or videos in the registry, my  
09:58:24 21 understanding is that then that victim is contacted so that  
09:58:27 22 they can make a decision whether or not to make a victim  
09:58:30 23 impact statement before the judge.

09:58:31 24           In some cases, those victims do come before the judge  
09:58:34 25 and at sentencing a judge would know what that person, you

09:58:37 1 know, what they're feeling about it, how they're impacted.  
09:58:40 2 But many do not want to go before the judge because they just  
09:58:43 3 want to, you know, have this in their past, and what is the  
09:58:47 4 harm, you know, the appreciation of the harm that's caused  
09:58:51 5 those victims to get those phone calls again and again and  
09:58:54 6 again and saying somebody else somewhere else had your picture  
09:58:58 7 and was distributing it.

09:58:59 8           And thinking rationally about a very, very disturbing  
09:59:03 9 topic and saying what are the harms here, what are the risks  
09:59:06 10 that this person is abusing children; if they have abused  
09:59:10 11 children, what are the risks they will re-offend; what are the  
09:59:13 12 harms for creating a market for this sort of material; what  
09:59:18 13 are the harms to the victims in finding out that it was  
09:59:19 14 possessed by someone else would be a useful thing to educate  
09:59:22 15 prosecutors, the public, Congress, judges, anything we can do  
09:59:26 16 to take the extent of the disconnect and narrow it would be  
09:59:30 17 very helpful.

09:59:31 18           I will say that our view in this district, as I think  
09:59:35 19 we do less volume of child pornography cases, we do lots of  
09:59:40 20 triage. We look to state and local partners, and we look for  
09:59:49 21 our what we believe are the most egregious cases, and our view  
09:59:49 22 is to bring those cases that warrant these penalties.

09:59:52 23           And I can tell you, just having nothing to do with  
09:59:54 24 the policy, the people who do it in my office, I've gone, I've  
09:59:57 25 seen them recently. One week we just had an unbelievable

10:00:01 1 number of exploiters of horrible child pornography, where the  
10:00:06 2 prosecutors and agents looked at the materials and could not  
10:00:08 3 believe what they were seeing, and they've been doing this for  
10:00:10 4 a number of years.

10:00:11 5           So this is an area fraught with a lot of emotion, and  
10:00:15 6 we shouldn't put people in jail for longer than they deserve  
10:00:18 7 or longer than necessary to protect the public, but we  
10:00:22 8 shouldn't put them in jail for less than that. And anything  
10:00:24 9 we can do to get a better consensus and better understanding  
10:00:27 10 of what is behind this problem so we can address it better I  
10:00:31 11 think is important.

10:00:34 12           VICE CHAIR CARR: Mr. Fitzgerald, you said that  
10:00:35 13 post-Booker you're getting fewer cooperation agreements  
10:00:38 14 because defendants and defense attorneys would prefer to make  
10:00:41 15 a pitch to the sentencing judge.

10:00:43 16           I assume that means that your cooperation agreements  
10:00:45 17 are 11(c)(1)(C) agreements that require a negotiated and  
10:00:49 18 binding sentence?

10:00:50 19           MR. FITZGERALD: That's generally what they are, so  
10:00:53 20 it's situational. The defense attorneys will examine the  
10:00:56 21 case, the facts, the defendant, the judge and decide, well,  
10:01:00 22 maybe my fellow wants to cooperate, but we don't want to take  
10:01:03 23 your (c)(1)(C) agreement to one-third off the guidelines  
10:01:06 24 range. We'd rather just cooperate and go in and make a pitch  
10:01:09 25 to the judge in the hope that we'll get -- do better than that

10:01:13 1 and certainly no worse.

10:01:14 2 VICE CHAIR CARR: I understand.

10:01:15 3 Now, do you believe that you're getting less  
10:01:17 4 cooperation or just fewer cooperation agreements with a  
10:01:20 5 binding sentence?

10:01:21 6 MR. FITZGERALD: My impression is we get somewhat  
10:01:25 7 less cooperation, but later cooperation as well, so that the  
10:01:29 8 timeliness -- my impression is that we get less cooperation,  
10:01:33 9 but almost more importantly that sometimes the cooperation is  
10:01:36 10 less timely.

10:01:39 11 VICE CHAIR CARR: And pre-*Booker*, did your plea  
10:01:42 12 agreements also require that they be (C) agreements with a  
10:01:45 13 binding sentence?

10:01:46 14 MR. FITZGERALD: Yes. Our plea agreements haven't  
10:01:48 15 changed. The willingness of the defense bar to have their  
10:01:50 16 clients engage in them has changed.

10:01:52 17 VICE CHAIR CARR: Thank you.

10:01:56 18 COMMISSIONER WROBLEWSKI: First, Pat, Ed, thank you  
10:01:59 19 both for being here and for participating in this and the  
10:02:02 20 working group back at the department.

10:02:04 21 Pat, we heard yesterday from Professor Kennedy -- I  
10:02:11 22 almost forgot his name -- Professor Kennedy from the John Jay  
10:02:15 23 College about Project Ceasefire and his experiences around the  
10:02:20 24 country, including a little bit about what's going on in  
10:02:22 25 Chicago.



10:02:23 1            Could you describe a little bit about the Chicago PSN  
10:02:26 2 program, the interventions, how you select the people who are  
10:02:30 3 going to be prosecuted federally, the work you do with the  
10:02:34 4 local police department and other federal agencies and all  
10:02:37 5 that?

10:02:38 6            MR. FITZGERALD: We actually have three programs that  
10:02:40 7 are somewhat related. There's Project Safe Neighborhoods,  
10:02:43 8 there's a gang program that we call The Top 20 Program, and  
10:02:46 9 there's a program, a funding program called CAGI, which is  
10:02:50 10 Comprehensive Anti-Gang Initiative.

10:02:53 11            The PSN program is a deterrence program where we  
10:02:56 12 started with two districts in Chicago. The districts are  
10:03:01 13 police areas, in New York they call them precincts, it's  
10:03:04 14 different in different areas. We went to the areas that had  
10:03:06 15 the largest concentration of violence.

10:03:10 16            In 2002, I believe the homicide rate in Chicago was  
10:03:14 17 666 homicides that occurred. The city had not had homicides  
10:03:19 18 below the level of 600 homicides per year in 36 years, going  
10:03:23 19 back to the '60s. We wanted to see if we could work with our  
10:03:27 20 local partners to take the homicide rate down.

10:03:29 21            So one of the things we did besides selecting  
10:03:31 22 particular cases to prosecute in conjunction with police and  
10:03:34 23 ATF to find what we thought were the worst of the worst to  
10:03:37 24 bring federally on gun charges was to try to do deterrence.  
10:03:41 25 So we selected the two districts with the highest homicide

10:03:43 1 rates, we expanded it to four, now we're up to six districts,  
10:03:47 2 where we select people coming out of the state prison,  
10:03:49 3 Illinois Department of Corrections. They are required to show  
10:03:52 4 up for a forum for one hour. They are randomly selected.  
10:03:56 5 There's a control group that doesn't go to these meetings.

10:03:59 6 In the meeting, we have two prosecutors, one state,  
10:04:02 7 one federal, who briefly read the riot act to these guys  
10:04:05 8 getting out of prison and tell them that if they're caught  
10:04:08 9 with a gun, here are the penalties. We advertise the 15-year  
10:04:11 10 mandatory minimum for armed career criminals. We usually cite  
10:04:15 11 them examples of recent people who were prosecuted from their  
10:04:18 12 neighborhood that they'd know from the streets. So we say,  
10:04:21 13 Did you know so-and-so with this nickname? Do you know where  
10:04:23 14 he is and what he's doing now? He's in this prison with this  
10:04:26 15 sentence because he was caught with a gun and let them know  
10:04:28 16 that we're out there looking.

10:04:29 17 We send him a letter personalized, Dear name, you're  
10:04:32 18 in the Project Safe Neighborhoods database. If you're caught  
10:04:35 19 with a gun, we're going to be notified and your case will be  
10:04:39 20 sent for federal prosecution. We also involve the police  
10:04:42 21 officers and ATF.

10:04:43 22 Then we switch to service providers, people who offer  
10:04:46 23 educational programs, G.E.D. programs, detox programs, job  
10:04:50 24 training programs. Often either job counselors or people from  
10:04:54 25 the private sector who literally say here's where I work.

10:04:58 1 Here's the job I offer. Show up on Monday if you'd like at  
10:05:01 2 9:00, and here's how we work.

10:05:03 3           And then we switch finally to the most effective  
10:05:05 4 speaker who is usually an ex-felon. One fellow in particular  
10:05:11 5 was on death row, was involved in gangs, involved in violence  
10:05:15 6 and talks about his life on the street, his life in prison,  
10:05:19 7 what happened to his family, what happened to his mother, what  
10:05:21 8 happened to his relationships, what happened to his kids.

10:05:24 9           We also have another very effective speaker who shows  
10:05:27 10 up in a wheelchair who was in a gang, was involved in a  
10:05:30 11 shooting, paralyzed from the waist down and talks very  
10:05:34 12 graphically about what his life is like being paralyzed from  
10:05:38 13 the waist down. And the conversations with the parolee, the  
10:05:40 14 felon, the guy in the wheelchair, very salty, very  
10:05:41 15 down-to-earth, and all the people that we're trying to talk to  
10:05:44 16 would sometimes look up when we talked to them. They all  
10:05:46 17 looked up when they speak. And the end of the message in one  
10:05:49 18 hour is you've got two choices: You can see the fence when  
10:05:52 19 you get caught with a gun and this is what's going to happen  
10:05:54 20 to you, or you can go see the people about a job.

10:05:57 21           That program has resulted in a 30 percent lesser  
10:06:01 22 recidivism rate for the people attending for one hour. We  
10:06:04 23 can't do something more effective than that in law enforcement  
10:06:07 24 when there's no follow-up cost. There's no human cost of  
10:06:10 25 incarceration, no cost of imprisonment, and we try to do more

10:06:13 1 and more of that, and we're trying to refine our message.

10:06:15 2           Separate from that, we have a gang strategy meeting,  
10:06:19 3 a team approach. All the districts are congregated into five  
10:06:24 4 areas in Chicago. So in each of the areas in Chicago once a  
10:06:27 5 month, a federal prosecutor with a state prosecutor and the  
10:06:29 6 local police sit down and talk about the violence problem in  
10:06:32 7 the area, answering the intelligence which gangs or which  
10:06:37 8 individuals are leading that violence, and then we assign  
10:06:40 9 AUSAs and assistant state's attorneys for particular gangs and  
10:06:44 10 say how do we go about going after this person who's causing  
10:06:48 11 particular violence, and let's see what cases we can make.  
10:06:50 12 Let's focus our resources on their prosecution.

10:06:53 13           After all those area strategy meetings, then once a  
10:06:57 14 month at the offices of DEA we have the top 20 meeting, which  
10:07:00 15 is we sit down and we talk through who are the 20 most violent  
10:07:03 16 targets in this city, people or groups of people, leaders of a  
10:07:07 17 gang or a gang. To those of you who have ever been in federal  
10:07:11 18 law enforcement, it would be remarkable to hear that we have  
10:07:13 19 the Chicago Police Department, DEA, ATF, FBI and IRS openly  
10:07:17 20 talking about what cases they have. When one of the top 20  
10:07:20 21 targets is identified, if FBI has a case open, they'll say it.  
10:07:23 22 If DEA has an informant or useful information, they will say  
10:07:28 23 we'll give the information to the FBI and let you go with it.

10:07:31 24           The next one that comes up they may -- FBI may defer  
10:07:34 25 to DEA. If there's an open case, then one federal agency will

10:07:38 1 volunteer and say we're responsible. We'll work with CPD.

10:07:44 2 And those are how we do those cases. So we want to take our

10:07:47 3 resources not to go after the person who happened to deal

10:07:50 4 drugs with the person who happened to get caught, but let's

10:07:52 5 say the people who are making an impact on violence, and

10:07:56 6 that's what we're going to do is have it intelligence driven.

10:07:59 7 I will redact the name when a person who is not

10:08:01 8 involved in law enforcement, very important in the community

10:08:05 9 came once to me and said in my neighborhood, there's one

10:08:06 10 particular gang who's involved in a lot of shootings and

10:08:11 11 they're drawing people away from social service programs, and

10:08:14 12 checked, and he was on the list of important targets. And

10:08:17 13 when he was arrested, we heard back that the community was

10:08:20 14 different. It was safer. People were doing other things.

10:08:23 15 So that's our sort of gang strategy approach.

10:08:26 16 And lastly the CAGI approach, which is where we look

10:08:29 17 at re-entry programs and funding. We receive this grant, some

10:08:32 18 of it's for enforcement, some of it's for re-entry programs,

10:08:36 19 and some of it's for deterrence. We've seen that we just

10:08:38 20 don't want to make arrests, we want to make an impact.

10:08:41 21 We had a case before Judge Castillo involving Aurora,

10:08:43 22 where the Insane Deuces were a very violent group. And after

10:08:46 23 we brought a RICO prosecution there, I woke up one morning and

10:08:50 24 I heard on the radio that the first killing had occurred in

10:08:52 25 Aurora that year. I believe it was last, it was in September

10:08:56 1 when I heard that.

10:08:57 2           And if you had told people a year or two before that  
10:09:00 3 the first homicide in Aurora would happen in September, they  
10:09:03 4 would have been stunned. There have been other times in  
10:09:05 5 Chicago where we take a group out, and another group comes in.  
10:09:08 6 And so actually we want to make sure that we put our program  
10:09:12 7 money in the right place.

10:09:13 8           We will sit down with the police and we'll sit down  
10:09:15 9 with the program people running re-entry programs and say if  
10:09:19 10 we've got several violent sections where violence is breaking  
10:09:22 11 out in Chicago and we want to crack down on that violence,  
10:09:24 12 where do we have the best re-entry programs and support  
10:09:27 13 personnel? So if we have two neighborhoods with violence and  
10:09:30 14 we can put overtime and try and make a case, let's go where we  
10:09:33 15 can also send resources where there's a program where we can  
10:09:36 16 take troubled youth, we'll take re-entry and try and fill that  
10:09:39 17 in so we're not just arresting the bad gang, but maybe taking  
10:09:45 18 the people who are now in a vacuum and driving them into  
10:09:47 19 something more productive.

10:09:49 20           And so between the three strategies what we're trying  
10:09:51 21 to do is make sure in a city that has estimated to be 70 to  
10:09:55 22 100 thousand gang members, we're going to prosecute in the  
10:09:58 23 hundreds, not in the thousands. We're not going to  
10:10:00 24 incarcerate our way out of a problem by arresting 100,000  
10:10:04 25 people. It's to take the people most likely to kill and

10:10:06 1 prosecute them and incarcerate them and market what we're  
10:10:08 2 doing to others.

10:10:11 3 VICE CHAIR CASTILLO: I take it as a result of your  
10:10:13 4 experience with Project Safe Neighborhoods, you're a big  
10:10:16 5 proponent of re-entry programs and would like to see them  
10:10:19 6 expanded nationwide.

10:10:21 7 MR. FITZGERALD: I think re-entry programs are  
10:10:23 8 critical. I think the number of people released into the  
10:10:27 9 Chicago area from the Illinois state system each year is about  
10:10:31 10 17,500, and we've actually tried to get the word out because  
10:10:36 11 people expect to hear about re-entry not from prosecutors.

10:10:41 12 I try to do a little bit of a speaking tour saying if  
10:10:44 13 you want to cut down on crime, here's what a business can do:  
10:10:47 14 Be open to hiring felons because this is a chance to do  
10:10:50 15 something. And I believe there are an awful lot of companies  
10:10:53 16 that are hiring felons, many of whom don't advertise it,  
10:10:56 17 they're having very good, positive experiences.

10:10:58 18 But the number of re-entry opportunities and number  
10:11:01 19 of employers willing to hire felons coming out of jail  
10:11:05 20 doesn't, I think, come close to being able to deal with 17,500  
10:11:10 21 a year. And to me, taking off the sentencing guidelines and  
10:11:14 22 prosecutor hat, I think one of the key things to reducing  
10:11:18 23 long-term violence is to find a way to get people who decide  
10:11:23 24 to go straight, to give them that opportunity. And my thought  
10:11:26 25 is if in a one-hour meeting we can reduce recidivism by the

10:11:29 1 people attending by 30 percent, you know, if we had more  
10:11:33 2 re-entry programs, I wonder if that number couldn't be higher.

10:11:38 3 COMMISSIONER FRIEDRICH: Mr. Fitzgerald, you've  
10:11:40 4 testified that at least in this district, your AUSAs have the  
10:11:44 5 authority in appropriate cases to seek approval to seek a  
10:11:47 6 sentence recommendation outside the guideline range, you have  
10:11:52 7 a centralized process to approve those requests.

10:11:54 8 For a long time following *Booker*, we'll hear from  
10:11:57 9 prosecutors across the country that they really had one hand  
10:12:01 10 tied behind their back, the department's position was that the  
10:12:02 11 guidelines adequately take into account the 3553(a) factors  
10:12:06 12 and prosecutors are seeking a guideline sentence.

10:12:10 13 I'm just curious, one, whether you know to what  
10:12:13 14 extent you're leading other districts throughout the country,  
10:12:19 15 other prosecutors' offices, and, secondly, whether Main  
10:12:21 16 Justice is considering providing some sort of guidance to the  
10:12:24 17 field to ensure that this discretion is exercised  
10:12:26 18 consistently?

10:12:27 19 MR. FITZGERALD: Let me tell you what I can about  
10:12:30 20 that. I don't want to create the impression that in the  
10:12:33 21 Northern District, we're routinely going outside the  
10:12:36 22 guidelines. I think we start from sort of a presumption that  
10:12:40 23 the guidelines sentence is probably the right sentence, but we  
10:12:44 24 want the discretion in the right case to not file a five-count  
10:12:49 25 information or not seek a mandatory minimum or to give phone



10:12:52 1 counts, and so we do do it in the appropriate case.

10:12:54 2 I don't -- I don't -- I can't represent that that's  
10:12:58 3 the same in other districts, and the one thing I would point  
10:13:01 4 out, and I looked it up this morning because I'm starting to  
10:13:05 5 think about that, there was the Ashcroft Memorandum, and the  
10:13:09 6 Ashcroft Memorandum, like many other things that come out, I  
10:13:12 7 sometimes wonder if everyone has the same understanding of the  
10:13:15 8 Ashcroft Memorandum.

10:13:16 9 The Ashcroft Memorandum I read in conjunction with  
10:13:19 10 the *U.S. Attorneys' Manual*. I don't spend all my days reading  
10:13:23 11 the *U.S. Attorneys' Manual*, but this morning I happened to  
10:13:25 12 look up something that I think would surprise lots of people.  
10:13:28 13 And in the *U.S. Attorneys' Manual* when it talks about charging  
10:13:32 14 the most serious offense under section 9-27.330, there are two  
10:13:36 15 sentences in one paragraph that sound like what most people  
10:13:39 16 understand. It says, "[T]he attorney for the government should  
10:13:41 17 charge or should recommend that the grand jury charge the most  
10:13:44 18 serious offense that is consistent with the nature of the  
10:13:47 19 defendant's conduct," and later says the most serious offense  
10:13:50 20 is normally that which yields the highest range of the  
10:13:52 21 sentencing guidelines. That paragraph also talks about taking  
10:13:55 22 into account the mandatory minimums. That is the presumption  
10:13:58 23 from which we start, but the next paragraph continues, and  
10:14:01 24 I'll just read it out loud: "However, a faithful and honest  
10:14:05 25 application of the sentencing guidelines is not incompatible

10:14:07 1 with selecting charges or entering into plea agreements or the  
10:14:11 2 basis of an individualized assessment of the extent to which  
10:14:14 3 particular charges fit the specific circumstances of the case,  
10:14:17 4 are consistent with the purposes of the purpose of the federal  
10:14:21 5 criminal code, and maximize the impact of federal resources on  
10:14:24 6 crime. Thus, for example, in determining the most serious  
10:14:26 7 offense that is consistent with the nature of the defendant's  
10:14:29 8 conduct that is likely to result in a sustainable conviction,  
10:14:32 9 it is appropriate that the attorney for the government  
10:14:34 10 consider, inter alia, such factors as the sentencing guideline  
10:14:37 11 range given by the charge, whether the penalty yielded by such  
10:14:40 12 sentencing range or potential mandatory minimum charge, if  
10:14:43 13 applicable, is proportional to the seriousness of the  
10:14:46 14 defendant's conduct, and whether the charge achieves such  
10:14:49 15 purposes of the criminal law: Punishment, protection of the  
10:14:52 16 public, specific and general deterrence, and rehabilitation,  
10:14:56 17 and note that these factors may also be considered by the  
10:14:58 18 attorney for the government when entering into plea  
10:15:01 19 agreements."

10:15:01 20           So I read the Ashcroft Memorandum in conjunction with  
10:15:04 21 that provision as allowing more discretion. To make it  
10:15:07 22 concrete, if we had one of these meetings where we decided  
10:15:10 23 that John Smith was causing an awful lot of violence in a  
10:15:13 24 particular area, we're going to prosecute him. And my  
10:15:16 25 assumption is if John Smith gets a ten-year mandatory minimum

10:15:20 1 and 15-year range and he's been reeking violence in the  
10:15:23 2 neighborhood, we're going to argue for that mandatory minimum,  
10:15:25 3 we're going to argue under 3553 that he ought to get that  
10:15:28 4 sentence.

10:15:28 5 But if, in prosecuting John Smith, we find he has a  
10:15:30 6 partner who's equally culpable, we'll do the same. But in  
10:15:34 7 making that case, if we deal with lesser players involved in a  
10:15:36 8 drug ring with John Smith, then if those lesser players  
10:15:40 9 cooperate, that's a great thing. If they qualify for the  
10:15:43 10 safety valve, then we ameliorate the harshness there; and if  
10:15:47 11 they don't cooperate, don't qualify for the safety valve but  
10:15:50 12 our assessment of those defendants is that they don't merit  
10:15:52 13 the penalties that we selected for John Smith and/or his other  
10:15:57 14 serious violators, we feel it's consistent with the *U.S.*  
10:16:00 15 *Attorneys' Manual* that we can offer a phone count under those  
10:16:03 16 circumstances.

10:16:04 17 ACTING CHAIR HINOJOSA: And then wouldn't go outside  
10:16:06 18 the guidelines, you would go to the guidelines for the phone  
10:16:08 19 count is your statement. What you're saying is you used a  
10:16:12 20 different charge, but then you would argue for a guidelines  
10:16:15 21 sentence within that charge.

10:16:16 22 MR. FITZGERALD: Or in the appropriate case, we could  
10:16:18 23 argue for -- that was an example. If there weren't a  
10:16:21 24 mandatory minimum, if it wasn't a drug case, if an Assistant  
10:16:26 25 U.S. Attorney believes a downward variance is appropriate,

10:16:28 1 that assistant cannot do that on their own. They would then  
10:16:32 2 go to their deputy chief or section chief and then it would be  
10:16:35 3 approved by the criminal chief to make sure we're consistent.  
10:16:39 4 We don't want one assistant giving -- seeking more variances  
10:16:42 5 than others.

10:16:43 6 But we do have that authority, and our criminal chief  
10:16:45 7 can authorize a downward variance independent of phone counts  
10:16:49 8 or mandatory minimums.

10:16:50 9 VICE CHAIR CASTILLO: I wanted to ask one follow-up  
10:16:52 10 to that because the Ashcroft Memo is, by its definition, a  
10:16:57 11 little bit dated, but I want to bring it more contemporaneous.

10:17:01 12 This year, Mr. Breuer issued a memo to all of the  
10:17:06 13 U.S. Attorneys saying that with regard to the controversial  
10:17:10 14 issue of crack versus powder cocaine and the disparities, he  
10:17:15 15 was giving each of the assistants discretion, in appropriate  
10:17:19 16 cases, to agree to either some type of equalization or  
10:17:24 17 variation. And what I hear here in this district, and I think  
10:17:31 18 you've told me this, Patrick, is that you have a group that  
10:17:34 19 decides which cases an assistant would be authorized. Is that  
10:17:39 20 essentially what happens?

10:17:40 21 MR. FITZGERALD: Yes.

10:17:41 22 VICE CHAIR CASTILLO: Okay. So let me just ask  
10:17:45 23 Mr. Yarbrough, what happens in your district?

10:17:48 24 MR. YARBROUGH: My narcotics chief makes those  
10:17:49 25 decisions, for the most part, unless it's something that needs

10:17:52 1 to be up the line beyond his level, and I would say that, in  
10:17:55 2 general, we are making a good-faith effort to follow  
10:18:01 3 Mr. Breuer's recommendation in his memo.

10:18:04 4 VICE CHAIR CASTILLO: But it is in each case, in  
10:18:06 5 Memphis and in Chicago, it is not an AUSA deciding that, but  
10:18:11 6 it's more centralized than that.

10:18:14 7 MR. YARBROUGH: It's always a supervisor. Any time  
10:18:16 8 we deviate from a standard policy, whether it's the guideline  
10:18:21 9 range or our policy on departures or whatever, a supervisor  
10:18:26 10 needs to be involved in that. And to the extent there's a  
10:18:28 11 controversy, it may go a little higher.

10:18:33 12 VICE CHAIR CASTILLO: I didn't mean to cut you off,  
10:18:34 13 Patrick. Did you want to say anything?

10:18:36 14 MR. FITZGERALD: No, that's fine.

10:18:37 15 VICE CHAIR CASTILLO: Okay. Thank you.

10:18:42 16 VICE CHAIR SESSIONS: You were talking about the  
10:18:43 17 re-entry programs and the wisdom of the re-entry programs --  
10:18:46 18 and this is a question to both of you -- the logical way of  
10:18:49 19 approaching re-entry is to actually move it back into the  
10:18:52 20 Bureau of Prisons.

10:18:54 21 And I wonder to what extent the working groups are  
10:18:58 22 considering re-entry programs within the Bureau of Prisons  
10:19:03 23 perhaps by providing incentives for people who are coming  
10:19:07 24 toward the end of their sentence, something along the line of  
10:19:10 25 the 500-hour drug and alcohol rehabilitation program,

10:19:13 1 something to get people involved in planning re-entry as they  
10:19:19 2 come out into the community and really incentivizing that  
10:19:24 3 within the Bureau of Prisons? Are you thinking about that at  
10:19:28 4 all?

10:19:30 5 MR. YARBROUGH: He can answer that. I don't have any  
10:19:31 6 information. I will say, though, I hope they're focusing on  
10:19:34 7 something that actually works.

10:19:36 8 MR. FITZGERALD: I have thought about it, and I'm  
10:19:40 9 not -- there are so many working groups. I'm not on the  
10:19:42 10 working group that deals with re-entry. But I can tell you  
10:19:46 11 one concern I would have is making sure that any sort of  
10:19:49 12 incentives don't allow the re-entry system to be gamed. And  
10:19:53 13 I'll make two points.

10:19:54 14 There's some credit for people who get alcohol  
10:19:58 15 rehabilitation, and there's some anecdotal belief that there  
10:20:01 16 are some people who may drink a bit but are not alcoholics,  
10:20:03 17 understand it's nice to get a sentencing benefit for going  
10:20:06 18 through alcohol rehab. So you go through, you say you're an  
10:20:09 19 alcoholic, you get some time off at sentencing.

10:20:11 20 You'll probably make the statistics look good because  
10:20:15 21 if you're not really an alcoholic, you'll probably do better  
10:20:19 22 than the people who are trying to battle it. And I would  
10:20:19 23 worry about it being gamed.

10:20:21 24 And there's a real reason for that. In going out and  
10:20:24 25 talking to the business community who has seen a federal

10:20:26 1 prosecutor stand up and say you want to think about hiring  
10:20:29 2 felons, they do a double take. And then you see the look in  
10:20:31 3 their eyes, thinking why in the world would we want Willie  
10:20:35 4 Horton working in our office? They have this image that any  
10:20:41 5 felon is going to be violent.

10:20:42 6           And even if they get past that, they think even if I  
10:20:43 7 believe we should take a risk, why do I want to lose my job or  
10:20:45 8 my career by everyone thinking I'm crazy for bringing a  
10:20:48 9 convicted felon in our business. And you're trying to get  
10:20:51 10 past that, and one of the things I say is lots of these people  
10:20:54 11 when they come out to like a parolee forum, they're told you  
10:20:57 12 go look for a job, but to look for a job that's going to pay a  
10:20:59 13 relatively modest wage. And the difference between the person  
10:21:02 14 who's getting out of jail who just wants to get back to the  
10:21:05 15 gangbanging life, who's thinking as soon as I get out of this  
10:21:09 16 darned forum, I'm going back to my block. I'm going to go  
10:21:11 17 take over control. I'm going to sell the drugs. I'm going  
10:21:13 18 back to that life, they have no interest in showing up the  
10:21:15 19 next day to get training for a job.

10:21:16 20           The person who's been in prison who says this is not  
10:21:19 21 a good thing for me, I don't want to ever go back, I've got a  
10:21:22 22 family with obligations, I want to turn my life around, will  
10:21:26 23 show up and go through the process in trying to seek a job,  
10:21:29 24 and if there's no incentive in my mind in terms of a  
10:21:32 25 sentencing break for people that go through re-entry programs,

10:21:35 1 you will get the people in the re-entry programs who really  
10:21:38 2 want to re-enter and get new jobs.

10:21:42 3           They, to me, will self-select. That's one thing I  
10:21:46 4 think the people who self-select without being rewarded I  
10:21:48 5 think will be far better candidates for rehabilitation.

10:21:51 6           So I would worry about a system. I'm all for doing  
10:21:54 7 more re-entry, all for rehabilitation in prison, but I think  
10:21:58 8 we have to watch that if we design a system, we don't crowd  
10:22:02 9 out the people who really want to turn their lives around by  
10:22:05 10 people who want to game the system. Not only do we crowd out  
10:22:08 11 people who could take advantage of it, but we may then make it  
10:22:11 12 less marketable to employers if the people who really don't  
10:22:14 13 want re-entry game the system, then we'll sort of depress the  
10:22:19 14 success stories.

10:22:20 15           Right now from what I hear from the employers who  
10:22:24 16 regularly hire people who are felons, they're very, very happy  
10:22:27 17 with the people they get. They all are supervised by  
10:22:31 18 organizations that have grants. They show up. They do better  
10:22:33 19 work for less pay than what some of these companies, usually  
10:22:36 20 small to medium companies, get. And I think it's very, very  
10:22:39 21 important in the re-entry program we keep up the belief, which  
10:22:42 22 appears to be very true from these employers, that the people  
10:22:45 23 you get will turn out well.

10:22:47 24           So I think it's an excellent idea to advertise  
10:22:50 25 re-entry, excellent idea to bring re-entry back into the BOP



10:22:55 1 system, but I do think we ought to be cautious about creating  
10:22:58 2 incentives that might distort.

10:23:00 3 VICE CHAIR SESSIONS: Aren't you just short changing  
10:23:02 4 a little the professional staff in the Bureau of Prisons who  
10:23:06 5 can basically, since they're living with these folks, can make  
10:23:09 6 a real honest assessment as to whether or not they're gaming  
10:23:12 7 the system or whether or not, you know, they're really viably  
10:23:17 8 participating in the program and to give, within that  
10:23:21 9 particular structure, a little discretion to encourage people  
10:23:24 10 to participate.

10:23:25 11 MR. FITZGERALD: And maybe I should phrase it more  
10:23:28 12 precisely. I'm not saying you can't give them incentive. I'm  
10:23:32 13 saying I would worry about that incentive in making sure you  
10:23:35 14 design it so that you can make sure that the people who are  
10:23:37 15 getting in really want it, and the more incentive you create,  
10:23:41 16 the more risk that some people want to game it and can sort of  
10:23:45 17 ruin it for others.

10:23:47 18 ACTING CHAIR HINOJOSA: That concludes our time, and  
10:23:50 19 I want to thank both of you. Mr. Fitzgerald, just a word of  
10:23:53 20 caution with regards to our data. We do not report contested  
10:23:58 21 sentencing hearings because when you subtract the  
10:24:02 22 non-government-sponsored departure variances, you cannot  
10:24:06 23 assume that all the rest of them are contested because we  
10:24:09 24 actually get information on cases where the government has not  
10:24:11 25 opposed a departure or variance, and so you can't

10:24:15 1 automatically assume that every non-government-sponsored  
10:24:18 2 departure variance has been a contested sentence.

10:24:21 3 MR. FITZGERALD: Okay.

10:24:22 4 ACTING CHAIR HINOJOSA: So if you want somebody from  
10:24:23 5 your staff to contact our staff, we'd be glad to help you out  
10:24:27 6 with regards to that information.

10:24:28 7 MR. FITZGERALD: Okay. If I've inadvertently  
10:24:33 8 stated --

10:24:33 9 ACTING CHAIR HINOJOSA: No, I just want to clarify  
10:24:35 10 because we don't report contested sentencing hearings, as far  
10:24:39 11 as I know, and so you can't make the assumption that they're  
10:24:42 12 all contested. In fact, we actually have something on the  
10:24:44 13 form that indicates when the government hasn't objected to a  
10:24:47 14 departure or variance and it's not government sponsored.

10:24:50 15 MR. FITZGERALD: If I review this with someone on  
10:24:52 16 your staff --

10:24:53 17 ACTING CHAIR HINOJOSA: Yes.

10:24:54 18 MR. FITZGERALD: -- somebody will correct my  
10:24:56 19 statement.

10:24:56 20 ACTING CHAIR HINOJOSA: We'll be glad to work with  
10:24:57 21 you.

10:24:57 22 MR. FITZGERALD: I will submit a revised statement or  
10:25:00 23 supplement. I don't want the record to have something that's  
10:25:02 24 inaccurate.

10:25:03 25 ACTING CHAIR HINOJOSA: Thank you both. You have

10:25:04 1 been very helpful and very informative, and thank you for your  
10:25:07 2 time.

10:25:07 3 MR. FITZGERALD: Thank you.

10:25:09 4 MR. YARBROUGH: Thank you.

10:25:20 5 (Recess from 10:20 to 10:37 a.m.)

10:37:41 6 PANEL VII. VIEW FROM THE DEFENSE BAR

10:37:41 7 ACTING CHAIR HINOJOSA: Our next panel is a "View from  
10:37:44 8 the Defense Bar," and we know how busy you are and your taking  
10:37:49 9 your time to be here is certainly very helpful to the  
10:37:51 10 Commission.

10:37:52 11 We have Ms. Carol Brook who is the executive director  
10:37:56 12 of the Federal Defender Program for the Northern District of  
10:37:58 13 Illinois. She joined the office in 1976 after graduating from  
10:38:03 14 the University of Illinois College of Law.

10:38:05 15 We also have Jacqueline Johnson, who is the first  
10:38:08 16 assistant federal public defender for the Northern District of  
10:38:12 17 Ohio. Prior to joining the Federal Defender's Office, she was  
10:38:15 18 in private practice, litigating both civil and criminal  
10:38:19 19 matters. And Ms. Johnson graduated from Cleveland-Marshall  
10:38:22 20 College of Law and Wittenberg University.

10:38:25 21 We also have Mr. Thomas W. Cranmer who has been a  
10:38:30 22 principal in the law firm of Miller, Canfield, Paddock and  
10:38:32 23 Stone since 2005. He also serves as an adjunct professor of  
10:38:37 24 law at the Thomas M. Cooley School of Law, and he's served as  
10:38:42 25 an assistant U.S. attorney from [the] Eastern District of

10:38:46 1 Michigan. He holds a law degree from Ohio Northern University  
10:38:46 2 and a bachelor's degree from the University of Michigan.

10:38:49 3 Ms. Brook, are you going first?

10:38:51 4 MS. BROOK: I am.

10:38:52 5 ACTING CHAIR HINOJOSA: So far the only panel that  
10:38:54 6 has changed the order is the appellate panel, and I didn't  
10:38:57 7 think I could overrule them.

10:38:59 8 Go ahead.

10:39:00 9 MS. BROOK: There's some message there. I am not  
10:39:04 10 going to overrule anybody.

10:39:06 11 Like Patrick, I want to say you appreciate our time,  
10:39:11 12 but I think more we appreciate your time going all around the  
10:39:15 13 country. I have tried to read all the transcripts with all  
10:39:22 14 the information that you have had, and I can't imagine how you  
10:39:27 15 do it.

10:39:28 16 I'm actually getting this water because I'm much more  
10:39:31 17 comfortable standing up. I need a phone book down here.

10:39:34 18 But --

10:39:37 19 ACTING CHAIR HINOJOSA: You're welcome to stand up if  
10:39:39 20 you want.

10:39:41 21 MS. BROOK: Can you hear me?

10:39:42 22 ACTING CHAIR HINOJOSA: Yes.

10:39:43 23 MS. BROOK: Yes, that would be all right? I felt  
10:39:45 24 like it might be a little presumptuous, so it would be better  
10:39:48 25 for me though.

10:39:49 1 I think what you got yesterday from Chief Judge  
10:39:53 2 Holderman was a really good sense of how our district works  
10:39:59 3 and how it works together. I feel very lucky to have  
10:40:06 4 practiced here as long as I have and to be in a district where  
10:40:09 5 there's such amazing respect -- I think you heard it from  
10:40:14 6 Patrick today as well -- among everybody here. You, Judge  
10:40:19 7 Castillo, probably know better than anybody, since you chair  
10:40:23 8 that I know of at least two committees, the Crack Cocaine  
10:40:26 9 Committee and the Re-Entry Committee, where you have brought  
10:40:30 10 people representing agencies inside and outside the courthouse  
10:40:33 11 to really work together for a common good, and I do mean work  
10:40:39 12 together for a common good, which brings me to something,  
10:40:45 13 Mr. Wroblewski, that you said in New York, which is really  
10:40:49 14 where I wanted to start.

10:40:50 15 You were talking about how moving it was to you  
10:40:53 16 really that so many people appeared before the Commission and  
10:40:58 17 had the same kind of common goals for better sentencing in the  
10:41:05 18 same ways, and it seems to me that that desire for a common  
10:41:10 19 good is really where we need to start.

10:41:14 20 What we heard yesterday, I thought, at least what I  
10:41:17 21 took away from it, was that judges really want to follow the  
10:41:23 22 guidelines. They believe in the guidelines. We heard Judge  
10:41:30 23 Rosen struggle with how difficult it was for him when he said  
10:41:34 24 I can't find my way clear to follow this one child pornography  
10:41:42 25 guideline. It seems to me in situations like that or maybe

10:41:46 1 more specifically in this district where we have, I wanted to  
10:41:49 2 use the immigration example because in immigration cases, the  
10:41:55 3 judicial non-guideline rate is 38 percent, which is higher  
10:42:02 4 than the national rate, so I would think the Commission would  
10:42:08 5 want to look at that, not to say, oh, my God, this is  
10:42:12 6 terrible, unwarranted disparity, but to say, you know, what is  
10:42:16 7 going on here? Is there a reason for this? Let's put some  
10:42:21 8 research into this and try and understand. Maybe in the  
10:42:25 9 immigration guideline across the country that this is a red  
10:42:32 10 flag, there's something going on. Certainly, there is.

10:42:38 11 I think without too much research, we would see,  
10:42:40 12 number one, is the U.S. Attorney's Office in this district  
10:42:43 13 rarely requests a non-guideline sentence in immigration cases.  
10:42:47 14 It's 4.2 percent, which is far lower than the national  
10:42:50 15 average. And if you added together the judicial rate and the  
10:42:57 16 government rate, it actually comes out to the national  
10:43:03 17 average.

10:43:03 18 So we don't have fast track, which may be the entire  
10:43:08 19 answer to this, I don't know; but it seems to me in those  
10:43:12 20 situations, that's something to look deeper at and say may be  
10:43:17 21 unwarranted disparity, may be just disparity, may be a problem  
10:43:23 22 that we need to be looking at and putting our resources into.

10:43:27 23 Now, this brings me to something that each of you are  
10:43:31 24 my heroes for doing. You have created fairness in the  
10:43:41 25 crack/powder arena in a way that I don't think any other group

10:43:44 1 of people in the government could have done. You took all the  
10:43:53 2 resources of the Commission and did the research, got the  
10:43:55 3 empirical evidence, put it in language that we could actually  
10:43:59 4 understand, that judges could understand, that the public  
10:44:02 5 could understand, that I'm really hoping Congress will  
10:44:04 6 understand, and changed the law. That, to me, is an  
10:44:13 7 extraordinary thing that can be done -- I'm sure it was an  
10:44:17 8 extraordinary effort on your part -- but that can be done  
10:44:20 9 really only by the Commission.

10:44:24 10           And it seems to me that it needs to be done in every  
10:44:29 11 case, in every guideline, that we need to start building a  
10:44:34 12 better guideline system, and the way to do that -- I have  
10:44:39 13 heard every single speaker say the same thing -- we want  
10:44:44 14 information. We want to be educated. Patrick said that when  
10:44:51 15 he was talking about child pornography. I don't know, he said  
10:44:54 16 give me information. Every judge yesterday, including Judge  
10:44:58 17 Easterbrook, said that. Information is critical to educating  
10:45:01 18 the judges.

10:45:04 19           What it would do, I think, is if that information  
10:45:07 20 could go in the guidelines so each guideline could say why is  
10:45:11 21 this guideline here? Is it from a directive from Congress?  
10:45:15 22 Is it to meet a particular goal or goals of sentencing? What  
10:45:22 23 are the recidivist rates if we do it at this level versus this  
10:45:26 24 level, or where can I get this information? Does it have some  
10:45:30 25 racial impact? All of those things would give judges the

10:45:34 1 information they need, I think, to make more informed  
10:45:38 2 sentences and would create for us more consistent sentencing,  
10:45:42 3 I am certain, and give the guidelines tremendous, tremendous  
10:45:47 4 credibility, which is, I think, what everybody wants. Going  
10:45:51 5 forward, can we have a credible guideline system? And I think  
10:45:55 6 that is the way to do it.

10:46:01 7 In the meantime, I can tell you, at least from my  
10:46:04 8 personal position and the defender's that the advisory  
10:46:10 9 guidelines are working.

10:46:12 10 She's going to take my picture when I'm about to tell  
10:46:15 11 you how old I am. This is not a good thing. Go away.

10:46:18 12 (Laughter.)

10:46:22 13 ACTING CHAIR HINOJOSA: And you will be the only one  
10:46:24 14 who ever stood.

10:46:26 15 (Laughter.)

10:46:27 16 MS. BROOK: I'm sitting down right now.

10:46:29 17 It's because I'm short, Judge.

10:46:32 18 When I started practicing law in 1976, I had ten  
10:46:38 19 years of practice before the guidelines in this courthouse,  
10:46:46 20 and I remember, as clearly as if it just happened, standing in  
10:46:52 21 a courtroom with a client in a bank robbery case and hearing a  
10:46:59 22 judge impose the longest sentence I had ever heard. The  
10:47:06 23 sentence was eight years.

10:47:10 24 Now, I tell that story to the young lawyers in our  
10:47:13 25 office, and they laugh at me. I think secretly they don't



10:47:18 1 believe me. They think I'm just kind of making up this  
10:47:21 2 apocryphal story. But what I'm telling you why I think it's  
10:47:28 3 important to say how shocking it was to me then is to say that  
10:47:32 4 I really feel like I have seen sentencing from here and here  
10:47:36 5 and here, and I think we are in the best place we've ever  
10:47:40 6 been.

10:47:41 7 Judges do have discretion. They can sentence a whole  
10:47:45 8 person. If the prosecutors use their discretion -- which they  
10:47:50 9 sometimes do, your statistics show it, we know it -- in a way  
10:47:56 10 that maybe isn't the best, judges have the opportunity to in  
10:48:04 11 the open transparently counterbalance that discretion, which  
10:48:10 12 is not true under mandatory guidelines. And, of course,  
10:48:15 13 before there were any guidelines, there was kind of a  
10:48:17 14 free-for-all, no appeals, a lot of [inaudible], as we like to  
10:48:24 15 say.

10:48:25 16 So I can say now to my clients something that I  
10:48:29 17 couldn't say before. Under mandatory guidelines, my client  
10:48:35 18 would say to me -- I have this example in the testimony -- my  
10:48:40 19 parents left me when I was really young. Me and my brothers  
10:48:44 20 and sisters became addicted to heroin at age 17. I got  
10:48:50 21 diagnosed with mental illness, but nobody did anything about  
10:48:54 22 it for 20 years. None of that is uncommon. You've all seen  
10:48:58 23 that.

10:49:00 24 And I would say to them under mandatory guidelines I  
10:49:04 25 am so sorry. I will try and get you what help I can, but none

10:49:12 1 of that is going to make a difference at sentencing. No  
10:49:16 2 matter what I do, I've got to be straight, it's not going to  
10:49:20 3 matter. Like I think it was Judge Carr who said under  
10:49:24 4 mandatory guidelines, he wanted to do something, but really he  
10:49:26 5 walked into the courtroom and knew what was going to happen.

10:49:30 6 That's bad for the clients. It's bad for the justice  
10:49:34 7 system. It's really bad for criminal defense lawyers who are  
10:49:39 8 struggling every day to figure out how to best represent their  
10:49:44 9 clients and feel at that point like what am I doing? Most of  
10:49:49 10 our clients are sentenced. This is most of what we can do to  
10:49:54 11 help. It's very troubling. And now, it's not true.

10:50:00 12 Now I can listen and I can say I'm really sorry.  
10:50:04 13 That's terrible. I will tell the judge. I can't tell the  
10:50:08 14 judge -- I can't tell you that the judge is going to say, oh,  
10:50:11 15 okay, go home, which, I guess, goes to this question of  
10:50:15 16 certainty of punishment which I just want to say one thing on.  
10:50:23 17 In my experience, the certainty of what the punishment is  
10:50:25 18 going to be is not the question, at least for our clients. I  
10:50:32 19 mean, yes, they would love to know what the judge is going to  
10:50:35 20 give, but we kind of never have been able to say that anyway  
10:50:41 21 for fear that we would be, as we often are, completely wrong.

10:50:46 22 So the idea is that the judge will listen. The judge  
10:50:52 23 will hear me represent your life in total and make a reasoned  
10:50:59 24 decision, and I can't tell you how important that is to our  
10:51:03 25 clients.

10:51:05 1           Now, there is one piece of that that I would ask this  
10:51:07 2 Commission to add to, which I think is really important, and  
10:51:12 3 that is to go back to 994 and say, yes, we're going to put an  
10:51:20 4 in/out decision into the guidelines and judges can look and  
10:51:24 5 say before how long, should this person go to prison or not;  
10:51:31 6 and if not, what kind of alternatives can we suggest -- we the  
10:51:39 7 Commission -- and for what kinds of people in what kinds of  
10:51:44 8 cases.

10:51:46 9           Again, I think that kind of information, that kind of  
10:51:48 10 research, that kind of education would be amazingly helpful to  
10:51:53 11 all of us and create not only credibility for the guidelines,  
10:51:58 12 but a desire for everybody to say we're looking to the  
10:52:02 13 guidelines first, not just because we have to, but because  
10:52:05 14 that's the place where all the guidance is. And that, I  
10:52:12 15 think, should be the goal.

10:52:20 16           We have heard from various people, I think, and also  
10:52:23 17 from the commissioners, concerns about advisory guidelines  
10:52:28 18 creating disparity and perhaps going forward creating more  
10:52:32 19 disparity. I want to say just a couple things about that.

10:52:38 20           One is that disparity, I think, is inevitable in an  
10:52:44 21 individualized sentencing system. And it's really not  
10:52:47 22 disparity that we're concerned with, it's unwarranted  
10:52:50 23 disparity.

10:52:53 24           Now, I would say that some unwarranted disparity even  
10:52:57 25 is going to exist in any sentencing system. Congress directed

10:53:02 1 the Commission to reduce unwarranted disparity, not eliminate  
10:53:07 2 it. And I think as human beings, elimination probably is not  
10:53:12 3 possible. But reduce, a goal I think we all can agree on, if  
10:53:19 4 it's unwarranted.

10:53:21 5 Culpability differs in different cases. All  
10:53:26 6 disparity is not unwarranted. You all know that. I know you  
10:53:29 7 know that. I want to give you two statistics now, we're going  
10:53:35 8 to see if I can get through these numbers without completely  
10:53:38 9 screwing them up. I'm going to do my best. Smile at that and  
10:53:42 10 not be looking at me, uh-oh. You can correct me if I'm wrong.

10:53:49 11 As I see the numbers for the extent, and this is now  
10:53:54 12 the extent of the variances, I see -- and this is all taken  
10:54:01 13 from the preliminary quarterly data that the Commission put  
10:54:07 14 out in '06, '07, '08 and the first quarter of '09 -- I don't  
10:54:11 15 see any change, virtually any change, in the variances from  
10:54:17 16 '06 to now. Like I say, I was kind of surprised at that  
10:54:23 17 because I was listening to Patrick say he had this gut sense  
10:54:26 18 that sentences were getting bigger and bigger away. But I  
10:54:30 19 think Judge Castillo, and I think you said that, too, Judge  
10:54:33 20 Sessions, that that's not true. It seems to me that your own  
10:54:37 21 data shows that the extent of the variances hasn't changed.

10:54:45 22 The percentage has changed some; but, again, I go  
10:54:49 23 back to what I said originally on that, which is I think it's  
10:54:53 24 important to look at where those percentages are changing and  
10:54:58 25 use your resources to try and pinpoint why that is. Maybe it

10:55:02 1 is unwarranted disparity, or maybe it's something else. Maybe  
10:55:06 2 it's a problem you could analyze and help fix.

10:55:17 3 I want to talk for just a minute about how not all  
10:55:23 4 non-guideline sentences create this unwanted disparity I guess  
10:55:29 5 by talking about the career offender guideline because that's  
10:55:33 6 perhaps the most obvious problem, not that there aren't  
10:55:37 7 others, but in terms of who it picks up in prior criminal  
10:55:41 8 history.

10:55:43 9 So when a judge doesn't sentence someone as a career  
10:55:48 10 offender, it seems to me it's very possible that what that  
10:55:54 11 judge is doing is preventing unwarranted disparity rather than  
10:55:59 12 creating it, although if you look at the numbers that you see  
10:56:04 13 here, it would just look like, you know, more non-guideline  
10:56:08 14 sentences.

10:56:09 15 Which brings me back to what I say, I think it's  
10:56:12 16 really important to look at what these numbers mean. Why are  
10:56:17 17 the judges doing this? Clearly the judges want to be doing  
10:56:21 18 the right thing. They want to follow the guidelines. If  
10:56:24 19 they're not, they're struggling somewhat. Maybe it's not  
10:56:29 20 something you in the end decide is important, but maybe it is.  
10:56:33 21 And we all would be better off knowing one way or another what  
10:56:40 22 it is.

10:56:48 23 My final point is, to me, the most important point  
10:56:53 24 and always the hardest thing to talk about, which is race. As  
10:56:58 25 defense lawyers, whether you've been around for three years or

10:57:03 1 33 years, as judges and prosecutors, you see that certainly as  
10:57:11 2 public defenders, the vast majority of our clients have dark  
10:57:15 3 skin, there's no doubt about it, and the vast majority of  
10:57:21 4 people that end up in prison.

10:57:24 5           Some of that is necessary, has a significant law  
10:57:32 6 enforcement purpose, but some of it does not. And to your  
10:57:34 7 great credit, the Commission has really done amazing research  
10:57:39 8 on the area of which guidelines actually contribute to  
10:57:45 9 unwarranted, I'll say, racial disparity.

10:57:49 10           When I started looking at the research, I was amazed.  
10:57:54 11 But that research is hard to find. You have to be really  
10:57:58 12 committed to going in there and finding it and trying to  
10:58:01 13 figure out what it is that it says. I would ask this  
10:58:06 14 Commission to do more of that research, to put that research  
10:58:12 15 in the guidelines themselves so that the judges can see it,  
10:58:17 16 and probably most importantly, I think, to change those  
10:58:20 17 guidelines, like the career offender guideline, that you know  
10:58:25 18 from your own research have an unwarranted racial impact on  
10:58:31 19 people of color.

10:58:33 20           I think all of that would go a long, long way toward  
10:58:37 21 credibility and I know make us all a better nation.

10:58:42 22           Thank you.

10:58:42 23           ACTING CHAIR HINOJOSA: Thank you, Ms. Brook.

10:58:44 24           Ms. Johnson.

10:58:45 25           MS. JOHNSON: Good morning. I want to thank you all

10:58:48 1 for the opportunity to speak and share with you and have a  
10:58:53 2 dialogue about these guidelines that I have been laboring  
10:58:57 3 under for, off and on, the past 25 years. I just celebrated  
10:59:02 4 my 25th year of practice, and I was very surprised but very  
10:59:07 5 grateful when I was invited to come and speak to the  
10:59:10 6 Commissioners who actually are responsible for these  
10:59:13 7 guidelines.

10:59:14 8           So you will see that my statement is very lengthy.  
10:59:17 9 I'm only going to highlight it because, as I said, I was so  
10:59:21 10 excited when I got the call. How often does a criminal  
10:59:23 11 defense attorney have an opportunity to really face the  
10:59:25 12 Commissioners who prepared these guidelines?

10:59:28 13           But having said that, in talking to Carol and  
10:59:32 14 preparing for today's presentation, it occurs to me that there  
10:59:36 15 is a theme that has developed and it's from what I've heard  
10:59:41 16 yesterday and in reading the testimony of others. I have to  
10:59:45 17 commend the Commission for devoting the time, you've already  
10:59:48 18 had several of these dog-and-pony shows behind you, and I  
10:59:51 19 looked at your schedule for September and October and I think  
10:59:54 20 maybe even November, and so we thank you again for the  
10:59:58 21 opportunity to share.

11:00:00 22           The first thing that strikes me is that we were  
11:00:03 23 talking about an evolution of the guidelines. First there  
11:00:06 24 were no guidelines and then the mandatory guidelines and now  
11:00:10 25 the advisory guidelines. And so during that evolution, there

11:00:16 1 have been lots of changes, and I think by having these  
11:00:19 2 sessions, you have an opportunity to kind of step back, as I  
11:00:22 3 do. I think one of the judges said yesterday in operating  
11:00:24 4 under these guidelines, we're sort of in the vortex, and  
11:00:27 5 certainly as a defense attorney handling cases and trials and  
11:00:32 6 appeals, you don't realize until you can step back and take a  
11:00:37 7 look at all the work that the Commission has done and how much  
11:00:40 8 I know that in my practice I've relied upon some of the data  
11:00:44 9 that you have provided. So there's an evolution.

11:00:46 10           And then second there's been an education, and  
11:00:49 11 there's the need for the Commission to educate. You need to  
11:00:52 12 educate the users of the guidelines. By that, I mean the  
11:00:55 13 judges, the prosecutors and the defense attorneys. And then  
11:00:58 14 you need to educate those who are impacted by the guidelines.  
11:01:03 15 By that, I mean the community. The community has a right to  
11:01:08 16 understand exactly what's going on. And also the defendants.

11:01:12 17           Finally, there is the issue of analysis or the  
11:01:16 18 empirical research. I know that there was some concern about  
11:01:20 19 whether or not there is credibility for the Commission and  
11:01:24 20 with the guidelines. And the way that you can get that  
11:01:26 21 credibility is confidence in the guidelines, and if you  
11:01:29 22 provide the empirical research as to the reasons for the  
11:01:34 23 guidelines, I think that that will go a long way. And  
11:01:37 24 certainly what you're doing here today supports both the  
11:01:41 25 evolution, the education, and the analysis.



11:01:44 1           We appreciate the work that the Commission has  
11:01:47 2 already done to improve federal sentencing. Primarily because  
11:01:50 3 of the Commission's work on crack cocaine, the Attorney  
11:01:54 4 General has announced the Administration's support for a  
11:01:57 5 one-to-one ratio, and Congress seems to be on the brink of  
11:02:00 6 enacting legislation to accomplish the result. We hope that  
11:02:03 7 the Commission will recommend the statutory change to make it  
11:02:05 8 retroactive.

11:02:06 9           The Commission's retroactive two-level reduction in  
11:02:10 10 the crack cocaine guidelines has resulted in relief for more  
11:02:13 11 than 300 defendants in the Northern District of Ohio and  
11:02:16 12 thousands more cross the country.

11:02:19 13           In July of this year, a judge in the Northern  
11:02:21 14 District of Ohio adopted a one-to-one ratio after considering  
11:02:25 15 the Commission's reports. Other judges have also adopted a  
11:02:29 16 one-to-one ratio. This demonstrates that, when the Commission  
11:02:31 17 provides empirical research and data, judges trust the  
11:02:35 18 Commission's findings.

11:02:36 19           I wish sometimes, though, that I could take Patrick  
11:02:39 20 back with me to the Northern District of Ohio because he was  
11:02:42 21 saying that they look at their cases on a case-by-case basis  
11:02:46 22 and make the determination as to whether a one-to-one crack  
11:02:49 23 applies.

11:02:49 24           That has not happened in our district yet. If the  
11:02:54 25 defense attorney does not file a sentencing memorandum pushing

11:02:57 1 and encouraging for the court to consider that one-to-one  
11:03:01 2 ratio, it isn't something that's brought to the court's  
11:03:03 3 attention. And I think that the 3553(a) factors that the  
11:03:07 4 courts have to take a look at should be explored not only and  
11:03:11 5 presented not only by the defense attorneys, but by the U.S.  
11:03:14 6 Attorneys. That doesn't happen in our district either.  
11:03:17 7 Seldom is there any type of sentencing memorandum from the  
11:03:19 8 U.S. Attorney's Office. It's always from our office, and it's  
11:03:24 9 more of an advocacy.

11:03:26 10 In Part I of my discussion, I discuss how the Supreme  
11:03:29 11 Court's decisions in *Booker* and subsequent cases have improved  
11:03:34 12 sentencing in the district court and have resulted in  
11:03:36 13 appellate review that is working as it should be.

11:03:39 14 In Part II, I discuss how the Commission can improve  
11:03:42 15 the system by revising the guidelines and advising Congress  
11:03:45 16 based on feedback and empirical data and research.

11:03:49 17 In Part III, I discuss evidence showing that judges  
11:03:52 18 are exercising their discretion moderately by any measure and  
11:03:57 19 address certain anecdotes that can be offered to undermine  
11:04:00 20 confidence in judges.

11:04:02 21 The Supreme Court's decisions in *Booker* and  
11:04:04 22 subsequent cases have improved sentencing in the district  
11:04:06 23 court and have resulted in appropriate appellate review. The  
11:04:10 24 sentencing process is more transparent and honest, and  
11:04:14 25 sentences imposed are more fair and effective.

11:04:17 1           Like most of the judges, probation officers,  
11:04:20 2 academics and community representatives who have testified  
11:04:23 3 before you, the defenders believe that the advisory guidelines  
11:04:28 4 system is working better than a mandatory guidelines system.  
11:04:32 5 We support this system because sentencing is more honest and  
11:04:35 6 sentences are more just.

11:04:37 7           At the same time, the sentencing decision still  
11:04:39 8 revolves around the guidelines. The sentencing judge must  
11:04:43 9 begin all sentencing proceedings by correctly calculating the  
11:04:46 10 applicable guideline range. And to secure nationwide  
11:04:50 11 consistency, the guidelines should be the starting point and  
11:04:53 12 the initial benchmark. A major variance from the guideline  
11:04:57 13 range requires a more significant justification than a minor  
11:05:00 14 one.

11:05:02 15           We do suggest that appellate review is working  
11:05:05 16 appropriately. When Congress enacted the Sentencing Reform  
11:05:10 17 Act, its goals for appellate review were to reserve the  
11:05:14 18 concept of the discretion of the sentencing judge who has a  
11:05:17 19 proper place in sentencing and should not be displaced by the  
11:05:19 20 discretion of the appellate court.

11:05:20 21           And I think that we heard that yesterday from one of  
11:05:24 22 our judges who said that he didn't believe that he was in a  
11:05:27 23 position to make a decision as to the sentencing variance. Is  
11:05:32 24 six months appropriate? Is it too much or too little? He  
11:05:35 25 says he takes a closer look at those variances that are

11:05:38 1 larger.

11:05:39 2           And the reason that an appellate judge should feel  
11:05:43 3 some discomfort in terms of sentencing is that because a  
11:05:48 4 district court typically will sentence up to 125 defendants  
11:05:50 5 within a year. So certainly, having either tried the case or  
11:05:53 6 considered all of the factors, reviewed the sentencing  
11:05:57 7 memorandum, and you can't discount the ability to actually  
11:06:00 8 have a discourse and a discussion with the actual defendant  
11:06:04 9 who's going to be sentenced.

11:06:07 10           The courts of appeals enforce guidelines more rigidly  
11:06:12 11 than expected or than the statutes required, even before the  
11:06:16 12 PROTECT Act formally enacted de novo review. In *Koon v.*  
11:06:21 13 *United States*, the Supreme Court clarified that the standard  
11:06:23 14 of review was abuse of discretion, but the courts of appeals  
11:06:27 15 continued to reverse departures at a high rate and to reverse  
11:06:30 16 denials of departure at a low rate, and, thus, Koon had no  
11:06:35 17 significant impact on departure rates. This overly strict  
11:06:38 18 enforcement of the guidelines created unwarranted uniformity  
11:06:41 19 and stifled feedback to the Commission which had been thought  
11:06:44 20 to be essential to proper functioning of the guidelines  
11:06:48 21 system. The Supreme Court has now excised de novo review and  
11:06:52 22 prohibited extraordinary circumstances review because those  
11:06:55 23 standards made the guidelines mandatory and, therefore,  
11:06:57 24 unconstitutional.

11:06:59 25           The court also emphasized, as Congress did in

11:07:01 1 enacting the Sentencing Reform Act, that sentencing is  
11:07:05 2 properly the function of the district court judge, not the  
11:07:07 3 court of appeals, for reasons of institutional competence.  
11:07:11 4 The current abuse of discretion standard ensures that the  
11:07:15 5 Commission receives necessary feedback from the sentencing  
11:07:17 6 judge. The judge's reasoned sentencing judgment, resting upon  
11:07:22 7 an effort to filter guidelines' general advice through  
11:07:26 8 3553(a)'s list of factors provides relevant information to the  
11:07:30 9 Commission so that the guidelines can constructively evolve  
11:07:34 10 over time, as both Congress and the Commission foresaw.

11:07:40 11           A sentence must first pass muster under a robust set  
11:07:49 12 of procedural requirements. Procedural errors that may affect  
11:07:53 13 the kind or length of a sentence, like improperly calculating  
11:07:56 14 the guidelines, overlooking relevant factors or clearly  
11:07:59 15 erroneous fact-finding are caught and remedied on remand.  
11:08:04 16 Inadequate explanations for the chosen sentence are similarly  
11:08:07 17 rejected. By requiring district courts to adequately explain  
11:08:12 18 the reasons for the sentence imposed, appellate courts are  
11:08:15 19 better able to determine whether a sentence is substantively  
11:08:20 20 reasonable.

11:08:20 21           Requiring reasoned explanations also guards against  
11:08:24 22 arbitrariness and promotes confidence in the justice system  
11:08:27 23 because the parties and the public can both understand why the  
11:08:31 24 defendant received a particular sentence.

11:08:33 25           The Sixth Circuit has embraced this robust procedural

11:08:38 1 review for all sentences, whether within or outside the  
11:08:41 2 advisory guideline range. It has readily remedied or remanded  
11:08:47 3 cases involving sentences outside the guideline range when the  
11:08:50 4 district court's explanation for the sentence was insufficient  
11:08:54 5 or failed to address the defendant's non-frivolous arguments.  
11:08:58 6 It has also readily affirmed sentences outside the guideline  
11:09:02 7 range when the district court's explanation for sentence was  
11:09:06 8 sufficient.

11:09:06 9           The appellate process is working as it should in the  
11:09:11 10 Sixth Circuit. As Judge Sutton, writing for the en banc court,  
11:09:15 11 observed after the Supreme Court's decisions in *Rita*, *Gall* and  
11:09:18 12 *Kimbrough*:

11:09:19 13           "One thing runs through all three cases: *Booker*  
11:09:23 14 empowered district courts, not appellate courts and not the  
11:09:26 15 Sentencing Commission. Talk of presumptions, plain error and  
11:09:29 16 procedural and substantive rules of review means nothing if it  
11:09:33 17 does not account for the central reality that *Booker* breathes  
11:09:38 18 life into the authority of district court judges to engage in  
11:09:41 19 individualized sentencing within reason in applying the  
11:09:45 20 3553(a) factors to the criminal defendants that come before  
11:09:48 21 them. If there is a pattern that emerges from *Rita*, *Gall* and  
11:09:52 22 *Kimbrough*, it is that the district court judges were  
11:09:55 23 vindicated in all three cases and a court of appeals was  
11:09:59 24 affirmed just once -- and that of course was when it deferred  
11:10:03 25 to the on-the-scene judgment of the district court."

11:10:07 1           The endorsement of the sentencing judge as the  
11:10:10 2 primary decisionmaker comes with an active insistence that  
11:10:14 3 sentencing judges give detailed reasons for their sentences.  
11:10:17 4 In this matter, the Sixth Circuit not only receives better  
11:10:20 5 information upon which to base its review, but also paves the  
11:10:24 6 way for unfettered feedback to the Commission that can, if the  
11:10:28 7 Commission chooses to act on it, help the guidelines to  
11:10:30 8 constructively evolve over time. It is through this evolution  
11:10:34 9 that the guidelines will remain an important component in  
11:10:37 10 federal sentencing.

11:10:38 11           Of course, I don't always agree with the Sixth Circuit,  
11:10:41 12 but I'm encouraged overall that it requires adequate  
11:10:45 13 explanations whether the sentence is within or without the  
11:10:49 14 guideline range, and that it has demonstrated a willingness to  
11:10:52 15 consider arguments that a sentence is substantively  
11:10:55 16 unreasonable, including because it is greater than necessary  
11:10:58 17 to achieve the purposes of sentencing.

11:11:00 18           In 2003, when 4,925 defendants were sentenced in the  
11:11:07 19 Sixth Circuit, the government filed eight appeals involving  
11:11:10 20 sentencing issues and won 50 percent of them. In 2005, when  
11:11:16 21 5,353 defendants were sentenced in the Sixth Circuit, the  
11:11:21 22 government filed 15 appeals involving sentencing issues and  
11:11:24 23 won 60 percent of them. In 2008, when 5,409 defendants were  
11:11:29 24 sentenced in the Sixth Circuit, the government filed 15 appeals  
11:11:33 25 involving sentencing issues and won 73.4 percent of them.

11:11:39 1           The government won 55.7 percent of appeals on issues  
11:11:43 2 related to departures or variances compared to 39 percent in  
11:11:48 3 1999 and 44 percent in 2005. In contrast, defendants in 2008  
11:11:55 4 won on issues related to departures or variances only  
11:11:59 5 5.9 percent of the time, and that would explain why at least  
11:12:03 6 in our district, oftentimes there is not an appeal that is  
11:12:06 7 filed when there has been a departure or a variance because  
11:12:10 8 the U.S. Attorney's Office has made the determination that  
11:12:13 9 it's not an unwarranted disparity for that individualized  
11:12:19 10 individual.

11:12:19 11           And that's in response to Attorney Fitzgerald who  
11:12:22 12 said that he thought that nationwide that appeals were  
11:12:25 13 dropping. We fail to see why the government would be  
11:12:28 14 discouraged from filing appeals of below-guideline sentences  
11:12:32 15 when it's winning 55.7 percent of those appeals. At least it  
11:12:36 16 was in 2008.

11:12:38 17           The Commission can improve the system by revising the  
11:12:41 18 guidelines and advising Congress based on feedback from judges  
11:12:45 19 and empirical data and research. We're glad to see that the  
11:12:49 20 Commission plans to study and possibly address some of the  
11:12:52 21 outstanding problems in federal sentencing, including  
11:12:54 22 mandatory minimums. We understand that most of the problems  
11:12:57 23 in the guidelines are traceable to mandatory minimums,  
11:13:00 24 congressional directives and, less visible, political  
11:13:04 25 pressure. The Commission should take this opportunity to



11:13:09 1 revise those guidelines that it can without violating a  
11:13:11 2 specific congressional directive and to educate the Congress  
11:13:14 3 about how and why its mandatory minimums and specific  
11:13:18 4 directives have resulted in sentences that are unnecessarily  
11:13:20 5 severe.

11:13:21 6 This is contemplated by the Sentencing Reform Act and  
11:13:24 7 has been strongly urged by the Supreme Court, invited by the  
11:13:27 8 leadership in Congress, and urged by the judges, defense  
11:13:30 9 lawyers, probation officers, and academics who have testified  
11:13:33 10 before you.

11:13:34 11 It was surprising to me to learn from Judge Simon  
11:13:38 12 that he said he was unaware of the fact that when considering  
11:13:42 13 age, that the recidivism rate dropped significantly past a  
11:13:46 14 certain age. And that's information that comes directly from  
11:13:49 15 your own research. And we would suggest to the Commission  
11:13:52 16 that, one, you may want to simply make the specific  
11:13:57 17 characteristics under 5H a part of the historical notation,  
11:14:02 18 but that you would include the information as to why now age  
11:14:05 19 should be something that can be considered when you're looking  
11:14:08 20 at the issue of recidivism. If it's right there in the  
11:14:11 21 guidelines, it's going to be a much bigger help to the judges  
11:14:14 22 and to the other parties.

11:14:15 23 I think that Judge Carr suggested that you shouldn't  
11:14:20 24 be as concerned about the fact that there is a frequency of  
11:14:24 25 departures in specific areas, especially child pornography,

11:14:29 1 but that you should take a look at the reasons for those  
11:14:33 2 variances or departures and take a look at the length of time.  
11:14:39 3 And I think that that is something that the Commission would  
11:14:41 4 want to take a closer look at as it reviews that particular  
11:14:45 5 guideline.

11:14:46 6           Empirical evidence shows that the guidelines  
11:14:50 7 recommend and mandatory minimums require punishment that is  
11:14:54 8 greater than fully informed members of the public believe is  
11:14:57 9 just. Judge Gwin of the Northern District of Ohio has  
11:15:02 10 conducted a study aimed at answering the question: "Do the  
11:15:05 11 sentencing guidelines accurately reflect community sentiment  
11:15:09 12 on just punishment?" Judge Gwin's study is entitled, "Juror  
11:15:14 13 Sentiment on Just Punishment: Do the Federal Sentencing  
11:15:18 14 Guidelines Reflect Community Values?" And it will be  
11:15:21 15 published in Volume 4.1 of the *Harvard Law & Policy Review*,  
11:15:25 16 and he's graciously allowed me to share some of the  
11:15:28 17 information from the draft that he has prepared.

11:15:30 18           I mentioned to Judge Gwin that I would be testifying  
11:15:33 19 before the Commission, and he shared with me that he had been  
11:15:37 20 conducting this informal poll for his last 20 jury trials. I  
11:15:42 21 knew that I had been spending a lot of time in his courtroom,  
11:15:45 22 but I didn't realize that two of the cases that he cites in  
11:15:48 23 his law review article were cases that I tried, and I did not  
11:15:52 24 know at the time that he was conducting this poll.

11:15:55 25           He was concerned about the federal sentencing

11:15:58 1 guidelines reflecting what he calls the community sentiment,  
11:16:02 2 and he refers to it as the just punishment. And in doing  
11:16:06 3 that, he decided that he would prepare a simple questionnaire  
11:16:09 4 that he would have his law clerk to present at the conclusion  
11:16:14 5 of the trials in which there were convictions. And he would  
11:16:17 6 not have contact with the jurors, but that the questionnaire  
11:16:20 7 would ask, "What do you think an appropriate sentence is for  
11:16:24 8 this defendant in months?" And he provided the defendant's  
11:16:30 9 prior criminal record.

11:16:31 10 He thought that he might be able to gain some insight  
11:16:35 11 from an informed citizenry. That would be jurors who actually  
11:16:39 12 sat through the trial, considered the evidence and the  
11:16:41 13 testimony, had an opportunity to view the defendant and to  
11:16:46 14 listen to the arguments by both the government and by the  
11:16:50 15 defense attorney.

11:16:51 16 And we certainly want to say to you that we are not  
11:16:54 17 in favor of polls as a reason or as a basis for making a  
11:17:00 18 determination as to what an appropriate sentence is, but this  
11:17:02 19 is a judge who was very concerned and wanted some feedback  
11:17:06 20 because he had heard from his clerks that when -- the judge  
11:17:10 21 would often say at the end of the case you're now released.  
11:17:13 22 If you have any questions about what happens with this case,  
11:17:16 23 feel free to call my clerk back.

11:17:17 24 And what he was getting was calls from the jurors  
11:17:19 25 saying, well, what was the sentence for that particular

11:17:22 1 individual? And he was surprised that they were always  
11:17:25 2 shocked that the penalties were so harsh. And I've detailed  
11:17:30 3 in my statement that in looking at the 20 cases, the jurors  
11:17:37 4 recommended sentences that were 21 percent of the minimum  
11:17:43 5 guidelines that was recommended. Of 239 jurors, 221,  
11:17:48 6 92 percent, recommended a sentence below the low end of the  
11:17:51 7 guideline range, and that prompted Judge Gwin to ask the  
11:17:55 8 question: "If a system of sentencing should impose deserved  
11:17:58 9 just punishment, can it be credible if it is so dissonant  
11:18:02 10 from community beliefs?"

11:18:04 11           One of the purposes the guidelines are required to  
11:18:08 12 meet is the need for the sentence imposed to reflect the  
11:18:10 13 seriousness of the offense, to promote respect for the law and  
11:18:15 14 to provide just punishment for the offense. Although the  
11:18:19 15 Commission has never adopted just desserts, academics have  
11:18:24 16 observed that this is, in fact, the focus of the guidelines.  
11:18:26 17 If so, the guidelines should reflect the seriousness of the  
11:18:29 18 offense, measured by the harm it causes and the offender's  
11:18:33 19 blameworthiness for that harm.

11:18:35 20           Several of the factors Congress directed the  
11:18:39 21 Commission to consider in developing the guidelines relate to  
11:18:42 22 this purpose, including circumstances that mitigate or  
11:18:46 23 aggravate the seriousness of the offense, the nature and  
11:18:49 24 degree of the harm caused by the offense, the community view  
11:18:53 25 of the gravity of the offense, and the public concern

11:18:56 1 generated by the offense.

11:18:57 2           As to the first two factors, the only mitigating  
11:19:00 3 factor bearing on blameworthiness the guidelines include is  
11:19:04 4 role in the offense, and that factor is underused and often  
11:19:09 5 dwarfed by quantity or amount-based adjustments.

11:19:12 6           The Commission's research and other empirical  
11:19:15 7 research show that quantity is a poor proxy for offense  
11:19:20 8 seriousness and does not correlate with the offender's role in  
11:19:23 9 the offense.

11:19:24 10           As to the last two factors, Congress thought that  
11:19:27 11 significant changes in community views might justify  
11:19:29 12 increasing or decreasing the guidelines' recommended  
11:19:34 13 penalties. Such adjustments were not to be undertaken in  
11:19:37 14 response to public outcry about a particular case, but were to  
11:19:40 15 be based on research and data collection.

11:19:46 16           Judge Gwin's study indicates that the guidelines do  
11:19:50 17 not accurately reflect community views regarding just  
11:19:53 18 punishment. It is consistent with the feedback the Commission  
11:19:57 19 has been receiving from judges and with the Commission's  
11:20:00 20 empirical research indicating that certain guidelines and  
11:20:03 21 mandatory minimums are greater than necessary to achieve the  
11:20:07 22 purposes of punishment.

11:20:11 23           Surveys conducted by the Commission show that both  
11:20:13 24 the public and judges believe that the guidelines that are  
11:20:16 25 based on mandatory minimums and congressional directives are

11:20:20 1 overly harsh. A 1997 public opinion survey, based on  
11:20:24 2 vignettes incorporating elements of the guidelines, reveal  
11:20:29 3 that the guidelines produce much harsher sentences in drug  
11:20:33 4 trafficking cases than survey respondents would have given,  
11:20:36 5 and that respondents did not support the severity of increases  
11:20:40 6 under habitual offender rules like career offender guidelines.

11:20:46 7           And as Attorney Fitzgerald suggested, certainly more  
11:20:50 8 study would be made when he was speaking specifically about  
11:20:53 9 the safety valve. In our district, if an individual does not  
11:20:57 10 qualify for safety valve by having just one Criminal History  
11:21:01 11 Category point, a Criminal History Category I, then typically  
11:21:05 12 the U.S. Attorney's Office will not recommend safety valve.

11:21:09 13           We have argued directly to the judges that the  
11:21:13 14 Criminal History Category I isn't low enough, but the fact  
11:21:17 15 that it includes only one point for safety valve knocks out a  
11:21:23 16 lot of our clients who might have more than one Criminal  
11:21:25 17 History point. They might have two Criminal History points.

11:21:28 18           And so we would urge the Commission to consider  
11:21:30 19 whether or not it should re-evaluate that not only safety  
11:21:33 20 valve, but the criminal history categories, that Criminal  
11:21:38 21 History Category I, you might want to consider expanding it  
11:21:42 22 for the purposes of safety valve.

11:21:43 23           The Commission should amend the guidelines consistent  
11:21:48 24 with judicial feedback and empirical research. If the  
11:21:53 25 Commission revises the guidelines, there will be more good

11:21:57 1 sentences overall. The Commission can avoid excessive  
11:22:00 2 sentencing disparities through ongoing revision of the  
11:22:03 3 guidelines in response to sentencing practices, and as that  
11:22:09 4 occurs, district courts will have less reason to depart from  
11:22:12 5 the guidelines.

11:22:13 6           And that relates back to the drug guidelines. We  
11:22:17 7 join the many judges who have urged the Commission to de-link  
11:22:20 8 the drug guidelines from the arbitrary quantity-based  
11:22:23 9 punishment levels in the mandatory minimum statute. We urge  
11:22:26 10 the Commission to create a set of drug guidelines based  
11:22:29 11 primarily on functional role in the offense, with quantity  
11:22:33 12 given lesser weight. Congress may have thought that quantity  
11:22:37 13 would approximate functional role, but empirical research and  
11:22:41 14 experience have shown that that was mistaken, and that's a  
11:22:44 15 part of the evolution and the education.

11:22:46 16           I'm just going to speak very briefly about, I think  
11:22:49 17 that Carol has already addressed career offender, but I'll  
11:22:52 18 speak briefly about firearms, acquitted conduct, and then rely  
11:22:56 19 upon my written testimony for the rest.

11:23:00 20           All but two of the districts in the Sixth and Seventh  
11:23:09 21 Circuits have a higher-than-average firearms caseload, some as  
11:23:14 22 high as 20 to 30 percent. Many firearms cases, and most in  
11:23:18 23 some districts, are taken from state court, where the  
11:23:20 24 sentences are much lower. Many of the offenses have no  
11:23:24 25 connection to violence or drugs.

11:23:28 1           In Ohio, the average time served for possessing a  
11:23:31 2    weapon in the state system under disability is 1.15 months. I  
11:23:37 3    have a case now where ATF agents and local police were  
11:23:41 4    conducting surveillance at a gun show in a semi-rural  
11:23:46 5    community where few African-Americans live. They observed a  
11:23:50 6    black woman and a black man buy two guns and simply assumed  
11:23:54 7    that one or both of them were straw purchasers or convicted  
11:23:58 8    felons.

11:23:59 9           They followed the couple more than 20 miles into the  
11:24:01 10   City of Cleveland, and they observed the male give a gun to my  
11:24:04 11   client on the streets of the East Side of Cleveland. My  
11:24:08 12   client confessed immediately to possessing the weapon and to  
11:24:11 13   being a convicted felon. His friend had purchased the gun for  
11:24:14 14   him to give to his father -- and my client lives with his  
11:24:17 15   father -- for his upcoming birthday and because my client says  
11:24:22 16   that his home had recently been broken into. And,  
11:24:26 17   fortunately, I was able to obtain a police report that  
11:24:29 18   reflected that.

11:24:30 19           The reason that that's significant is that my client  
11:24:30 20   had been raised by his father and had lived with him most of  
11:24:33 21   his adult life, but that as a young child, there was a home  
11:24:37 22   invasion in which his father was seriously injured and my  
11:24:40 23   client found his father in a pool of blood, and that was  
11:24:43 24   traumatizing to him.

11:24:44 25           So when there was another recent break-in in their



11:24:48 1 home, this is 15 years after the original event, when his  
11:24:51 2 friend called him and said I have a gun here, he said, yeah, I  
11:24:55 3 think my dad would need that gun because we did that have  
11:24:57 4 break-in.

11:24:58 5           This client is 26 years old, and he has a Criminal  
11:25:02 6 History Category of IV. And that sounds like it's rather  
11:25:04 7 high, but then you have to take a close look at what exactly  
11:25:07 8 the conduct was that was involved.

11:25:09 9           He has two misdemeanors for which he received two  
11:25:12 10 points, one conviction for public gambling, three convictions  
11:25:16 11 for driving while under suspension -- he received three points  
11:25:19 12 for that -- and then he has one conviction for drug  
11:25:22 13 trafficking, which he received no time in prison at the state  
11:25:26 14 level, but he was assessed one point for that conviction,  
11:25:30 15 which puts him in a Criminal History Category IV.

11:25:33 16           If he were to proceed to trial and be convicted of  
11:25:36 17 the offense, he's looking at a guideline range of 51 to  
11:25:39 18 63 months. If he pleads guilty and receives that third point  
11:25:42 19 for acceptance of responsibility, he's looking at a possible  
11:25:45 20 sentence of 37 to 46 months. And, fortunately, the guidelines  
11:25:50 21 are now advisory, and I will at least have the opportunity to  
11:25:53 22 make an argument as to an individualized sentence for this  
11:25:57 23 individual, and some of the arguments that I'm going to use is  
11:26:00 24 that in our district, we have a wonderful work force program.

11:26:04 25           I think there was some discussion about whether or

11:26:06 1 not programs regarding re-entry or rehabilitation should start  
11:26:13 2 at the Bureau of Prisons or whether it should be with the U.S.  
11:26:16 3 Probation Office.

11:26:16 4 In the Northern District of Ohio, we have a program  
11:26:18 5 where even individuals who are on pretrial supervision, they  
11:26:24 6 can take part in a program where they learn what their skills  
11:26:28 7 and attributes are. They're not promised that they'll be able  
11:26:33 8 to get a job, but they'll receive job training, and there will  
11:26:35 9 be analysis. If they need to obtain a G.E.D., they're placed  
11:26:38 10 into a G.E.D. program because generally there's two to  
11:26:42 11 three months between the time of the initial case and the  
11:26:45 12 sentence.

11:26:46 13 And what we've learned, and this is a program that  
11:26:49 14 has just begun in the last six months, is that out of a group  
11:26:54 15 of, say, 20 individuals, maybe 15 of them stick with the four-  
11:26:58 16 or six-week program because what they want is they want a job.  
11:27:02 17 And they're not promised a job.

11:27:04 18 There is some drop-offs, so there is some  
11:27:07 19 self-selection. My client is currently participating in that  
11:27:10 20 program, and he's been placed with an organization where he  
11:27:13 21 can receive his G.E.D. He started doing this several times  
11:27:18 22 before in between his stints in the local jail but never  
11:27:22 23 completed it.

11:27:22 24 So what the probation department does is they  
11:27:24 25 actually direct the individuals and say come and meet with us

11:27:27 1 for several hours during the week. We will find out what your  
11:27:30 2 needs are, analyze them, and then direct you to exactly what  
11:27:34 3 program you should receive.

11:27:35 4 My client's been doing very well. He's been  
11:27:39 5 drug-free since he's been in the program. He's currently  
11:27:41 6 obtaining his G.E.D., and the program confirmed for him that  
11:27:46 7 he should be in the construction business.

11:27:47 8 I think that those are characteristics that are not  
11:27:51 9 accounted for in the guidelines, and by them being advisory, I  
11:27:53 10 have an opportunity to present that information to the judge.

11:27:57 11 Turning to acquitted conduct, the Commission should  
11:28:01 12 state expressly that acquitted conduct may not be considered  
11:28:04 13 in calculating the guidelines. The Commission indicates that  
11:28:10 14 the guidelines do not direct judges to consider acquitted  
11:28:12 15 conduct when calculating the guideline range. If so, then the  
11:28:16 16 Commission has allowed to go uncorrected an erroneous  
11:28:20 17 interpretation of the guidelines that has resulted in many  
11:28:22 18 hundreds or thousands of years of imprisonment that not only  
11:28:25 19 were unauthorized by jury verdicts, but were unauthorized by  
11:28:29 20 the guidelines.

11:28:30 21 Application Note 3 of the rules states [that]  
11:28:35 22 application [of] 1B1.3 "does not require the defendant, in fact,  
11:28:38 23 to have been convicted of multiple counts." 1B1.3 Comment Note  
11:28:44 24 3. The background commentary states: "Relying on the entire  
11:28:47 25 range of conduct, regardless of the number of counts that are

11:28:51 1 alleged or on which a conviction is obtained, appears to be the  
11:28:54 2 most reasonable approach to writing workable guidelines for  
11:28:58 3 these offenses."

11:29:00 4           Although neither 1B1.3 nor its commentary uses the  
11:29:06 5 word "acquitted," the courts have naturally concluded that the  
11:29:09 6 reference to counts for which a conviction was not obtained  
11:29:12 7 means counts of which the defendant was acquitted. By the  
11:29:15 8 mid-1990s, 1B1.3(a)(2) was viewed by every court of appeals  
11:29:21 9 except the Ninth as creating a mandate requiring the  
11:29:24 10 consideration of acquitted crimes -- if found by a  
11:29:31 11 preponderance of the evidence, as with every other guideline  
11:29:33 12 component -- in determining the guideline range, and we would  
11:29:35 13 urge the Commission to clarify this mistake.

11:29:39 14           I think that there was a lot of testimony yesterday  
11:29:48 15 from the judges regarding their concerns about child  
11:29:53 16 pornography and the sentences that are required. We are glad  
11:29:56 17 to see that the Commission has made it a priority to review  
11:29:59 18 the child pornography guideline and to possibly amend the  
11:30:03 19 guideline, report to Congress, and recommend statutory  
11:30:07 20 changes. 2G2.2 is dramatically flawed, and many judges have  
11:30:11 21 found it to be unsound and inhumane, as described in numerous  
11:30:15 22 published decisions.

11:30:17 23           In the first two quarters of 2009, judges departed or  
11:30:20 24 varied in 41.5 percent of these cases, and the government  
11:30:24 25 sponsored below-guideline sentences in 9.9 percent of the

11:30:28 1 cases, 7.6 for reasons other than substantial assistance.

11:30:32 2           And certainly it's important for a defendant to know  
11:30:37 3 what the possibilities are for his sentence. I'm currently  
11:30:42 4 representing an individual, however, who is a 37-year-old  
11:30:46 5 attorney who was charged with receipt and distribution of  
11:30:50 6 child pornography. He is exposed to the five-year mandatory  
11:30:55 7 minimum sentence, but it was of small comfort to him for me to  
11:30:58 8 explain to him that because of the enhancements involved that  
11:31:02 9 if he were to go to trial and be convicted, that he would be a  
11:31:05 10 criminal -- he's a Criminal History Category I, but offense  
11:31:10 11 level 40 and that with a plea of guilty he would be an offense  
11:31:13 12 level 37.

11:31:14 13           I think he's much more encouraged by the fact that I  
11:31:18 14 can argue that, yes, there's the certainty of a 17-to-20-year  
11:31:21 15 sentence, but what he really wants to know is whether or not  
11:31:24 16 the judge has the power to consider something less than  
11:31:28 17 17 years. As he said to me, as an attorney, that he was in  
11:31:31 18 custody with other individuals who were in and out of prison  
11:31:34 19 for several violations, and he is looking at what he views as  
11:31:38 20 a life sentence for one violation which he is prepared to  
11:31:42 21 admit was certainly a violation. We don't in any way diminish  
11:31:46 22 the harm that is created by those who may view child  
11:31:52 23 pornography, but we think that there needs to be more research  
11:31:55 24 and empirical study done.

11:31:57 25           I believe that Judge Caldwell yesterday said that in

11:32:00 1 her district that only child pornography cases that are  
11:32:03 2 prosecuted typically in the federal system are those where  
11:32:06 3 there is some evidence that that individual is a pedophile or  
11:32:10 4 has assaulted a child. That isn't the case in the Northern  
11:32:14 5 District of Ohio. In fact, to the contrary, in almost all of  
11:32:18 6 the cases that are prosecuted under child pornography, there  
11:32:21 7 isn't any indication that the individual has in any way  
11:32:24 8 assaulted a child or has had contact with a child. So, again,  
11:32:30 9 we would urge the Commission to take a closer look at child  
11:32:34 10 pornography.

11:32:34 11 In conclusion, the goal, as Carol has said, is not  
11:32:39 12 that you are to dispel all disparity, that it's unwarranted  
11:32:46 13 disparity, that certainly there should be some disparity  
11:32:49 14 because there should be individualized sentences. It's  
11:32:53 15 important that you build a better guideline, and you can do  
11:32:57 16 that in your evolutionary review of the guidelines, by  
11:33:01 17 educating those who are affected by it, and by sharing so much  
11:33:05 18 of the empirical research that you've already done and  
11:33:09 19 continue to provide that information so that there will be  
11:33:12 20 credibility for the Commission and so that there will be a  
11:33:16 21 greater confidence by the judges who are sentencing, by the  
11:33:20 22 prosecutors who are prosecuting, and by the defenders who are  
11:33:24 23 representing the defendants who are impacted the most, along  
11:33:27 24 with the community.

11:33:28 25 I thank you for the opportunity to share this

11:33:29 1 information.

11:33:30 2 ACTING CHAIR HINOJOSA: Thank you, Ms. Johnson.

11:33:31 3 Mr. Cranmer, do I have your name right?

11:33:34 4 MR. CRANMER: You do.

11:33:35 5 ACTING CHAIR HINOJOSA: Mr. Cranmer.

11:33:37 6 MR. CRANMER: Mr. Chairman, thank you very much.

11:33:40 7 Like my fellow panel members, I want to thank the Commission

11:33:43 8 for giving me the opportunity to appear before you today.

11:33:46 9 It's certainly an honor.

11:33:48 10 I suppose there's always a risk when you are the last

11:33:51 11 panel member to speak. Probably a risk in two ways,

11:33:57 12 particularly if your other two panel members are lawyers. One

11:34:00 13 is that they will have already very eloquently covered the

11:34:03 14 material that you want to touch upon. And the second, I

11:34:06 15 guess, is that they may have used up a bit of your time, and I

11:34:10 16 think perhaps that's happened in both instances.

11:34:12 17 ACTING CHAIR HINOJOSA: Both standing and sitting.

11:34:14 18 MR. CRANMER: That's true.

11:34:15 19 So as opposed to perhaps repeating or even

11:34:19 20 summarizing my written testimony, I wanted to share with you

11:34:22 21 for just a moment the topic that I chose to write on and

11:34:27 22 submit to you and indicate to you why I did that.

11:34:31 23 My experience is somewhat similar to Carol's. I've

11:34:33 24 been practicing about as long as she has, actually starting in

11:34:37 25 1975.

11:34:38 1 MS. BROOK: Stand up.

11:34:41 2 (Laughter.)

11:34:42 3 MR. CRANMER: It's better to sit down.

11:34:43 4 And I've had the opportunity, as perhaps others who  
11:34:47 5 have appeared before you, to kind of be on both sides of the  
11:34:50 6 fence. I started as a state prosecutor and from there had the  
11:34:54 7 wonderful opportunity to go to the United States Attorney's  
11:34:57 8 Office in Detroit, where I was a federal prosecutor for a  
11:35:00 9 period of time and then, in 1982, left to go into private  
11:35:03 10 practice.

11:35:04 11 And the past 25 or 27 years I've been representing  
11:35:08 12 people who largely fall under the rubric of white collar  
11:35:14 13 criminal defendants. And for the most part, the clients that  
11:35:17 14 I represent do not really fall within the area of concern that  
11:35:22 15 I wrote about, which is mandatory minimum sentences. For the  
11:35:25 16 most part, I do not represent individuals charged with gun  
11:35:28 17 offenses or offenses of child pornography.

11:35:32 18 But to me in my 35 years or so of practice, again  
11:35:37 19 both as a prosecutor and a defense lawyer, one of the great  
11:35:40 20 concerns that I have is the impact of mandatory sentencing and  
11:35:46 21 its impact on the criminal justice system itself.

11:35:49 22 I recognize that this is an issue that the Commission  
11:35:52 23 itself recognizes. It's one that the Commission has never  
11:35:56 24 shied away from. I think as early as 1992, the Commission  
11:35:59 25 offered comments to Congress about its view of what I'll call



11:36:04 1 the dangers and problems with regard to mandatory minimum  
11:36:07 2 sentencing.

11:36:09 3           And so perhaps I will just leave my comments with  
11:36:11 4 that, that I know the Commission has already received a great  
11:36:13 5 number of comments about mandatory minimum sentencing. I  
11:36:17 6 think it is an issue that needs to continually be revisited.  
11:36:20 7 There needs to be a greater degree of education, particularly  
11:36:23 8 with members of Congress and the public, and I would hope that  
11:36:26 9 the Commission would continue its efforts in that regard.

11:36:30 10           What I thought I might do, with the Commission's  
11:36:34 11 concurrence, is perhaps tackle a couple of the questions that  
11:36:38 12 the Commissioners had for Mr. Fitzgerald. I thought that his  
11:36:41 13 comments, as always, were very insightful and eloquent, and  
11:36:47 14 for the most part, I would tell you I agree with many of his  
11:36:49 15 comments.

11:36:50 16           But a couple of the comments that he had struck me,  
11:36:54 17 and I was a little bit surprised to some extent at his answer.  
11:36:58 18 I think, Judge Castillo, if I recall correctly, you asked  
11:37:01 19 Mr. Fitzgerald the question -- and I'll paraphrase it, I may  
11:37:05 20 get it wrong -- but essentially I think it was a thoughtful  
11:37:08 21 question asking about Mr. Fitzgerald's experience with regard  
11:37:14 22 to cooperation and cooperating defendants in what I'll call  
11:37:19 23 kind of the post-*Booker* era, and has he seen any diminution in  
11:37:23 24 the cooperation of defendants.

11:37:27 25           If I recall his testimony, I think he suggested

11:37:30 1 perhaps there was some diminution in the cooperation and, in  
11:37:33 2 particular, the timing of that cooperation. And I will tell  
11:37:38 3 you that I'm sure that is his experience. I was a little bit  
11:37:43 4 surprised to hear his comments.

11:37:45 5           That has not been my experience, and I would be  
11:37:47 6 surprised if prosecutors, federal prosecutors, in my district  
11:37:50 7 had a similar view.

11:37:52 8           I recognize in theory the reason why there may be  
11:37:56 9 some less cooperation and why prosecutors would favor the  
11:38:01 10 notion of mandatory guidelines as perhaps having a greater  
11:38:05 11 degree of leverage than perhaps the advisory guidelines, but  
11:38:10 12 certainly in my day-to-day practice, I have not seen that take  
11:38:13 13 effect, and I would be surprised if there was any real  
11:38:17 14 empirical evidence to support that notion.

11:38:20 15           Judge Sessions, I think you asked a question about  
11:38:23 16 re-entry programs and the idea of incentivizing individuals to  
11:38:28 17 come back out, somewhat along the lines of the residential  
11:38:34 18 drug and alcohol program. I would agree with Mr. Fitzgerald  
11:38:38 19 that, without revealing any client secrets, certainly I've  
11:38:43 20 discovered more than one client along the way who has suddenly  
11:38:46 21 found that he or she has a drug or alcohol problem that  
11:38:50 22 perhaps didn't seemingly exist at the time we initially sat  
11:38:55 23 down and discussed their case or situation because somewhere  
11:38:58 24 along the line, they became educated about the benefits, if  
11:39:02 25 you will, of going through a drug and alcohol program.

11:39:05 1           But I do think the idea of incentivizing people in  
11:39:09 2 connection with re-entry makes some sense, and I do believe  
11:39:12 3 that relying upon, to some extent, the professionals there at  
11:39:17 4 the Bureau of Prisons, people who have the opportunity to  
11:39:20 5 interact with individuals, giving them some degree of  
11:39:22 6 flexibility in trying to assess whether or not there's an  
11:39:26 7 earnest effort to re-enter and whether or not they have, for  
11:39:30 8 example, a serious or real substance abuse problem makes some  
11:39:34 9 sense to me, and I would hope that there would be some thought  
11:39:39 10 and consideration given to those kinds of efforts.

11:39:41 11           I suspect, again, it may be helpful to the  
11:39:44 12 Commission, without being too presumptuous, if you have some  
11:39:48 13 time to ask the panel some questions. So with that, I'll  
11:39:52 14 perhaps cede any additional time on my behalf, Mr. Chairman.

11:39:56 15           ACTING CHAIR HINOJOSA: Thank you, Mr. Cranmer.

11:39:57 16           Are there any questions?

11:39:59 17 QUESTION AND ANSWER SESSION

11:39:59 18           VICE CHAIR SESSIONS: Well, let me just follow  
11:40:02 19 through with reincentivize people or incentivize people, and  
11:40:09 20 I'm interested in the program that you have in Cleveland.

11:40:12 21           The idea is that you're getting people who are  
11:40:15 22 released prior to sentencing or prior to trial?

11:40:19 23           MS. JOHNSON: Well, originally, the program was for  
11:40:23 24 those who were placed on supervised release when they were  
11:40:27 25 first returned to the community, but they've expanded.

11:40:30 1 VICE CHAIR SESSIONS: In a re-entry kind of program.

11:40:33 2 MS. JOHNSON: In a re-entry kind of program. But  
11:40:34 3 they've expanded it to those who are in custody during  
11:40:38 4 pretrial supervision, after they've been charged, but before  
11:40:42 5 they have been sentenced.

11:40:44 6 VICE CHAIR SESSIONS: So these are people who are  
11:40:46 7 actually in custody awaiting sentencing or --

11:40:50 8 MS. JOHNSON: Most of these people are out on bond.  
11:40:52 9 They're in the community. They are not in custody. They are  
11:40:56 10 out on bond.

11:40:57 11 VICE CHAIR SESSIONS: Are these post-plea, between  
11:40:59 12 the period of plea and the period of sentencing, or are they  
11:41:01 13 after release after an initial appearance?

11:41:05 14 MS. JOHNSON: I would say it's after the initial  
11:41:07 15 appearance for those who are placed on pretrial supervision.  
11:41:12 16 When they are interviewed, then they are asked whether they  
11:41:14 17 are interested in participating in this particular program.

11:41:17 18 VICE CHAIR SESSIONS: We had testimony from a judge  
11:41:20 19 last -- well, yesterday which focused in upon incentivizing  
11:41:25 20 rehabilitation beginning really from the date of the initial  
11:41:28 21 appearance up until the date of sentencing, literally what he  
11:41:32 22 said, and suggested to us that we try to put something into  
11:41:38 23 the guidelines to create that incentive.

11:41:42 24 My question is: Is that something that we should do?  
11:41:47 25 And, if so, do you have any words of wisdom as to how one does

11:41:53 1 that?

11:41:53 2 MS. JOHNSON: I'm not prepared to answer that  
11:41:57 3 question in full. I think it is something that the Commission  
11:42:00 4 should certainly take a look at. As I said, this program is  
11:42:04 5 new to me. It came to my attention because the pretrial  
11:42:09 6 services officer learned that my client was about to be  
11:42:13 7 sentenced and asked the probation department -- this is in the  
11:42:17 8 probation department -- but asked the probation officer if she  
11:42:19 9 could add several paragraphs to say that the basis for  
11:42:23 10 departure or variance is how well another one of my clients  
11:42:27 11 was doing in that program.

11:42:29 12 And so I think it's certainly something that the  
11:42:32 13 Commission should take another look at in determining whether  
11:42:35 14 or not it's something that should be included in terms of  
11:42:37 15 making the individualized sentencing that we're talking about,  
11:42:41 16 and encouraging the judges to take a look at it.

11:42:44 17 So I think it's information that you might want to  
11:42:47 18 include, but I haven't thought it through as to exactly how  
11:42:50 19 you could accomplish that.

11:42:53 20 MS. BROOK: Judge, could I just comment on that for a  
11:42:55 21 second? I'll be short.

11:42:56 22 I think that the participation in those programs at  
11:43:01 23 the front end, taking what we're learning about the back end,  
11:43:06 24 could be used a lot better if -- I think I actually said this  
11:43:11 25 in my testimony -- the Commission could spend some time

11:43:13 1 looking at what those incentives might be for participating in  
11:43:17 2 those programs and then thinking about how that might work in  
11:43:23 3 terms of a sentence, which I have to say, like Ms. Johnson, I  
11:43:29 4 don't know the answer to.

11:43:30 5           But I do want to say that the idea of doing much  
11:43:33 6 rehabilitation in prison seems to me to be not likely, not  
11:43:40 7 just because Congress has said pretty much over and over in  
11:43:44 8 the statutes that prison really shouldn't be used to  
11:43:46 9 rehabilitate; but in my experience, talking to Bureau of  
11:43:50 10 Prisons officials, they really don't feel like that's what  
11:43:55 11 they're equipped to do.

11:43:57 12           So I feel like maybe we should be looking more at  
11:44:00 13 probation or alternatives to probation, some kind of split  
11:44:05 14 sentence, than back to the Bureau of Prisons, which will, if  
11:44:09 15 nothing else, save a lot of money.

11:44:11 16           VICE CHAIR SESSIONS: When you propose alternatives  
11:44:13 17 to imprisonment, isn't it logical to somehow tie in programs  
11:44:19 18 like those ones that exist in Cleveland, having gotten  
11:44:24 19 somewhat involved in rehabilitation, involved in treatment,  
11:44:28 20 using the possibility of alternatives either by way of base  
11:44:34 21 offense levels or alternatives in some other way to  
11:44:37 22 incentivize people to participate in those kinds of programs?

11:44:42 23           That's just thinking if you have ideas about how we  
11:44:46 24 could do that within a guideline structure which would  
11:44:49 25 encourage participation in those exact kinds of programs that

11:44:54 1 exist in Cleveland.

11:44:56 2 That's -- I guess I was testifying there. I'm sorry.

11:45:00 3 I was supposed to be questioning, right?

11:45:02 4 MS. BROOK: Well, amen. I agree.

11:45:05 5 ACTING CHAIR HINOJOSA: I guess I have a question.

11:45:08 6 The first three-quarters of fiscal year 2009 show that

11:45:13 7 42 percent of the defendants, in the federal system at

11:45:16 8 least -- at the felony level in the Class A misdemeanor if

11:45:19 9 this is even reported -- are non-citizens of the United

11:45:22 10 States. They tend to be held without bond in most cases, and

11:45:27 11 what would your suggestion be with regards to anything at the

11:45:30 12 front end for those defendants?

11:45:32 13 And then my next question is somewhat unrelated.

11:45:37 14 It's about supervised release terms. Obviously drug

11:45:41 15 trafficking cases, it's mandatory when you sentence somebody

11:45:43 16 to prison to impose a supervised release term. There's a high

11:45:48 17 percentage of defendants who get supervised release terms.

11:45:52 18 Some of it may be guideline driven because the guidelines are

11:45:56 19 written in such a way that there's a supervised release term.

11:46:00 20 Some other statutes also require supervised release terms.

11:46:03 21 And so my question is with regards to those two

11:46:06 22 issues what, if anything, should the Commission look at in

11:46:10 23 regards to those two issues?

11:46:13 24 MS. BROOK: You know, Judge Hinojosa, I think what

11:46:17 25 you see in terms of the immigration cases and what we see here

11:46:20 1 are very, very different. Actually, Judge Gettleman actually  
11:46:25 2 wrote an article about the amazing difference.

11:46:30 3 For us in the right case, we are actually able to get  
11:46:35 4 our immigration clients out on bond in both courts, in the  
11:46:39 5 Northern District and from the immigration court, so there is  
11:46:42 6 some --

11:46:43 7 ACTING CHAIR HINOJOSA: Even when they're here  
11:46:47 8 illegally, when the allegation is they're here illegally?

11:46:50 9 MS. BROOK: Yes. Yes. I know, that's why I'm  
11:46:52 10 saying, it sounds amazing, but we have a very different makeup  
11:46:56 11 of cases.

11:46:57 12 So I think it's different in different areas of the  
11:47:00 13 country and may be worth looking at if there is something that  
11:47:04 14 can be done. Maybe it can't be done in Texas, but I do think  
11:47:09 15 something could be done in Illinois even for that population.

11:47:14 16 ACTING CHAIR HINOJOSA: Somebody want to talk about  
11:47:15 17 the supervised release issue?

11:47:19 18 MS. BROOK: You have to ask the question again.

11:47:21 19 ACTING CHAIR HINOJOSA: The question is obviously  
11:47:23 20 it's imposed in a very high percentage of cases. People have  
11:47:29 21 served their terms except for the 15 percent good time, and  
11:47:33 22 then they're on supervised release, which kind of took over  
11:47:36 23 the parole period in the old system.

11:47:39 24 Some statutes require it. Others don't. The  
11:47:43 25 guidelines address it and indicate that if it's a sentence of



11:47:51 1 more than one year, that supervised release terms should be  
11:47:55 2 imposed.

11:47:55 3 My question is do you find that helpful? Is that  
11:47:57 4 something the Commission should look at? What is your view on  
11:48:01 5 that?

11:48:04 6 MS. BROOK: My view, without actually thinking too  
11:48:06 7 much about it or consulting with anybody, is that any place in  
11:48:12 8 the guidelines where there can be more individualized  
11:48:16 9 discretion without interfering with some statutory issue is  
11:48:21 10 probably a good thing. It probably allows a judge to fashion  
11:48:27 11 a package front end, middle and back end, more individualized  
11:48:36 12 to a particular person.

11:48:39 13 And as I'm sitting here, I'm just thinking about the  
11:48:43 14 immigration issue, and I'm thinking maybe there's something  
11:48:45 15 that actually -- we've already talked about this in a  
11:48:48 16 different context -- that needs to be done with the  
11:48:51 17 immigration guideline altogether to take into account that  
11:48:56 18 problem. Another place to study, like you don't have enough.

11:49:03 19 MR. CRANMER: Judge, if I could weigh in briefly on  
11:49:06 20 your question about supervised release, I would tell you that  
11:49:08 21 with my clients, for the most part, that's not an issue that  
11:49:11 22 they focus on very much. It's really one of secondary  
11:49:16 23 importance, if that, because they're really concerned about am  
11:49:19 24 I going to prison and, if so, for what period of time.

11:49:22 25 But I will tell you that oftentimes, again, with the

11:49:26 1 clients that I tend to represent, supervised release, by the  
11:49:29 2 time we get to it, is really superfluous. I think it serves a  
11:49:33 3 limited purpose, and oftentimes thankfully in our district, we  
11:49:36 4 find that the probation officer, even before I have the  
11:49:40 5 opportunity to step in, will suggest to the court that this  
11:49:44 6 period of mandatory supervised release can and should be  
11:49:47 7 shortened.

11:49:48 8           So I'm not sure that I can even recall, candidly, a  
11:49:52 9 sentence in which there wasn't some type of supervisory  
11:49:55 10 release that was imposed, but to the extent, I would agree  
11:49:59 11 with Carol, that it could be made more discretionary to kind  
11:50:02 12 of fit the individual case and circumstance, I would certainly  
11:50:04 13 be in favor of something like that.

11:50:07 14           COMMISSIONER HOWELL: Yes. Thank you all for being  
11:50:10 15 our last panel to testify today, and I find all --

11:50:14 16           ACTING CHAIR HINOJOSA: We have one more.

11:50:16 17           COMMISSIONER HOWELL: We have one more? Sorry.

11:50:19 18           (Laughter.)

11:50:19 19           MS. BROOK: Sorry.

11:50:20 20           COMMISSIONER HOWELL: I thought the day was over. We  
11:50:24 21 have other meetings.

11:50:25 22           I wanted to talk about one of the points, Ms. Brook,  
11:50:27 23 that you brought up about racial disparity in sentencing,  
11:50:30 24 which is something that all of the commissions, including this  
11:50:33 25 one, has taken very seriously and has studied very closely,

11:50:37 1 particularly in crack context and in other contexts, including  
11:50:41 2 in our review of criminal history and how criminal history  
11:50:47 3 points are computed under the guidelines, resulting in our  
11:50:52 4 amendment in 2007 with revisions to criminal history  
11:50:56 5 computation.

11:50:57 6 We heard testimony in our July hearing from Professor  
11:51:01 7 Stone from Harvard's Kennedy School about how racial disparity  
11:51:06 8 in trivial arrests at the state and local level may be  
11:51:10 9 contributing to racial disparity in our criminal history  
11:51:17 10 categorizations at the federal level, which was, you know,  
11:51:20 11 something that we want to look at more closely.

11:51:22 12 And I was just interested, particularly hearing,  
11:51:25 13 Ms. Johnson, about your description of your client with  
11:51:28 14 Criminal History Category IV predicated, in part, on DWI  
11:51:34 15 arrests.

11:51:35 16 MS. JOHNSON: DWS, driving under suspension, not even  
11:51:41 17 driving under the influence.

11:51:41 18 COMMISSIONER HOWELL: Right, whether there are, just  
11:51:43 19 based anecdotally or in your experience, any of the trivial  
11:51:49 20 offenses that you see appearing frequently that you think the  
11:51:55 21 Commission should look at that are contributing to higher  
11:51:58 22 criminal history scores for your clients?

11:52:02 23 MS. BROOK: Well, certainly all the driving offenses,  
11:52:06 24 all of them across the board. The ACLU actually just filed a  
11:52:12 25 report in Illinois showing -- I can't remember the exact

11:52:14 1 figures -- but the number of Black and Hispanic drivers who  
11:52:19 2 are stopped over White drivers. Even though more contraband  
11:52:23 3 is eventually found, they have these arrests and convictions,  
11:52:28 4 which increases their criminal history basically because  
11:52:32 5 they're people of color.

11:52:35 6 In Illinois, most recently what we've been dealing  
11:52:39 7 with are misdemeanor convictions, for example, domestic  
11:52:43 8 battery misdemeanor convictions, that if you get two of them,  
11:52:46 9 they become a felony. So now you have two what may be very  
11:52:51 10 minor misdemeanor convictions, but they added up to a felony.

11:52:58 11 And I suspect in all the states, there are lots of  
11:53:03 12 different kinds of traps, I guess, like that, that you don't  
11:53:08 13 know about.

11:53:09 14 MS. JOHNSON: I do think you should take a closer  
11:53:11 15 look at some of the misdemeanor offenses that are included for  
11:53:15 16 Criminal History Category points, which is one of the reasons  
11:53:17 17 that I shared with you my client's situation, driving under  
11:53:22 18 suspension without a license, and part of that reason is that  
11:53:28 19 he said that he didn't have the money that he would need for  
11:53:31 20 insurance, and there were all kinds -- because he didn't have  
11:53:35 21 his G.E.D. It was just one thing after another, sort of  
11:53:38 22 complicated. He has three driving under suspensions.

11:53:41 23 And it's certainly true that we know that many times  
11:53:44 24 people of color are stopped more frequently and it doesn't  
11:53:48 25 mean that they have committed any crime or that there's

11:53:51 1 contraband that is found. In fact, I know that that has  
11:53:54 2 happened to my 19-year-old son who drives his Camaro in our  
11:53:58 3 community, which is a mixed community. And within the first  
11:54:01 4 year that he was driving, he was stopped on at least three  
11:54:05 5 different occasions and wasn't speeding.

11:54:08 6           Once they said it was because he was driving a car  
11:54:10 7 that had an out-of-town license. And my son, who is the child  
11:54:16 8 of criminal defense attorney, would ask what reason are you  
11:54:20 9 stopping me, and they would say, well, young man, we just  
11:54:23 10 wanted to check out your driver's license because you're  
11:54:25 11 driving an out-of-state license with your car.

11:54:29 12           Well, that seemed a little unusual to him, but a lot  
11:54:33 13 of our clients are stopped frequently, and they do not have  
11:54:36 14 their license. So we would urge the Commission, not to just  
11:54:40 15 stop with just the driving offenses, but to take a closer look  
11:54:44 16 at the misdemeanor offenses in which the individuals receive  
11:54:48 17 the Criminal History Category.

11:54:49 18           ACTING CHAIR HINOJOSA: Ms. Johnson, the two  
11:54:51 19 misdemeanor convictions that your client has are what? You  
11:54:55 20 said there were two misdemeanors and then the driving while  
11:54:59 21 license suspended.

11:55:01 22           MS. JOHNSON: The two misdemeanors were drug  
11:55:03 23 possession cases.

11:55:04 24           ACTING CHAIR HINOJOSA: And is he put in Criminal  
11:55:07 25 History Category IV in any way because of recency points, that

11:55:10 1 he was on probation or that he committed this within two  
11:55:16 2 years?

11:55:17 3 MS. JOHNSON: No, he was not. In fact, I brought his  
11:55:19 4 criminal history.

11:55:20 5 ACTING CHAIR HINOJOSA: There weren't any recency  
11:55:22 6 points?

11:55:23 7 MS. JOHNSON: Right.

11:55:23 8 No, in fact, he wasn't on probation or parole or  
11:55:26 9 supervision at all, and that is another catch phrase that we'd  
11:55:29 10 like the court or the Commission to take a closer look at, is  
11:55:33 11 that the fact that individual is on supervised release or  
11:55:37 12 probation. Even if it's at the end of that particular term,  
11:55:39 13 sometimes it's two or three years that they've actually been  
11:55:43 14 on the supervision and they've had no problems and they pick  
11:55:46 15 up the new federal case, and then suddenly they're socked with  
11:55:49 16 the additional points.

11:55:50 17 But for my client, no, it was strictly his prior  
11:55:53 18 criminal history. And the last two convictions were for  
11:55:56 19 driving, the last few convictions were for driving under  
11:56:00 20 suspension.

11:56:03 21 VICE CHAIR CASTILLO: I just want to close by  
11:56:06 22 commending you all for your testimony. I have to tease Carol,  
11:56:10 23 all the times I've seen you appear before the court, you've  
11:56:14 24 always been standing, so old habits are hard to vary from.

11:56:20 25 But I will tell you, in all seriousness, your written

11:56:24 1 testimony is just absolutely the best in terms of making  
11:56:30 2 points and picking up on prior testimony before the  
11:56:33 3 Commission. So all of your helpers are to be commended with  
11:56:38 4 regard to that.

11:56:39 5 I found in particular, Carol, your points about what  
11:56:44 6 we need to do on departures very helpful. I found,  
11:56:51 7 Ms. Johnson, your points on what has happened to sentences in  
11:56:56 8 Appendix 2, the point that sentences have not dropped after  
11:57:00 9 *Blakely* and *Booker*, much to your dismay, but that is a fact as  
11:57:06 10 confirmed by our own information.

11:57:08 11 And I also found your Appendix 1 to be the first  
11:57:13 12 compilation of appeals that's ever been put forth that I've  
11:57:17 13 ever seen in my ten years on the Commission, summarizing  
11:57:21 14 what's happened with government appeals, so I'd be  
11:57:25 15 interested --

11:57:25 16 MS. JOHNSON: I have to thank my helpers for that.

11:57:27 17 VICE CHAIR CASTILLO: I can imagine.

11:57:31 18 MS. BROOK: Our associate counsel were terrific.

11:57:33 19 VICE CHAIR CASTILLO: So I just really want to  
11:57:35 20 commend you for that written testimony. Your oral testimony  
11:57:37 21 here has been great, but there's no way any advocate can come  
11:57:42 22 in and summarize what you put in writing, and we will take  
11:57:44 23 that very seriously.

11:57:45 24 So thank you.

11:57:47 25 MS. JOHNSON: Thank you, your Honor.

11:57:48 1 MS. BROOK: Thank you.

11:57:49 2 ACTING CHAIR HINOJOSA: Thank you all very much.

11:57:50 3 MS. JOHNSON: Thank you again.

11:57:56 4 ACTING CHAIR HINOJOSA: We'll take a five-minute  
11:57:58 5 break.

11:57:58 6 (Recess from 11:58 to 12:12 p.m.)

12:11:27 7 PANEL VIII. ALTERNATIVES TO INCARCERATION

12:11:27 8 ACTING CHAIR HINOJOSA: We're ready for our next  
12:11:31 9 panel, which is a panel on "Alternatives to Incarceration."

12:11:36 10 We're very fortunate with the three individuals that are on  
12:11:38 11 this panel having taken their time off from their schedules to  
12:11:43 12 be here and share some of their thoughts with us.

12:11:45 13 We have Mr. James Van Dyke, who is the executive  
12:11:48 14 director of the Salvation Army Correctional Services here in  
12:11:51 15 Chicago. He oversees a 200-bed community corrections center  
12:11:56 16 under contract with the Federal Bureau of Prisons and also the  
12:11:59 17 U.S. Probation Office.

12:12:01 18 Previously, Mr. Van Dyke spent 13 years with the  
12:12:04 19 Circuit Court of Cook County performing various jobs there,  
12:12:09 20 and he is a licensed attorney who has also taught high school  
12:12:12 21 and worked in a youth home.

12:12:14 22 We also have the Honorable Roger K. Warren, who has  
12:12:22 23 served as president of the National Center For State Courts  
12:12:26 24 where he led initiatives to promote public trust and  
12:12:29 25 confidence, best practices, civil justice reform and racial



12:12:34 1 fairness from 1996 to 2004. Mr. Warren presently serves both  
12:12:40 2 as a consultant to the National Center For State Courts and as  
12:12:44 3 a scholar and resident for the California Administrative  
12:12:49 4 Office of Courts. He's a graduate of the University of  
12:12:53 5 Chicago Law School and has served as a judge in the past with  
12:12:55 6 the superior court in Sacramento.

12:12:57 7 We have Mr. Carl Wicklund, who is executive director  
8 of the American Probation and Parole Association. Previously  
12:13:01 9 he served as the director of a three-county adult and juvenile  
12:13:05 10 probation and parole department. He has served on numerous  
12:13:08 11 nationally oriented advisory groups and is currently the vice  
12:13:12 12 chair of the Global Justice Information Sharing Initiative  
12:13:15 13 Advisory Committee, which advises the U.S. Attorney General.

12:13:19 14 And we'll start with Mr. Van Dyke.

12:13:21 15 MR. VAN DYKE: Thank you, Mr. Chair, members of the  
12:13:24 16 Commission. I'm grateful for the opportunity to testify  
12:13:27 17 before you today on behalf of the Salvation Army, which has  
12:13:31 18 had a long history of working with offenders and ex-offenders.

12:13:36 19 I'm familiar with the comprehensive amount of  
12:13:39 20 information that this Commission received last year in its  
12:13:42 21 symposium on alternatives to incarceration, so I don't want to  
12:13:47 22 repeat a lot of that. My intent today is simply to give an  
12:13:50 23 informal, sort of ground-level view of alternatives to  
12:13:54 24 incarceration from the standpoint of an agency that is  
12:13:58 25 providing services to offenders and also because I see

12:14:06 1 alternative sentencing working.

12:14:08 2           The Salvation Army here in Chicago runs a community  
12:14:12 3 corrections center that houses about 200 individuals, most of  
12:14:15 4 whom are re-entry residents coming from federal prisons, but  
12:14:20 5 at any given time, 15 or 20 percent are people under the  
12:14:23 6 supervision of the U.S. Probation Office, and they're there  
12:14:28 7 either for residential services or out-patient services  
12:14:31 8 through our clinical department.

12:14:33 9           Prior to this time when I worked for the Circuit  
12:14:36 10 Court of Cook County, I oversaw interventions of various kinds  
12:14:41 11 for problem offender populations, domestic batterers, family  
12:14:46 12 violence perpetrators, persons with mental health and  
12:14:51 13 substance abuse issues, and I also helped design and implement  
12:14:56 14 the local drug court.

12:14:57 15           It's interesting to me that 20 years ago when I  
12:14:59 16 started working in corrections, that was sort of the advent of  
12:15:03 17 conversations about alternative sentencing, largely driven by  
12:15:08 18 the high cost of incarceration, and it's that same factor that  
12:15:12 19 seems to be bringing the conversation back up.

12:15:16 20           But simultaneously with my entry into the  
12:15:19 21 correctional field, there began to be a vast amount of  
12:15:23 22 research into what can be done to really change offender  
12:15:27 23 thinking and behavior, and that research has yielded rich  
12:15:32 24 results and I think offers much to us as far as cutting  
12:15:36 25 recidivism, really decreasing the social costs of crime, and

12:15:43 1 seeing to it that people can lead productive lives.

12:15:46 2 I read with interest the report of this Commission  
12:15:49 3 issued last January on alternative sentencing in the federal  
12:15:53 4 criminal justice system. I noted that according to that  
12:15:57 5 report in the previous ten years, 15 to 25 percent of  
12:16:01 6 offenders had received alternative sentencing, but though  
12:16:06 7 alternatives were available for up to 25 percent, courts still  
12:16:11 8 tended to impose prison, and the actual use of alternative  
12:16:15 9 sentencing had been decreasing slightly.

12:16:18 10 It might be that one thing that could promote the  
12:16:22 11 greater use of alternative sentencing would be if local courts  
12:16:27 12 were simply more aware of the contours of sentencing  
12:16:32 13 alternatives in their areas, exactly what would happen to  
12:16:36 14 individuals sentenced to alternatives to incarceration. And  
12:16:41 15 similarly I think that much could be gained by conversations  
12:16:45 16 among judges, prosecutors, the defense bar and probation  
12:16:51 17 administrators about the utility and the availability of  
12:16:55 18 alternative sentencing. I witnessed that being very helpful  
12:17:00 19 when we began the drug courts here in Cook County.

12:17:03 20 Alternative sentencing, I think, can hit a number of  
12:17:07 21 serious interests. First of all, yes, it can reduce the costs  
12:17:12 22 of imprisonment.

12:17:14 23 Secondly, it can provide very concrete consequences  
12:17:17 24 for criminal activity and even give the court a bit more  
12:17:22 25 latitude in crafting a punishment that fits the crime.

12:17:25 1           Thirdly, it can do something to protect and promote  
12:17:30 2 public safety by adequate supervision and monitoring and  
12:17:33 3 accountability measures.

12:17:34 4           And, finally, it can promote changes in individuals  
12:17:38 5 that will go beyond the time that they are going to be under  
12:17:41 6 sentence. In fact, changing offender behavior is really the  
12:17:45 7 truest basis for public safety and, I think, one of the chief  
12:17:50 8 values potential within alternative sentencing. Cutting the  
12:17:55 9 cycle of recidivism even slightly can yield significant  
12:17:59 10 benefits to our culture.

12:18:02 11           In its fullest sense, alternative sentencing is about  
12:18:07 12 much more than community supervision or confinement. It's  
12:18:10 13 about programming that addresses what are called criminogenic  
12:18:14 14 needs, needs of individuals that give rise to criminal  
12:18:18 15 activity, needs associated with such characteristics as  
12:18:22 16 anti-social behavior or anti-social associates, lack of  
12:18:27 17 self-control, a need for substance abuse or mental health  
12:18:30 18 treatment.

12:18:33 19           Individuals sentenced to alternatives to  
12:18:34 20 incarceration can continue to work to support themselves and  
12:18:40 21 their families or to seek work. They can pursue treatment.  
12:18:45 22 They can participate in change-producing programs without  
12:18:50 23 losing their ties to their community or their family and  
12:18:53 24 without having to undergo the very significant transitional  
12:18:57 25 difficulties of persons coming out of prisons.

12:19:00 1           Alternative sentencing requires at its basis a very  
12:19:04 2 comprehensive and thorough assessment of an individual's  
12:19:09 3 criminogenic needs and potential for re-offending. The  
12:19:13 4 assessment can occur, in part, before sentencing and even  
12:19:16 5 inform the Court's decision about the type of sentence to be  
12:19:19 6 given.

12:19:21 7           Alternatives to incarceration can also use this type  
12:19:26 8 of assessment in setting the road map for what's going to  
12:19:30 9 happen to offenders subsequently because assessment should be  
12:19:35 10 an ongoing activity during the course of the person's sentence  
12:19:38 11 to monitor change and progress.

12:19:41 12           Assessment leads to a case plan. The case plan is  
12:19:45 13 what we hope will take the person from being an offender to  
12:19:49 14 making the person an ex-offender. The case plan has very  
12:19:54 15 specific goals and objectives that the offender will work  
12:19:58 16 through when serving his or her sentence, but it's more than  
12:20:02 17 that.

12:20:02 18           Many persons caught up in the criminal justice system  
12:20:05 19 lack internal structures of self-discipline and self-control,  
12:20:11 20 and the case plan provides sort of an external structure that  
12:20:15 21 the individual can begin to internalize.

12:20:19 22           Beyond that, involving the person in creating the  
12:20:23 23 case plan and making, as it were, a behavioral contract with  
12:20:28 24 the offender enhances the offender's commitment to change, to  
12:20:32 25 living up to the case plan and motivates him or her more

12:20:35 1 highly.

12:20:36 2           At the program that the Salvation Army conducts in  
12:20:40 3 Chicago, part of our assessment and case planning process is a  
12:20:45 4 survey that offenders themselves fill out early in their time  
12:20:49 5 with us where they self-identify area of needs. Our  
12:20:53 6 experience is that individuals sometimes are not aware of the  
12:20:57 7 needs they have or lack the vocabulary to articulate them.  
12:21:02 8 And by providing this kind of instrument, we can engage them  
12:21:06 9 more intelligently in the process that they will undergo.

12:21:10 10           Assessment also gives a very good basis for  
12:21:14 11 determining how to best use scarce resources. If an  
12:21:19 12 assessment indicates that a person's risk level is relatively  
12:21:23 13 low, then let's not waste resources on this person. There's a  
12:21:27 14 temptation if so-and-so is a low-risk individual, let's  
12:21:31 15 involve him in some programming anyway to keep him that way.  
12:21:36 16 It's an unnecessary use of resources that can even be  
12:21:41 17 counterproductive because there is some research that shows  
12:21:45 18 having some low-risk individuals go through programming  
12:21:48 19 actually increases the likelihood that they will recidivate.

12:21:53 20           Rather, the resources should be channeled to those  
12:21:55 21 higher-risk individuals who not only benefit from them but who  
12:21:59 22 can actually perform quite well with the structure that they  
12:22:02 23 provide.

12:22:03 24           I believe it's crucial to engage the offender in  
12:22:07 25 change-related services and programming starting from the

12:22:10 1 earliest possible moment within that individual's sentence.  
12:22:15 2 In addition to addressing criminogenic needs, these services,  
12:22:19 3 these programs can get at some of the underlying issues that  
12:22:23 4 are common to persons who fall within the criminal justice  
12:22:26 5 system: Lack of communication skills, inability to plan or to  
12:22:34 6 set goals, to solve problems, to control behavior.

12:22:40 7 I have seen mandated treatment work. I have seen  
12:22:43 8 individuals ordered to pursue substance abuse treatment who  
12:22:47 9 otherwise might not have done so who, once they become  
12:22:51 10 involved, embrace it for other than simply compliance reasons.  
12:22:55 11 And I think there are many individuals who, but for their  
12:22:58 12 involvement in the criminal justice system, would never have  
12:23:02 13 experienced the interventions they need to become productive  
12:23:05 14 citizens.

12:23:06 15 Now, to give some examples of the kinds of programs  
12:23:10 16 and services beneficial to offenders, let me just quickly run  
12:23:14 17 through a short list.

12:23:16 18 Educational services from basic education to job  
12:23:20 19 preparation and employment skills training.

12:23:25 20 Employment-related services for individuals who are  
12:23:27 21 not employed. Few things give a greater stake in lawful  
12:23:32 22 citizenship than having a job, being able to support one's  
12:23:36 23 self and one's dependents. Providing pre-employment services,  
12:23:42 24 job referrals, as well as assistance in dealing with that  
12:23:45 25 question "have you ever been convicted of a felony?" can be a

12:23:49 1 major service for offenders.

12:23:51 2 Life skills classes because many offenders lack some  
12:23:55 3 of the basic know-how to navigate daily living. Life skills  
12:24:00 4 classes may be something as fundamental as money management.  
12:24:05 5 I've seen even white collar offenders require that type of  
12:24:10 6 life skill training. Additional examples would be anger  
12:24:14 7 management or control and parenting skills.

12:24:19 8 That leads to another type of service and programming  
12:24:23 9 of benefit, and that's the whole array of services that can be  
12:24:26 10 made available to families of offenders. While the court  
12:24:31 11 might not be able to sentence the family, I think the court  
12:24:34 12 needs to be aware of the family's influence.

12:24:37 13 The family remains the single largest influence and  
12:24:41 14 source of support for offenders; and to the degree that family  
12:24:45 15 members also need help, support, understanding, I think that  
12:24:50 16 the likelihood of positive outcomes increases.

12:24:54 17 Assistance in finding appropriate housing is a need  
12:24:58 18 of a fair number of offenders. They may lack any kind of  
12:25:03 19 stable housing situation, or they may need to move away from  
12:25:07 20 their negative environments, their anti-social associates, to  
12:25:13 21 more positive opportunities.

12:25:15 22 A more common need is that of substance abuse or  
12:25:19 23 mental health treatment. Clinicians dealing with offenders  
12:25:23 24 having these two types of problems need special know-how  
12:25:27 25 because in addition to understanding the problem itself, these



12:25:33 1 therapists need to understand how criminal thinking and  
12:25:37 2 conduct can be an overlay to the substance abuse and mental  
12:25:42 3 health problems and need.

12:25:46 4           Specialized programming for female offenders is a  
12:25:50 5 burgeoning and very necessary field. Previously, all offender  
12:25:53 6 programming was pretty much designed on the majority, the male  
12:25:55 7 model, but female offenders have different characteristics and  
12:25:59 8 needs. They're more likely to have suffered some form of  
12:26:04 9 abuse. They have higher incidence of mental health and  
12:26:08 10 substance abuse problems than male offenders, and they're more  
12:26:11 11 likely to have custodial care of their children.

12:26:16 12           Both male and female offenders can benefit from the  
12:26:20 13 cognitive behavioral programming that's I think one of the  
12:26:25 14 most significant fruits of the last 20 years of research as to  
12:26:30 15 what can make offenders change.

12:26:33 16           A good number of offenders lack even some of the  
12:26:37 17 basic constructs of living sensible, normal lives. For  
12:26:43 18 instance, they don't have communication skills. They lack  
12:26:47 19 insight into the connection between their thinking patterns  
12:26:50 20 and their behavior patterns and how their faulty thinking has  
12:26:55 21 led them to make bad choices.

12:26:57 22           They don't recognize the manner in which their  
12:27:00 23 emotions influence their behavior. They're not able to follow  
12:27:04 24 simple problem-solving techniques and, as a result, act more  
12:27:09 25 on impulse or reactively.

12:27:11 1 Cognitive behavioral programming addresses all of  
12:27:15 2 these elements with offenders in ways that have been proven by  
12:27:20 3 research to be effective. The individual gains greater  
12:27:25 4 control of his life by involving himself in very detailed,  
12:27:31 5 serious homework and classroom exercises that really bring him  
12:27:36 6 out a different person than when he entered.

12:27:38 7 Now, because we're talking about involving offenders  
12:27:42 8 in quite a bit of change, a related need is to keep the  
12:27:46 9 motivation level high. I think all of us realize that even  
12:27:49 10 engaging in positive change can cause efforts to keep the  
12:27:55 11 motivation going. Any of us who have ever tried to diet or  
12:27:59 12 get involved in an exercise program can attest to that.

12:28:02 13 For offenders, some of the most significant  
12:28:05 14 incentives to keep motivation going can be a reduction in  
12:28:09 15 community confinement time or the frequency in supervision  
12:28:15 16 context or in residential settings, such as the one where I  
12:28:18 17 work, more use of discretionary passes to do personal business  
12:28:22 18 and have contact with family members.

12:28:25 19 In fact, staff working to provide either supervision  
12:28:29 20 or services for offenders need to be consciously aware of the  
12:28:33 21 continual need to shore up and keep motivation going. We  
12:28:38 22 found that issuing certificates of completion or holding drug  
12:28:43 23 court graduations can be very significant moments in the lives  
12:28:48 24 of these individuals.

12:28:49 25 A more subtle way of reinforcing and sustaining

12:28:53 1 motivation is to use the techniques of what's called  
12:28:57 2 motivational interviewing, where a case manager asks an  
12:29:03 3 offender to articulate what is your next step? What do you  
12:29:06 4 plan to do now and when and how?

12:29:09 5           The person providing supervision can also offer  
12:29:12 6 feedback as to what the offender is doing, deciding to do, how  
12:29:17 7 he is acting, to become sort of a voice in the offender's  
12:29:22 8 head, commenting on his or her decisions and actions, and  
12:29:25 9 filling in for a lack of self-reflective ability that's common  
12:29:30 10 among offenders.

12:29:31 11           Now, counterbalancing this need for incentives and  
12:29:36 12 sustaining motivation is a need for prompt and very specific  
12:29:40 13 response to violations. If a person is not living up to the  
12:29:45 14 conditions of his or her community sentencing order, there  
12:29:49 15 needs to be some sort of consequence, but it need not be  
12:29:52 16 incarceration. It can be community confinement. It can be  
12:29:58 17 GPS monitoring. It might be more appropriate to require the  
12:30:02 18 person to go through some kind of programming that relates  
12:30:05 19 directly to whatever the violation was.

12:30:09 20           I believe that anyone working with offenders does an  
12:30:12 21 injustice if they don't also address with the person the  
12:30:16 22 possibility of relapse. Relapse prevention is a term from  
12:30:20 23 substance abuse treatment, but I think it can equally apply  
12:30:24 24 here because we're aware of the very high recidivism rate  
12:30:27 25 common to offenders.

12:30:29 1           And to sit with an offender and say let's take a look  
12:30:33 2   at how your offense happened. Let's work backward from the  
12:30:37 3   time of the offense through the chain of decisions and actions  
12:30:41 4   that brought you to that point. Perhaps it's a matter of  
12:30:45 5   pointing out to the offender that he or she opted for  
12:30:48 6   immediate gratification, rather than thinking of the long-term  
12:30:52 7   or more delayed negative consequences.

12:30:56 8           Clearly the staff who are offering supervision and  
12:30:59 9   services and programming to offenders need to be adequately  
12:31:03 10   trained and supervised and evaluated because the court and the  
12:31:08 11   public are putting a great deal of trust in their hands.

12:31:13 12           At our Salvation Army program in Chicago, beyond  
12:31:17 13   training people for what they need to know specifically for  
12:31:20 14   their positions, we do yearly retraining on issues of  
12:31:24 15   integrity and accountability, warning staff about the fact  
12:31:29 16   that offenders can be very manipulative individuals. Also  
12:31:33 17   admonishing them not to cross a line to have an inappropriate  
12:31:37 18   friendship or show favoritism toward offenders. And just as  
12:31:42 19   individual staff need to be accountable, so, too, the larger  
12:31:47 20   programs that provide the supervision and services to  
12:31:49 21   offenders.

12:31:50 22           The American Probation and Parole Association, the  
12:31:54 23   American Correctional Association have very good guidelines  
12:31:58 24   and standards for program design and performance. I would  
12:32:03 25   expect, too, that any entity that's providing alternative

12:32:07 1 sentencing service and supervision would have its own series  
12:32:11 2 of outcome measures, statistical feedback in order to measure  
12:32:16 3 progress, and also be open to audits by exterior agencies.

12:32:22 4           Our program in Chicago is monitored and audited  
12:32:26 5 yearly by the U.S. Probation Office, the Bureau of Prisons,  
12:32:30 6 the American Correctional Association, and Salvation Army  
12:32:34 7 Services, and we believe that this is the best way of making  
12:32:38 8 sure that we don't become complacent in what we're doing.

12:32:44 9           In summary, I believe that alternative sentencing is  
12:32:47 10 not only about what does not happen to the person; namely,  
12:32:51 11 incarceration, but it's also about what does or can happen to  
12:32:54 12 the person: accountability, consequences, and significant  
12:32:59 13 change. And in view of the burgeoning prison population and  
12:33:04 14 also in recognition of the evidence-based programming that has  
12:33:10 15 emerged in the last 20 years, I encourage re-examination and  
12:33:14 16 re-evaluation and further implementation of sentencing  
12:33:18 17 alternatives.

12:33:19 18           Thank you.

12:33:20 19           ACTING CHAIR HINOJOSA: Thank you, Mr. Van Dyke.

12:33:22 20           Mr. Warren?

12:33:24 21           JUDGE WARREN: Thank you, Judge.

12:33:26 22           Over the last several years, my principal area of  
12:33:30 23 interest and experience has been evidence-based sentencing in  
12:33:34 24 the state courts, by which I mean to refer to state sentencing  
12:33:39 25 policies and practices that are effective in reducing offender

12:33:43 1 recidivism.

12:33:44 2 I have published extensively on the topic over the  
12:33:47 3 last several years, working with the Pew Foundation and the  
12:33:52 4 National Center For State Courts, developing model curriculum  
12:33:56 5 for judges around the country, training judges in 15 or 20  
12:34:02 6 states and other criminal justice professionals as well.

12:34:07 7 I am not an expert on federal sentencing. I'm not an  
12:34:11 8 expert on the Sentencing Reform Act.

12:34:14 9 I will offer a few cautious comments about  
12:34:19 10 considerations you might undertake if you are persuaded that  
12:34:24 11 it's important to import into the federal sentencing structure  
12:34:30 12 and process some of the experiences and learnings in the state  
12:34:33 13 courts.

12:34:34 14 The main point I want to make is that I think the key  
12:34:38 15 to alternative sentencing, what you call alternative  
12:34:43 16 sentencing, expanding the use of alternative sentencing is the  
12:34:47 17 ability to safely and effectively supervise and treat  
12:34:54 18 offenders in the community. If we do not have that ability,  
12:34:58 19 policymakers and judges are not going to expand the use of  
12:35:02 20 alternative sentencing.

12:35:04 21 Judges are not going to put people on probation or  
12:35:07 22 into treatment that they think are going to fail and provide  
12:35:09 23 some further risk to the community. And we know from  
12:35:13 24 historical experience what happens when you do put folks on  
12:35:17 25 probation who fail. Policymakers and the public at large

12:35:22 1 become disenchanting.

12:35:25 2           What led to the rapid increase in incarceration over  
12:35:31 3 the last 30 years was that the violent crime rate in this  
12:35:35 4 country tripled from 1960 to 1975, and that led the states  
12:35:41 5 first and then at the federal level to much more extensive  
12:35:45 6 reliance on incarceration and imprisonment for dealing with  
12:35:49 7 criminal offenders.

12:35:50 8           So it was the failure of community supervision and  
12:35:54 9 treatment and the perception, even in the research community  
12:35:59 10 and among policymakers and the public, it was fed up with what  
12:36:05 11 was going on at the community level, that led to our current  
12:36:09 12 reliance on imprisonment and incarceration.

12:36:12 13           So the tragic consequences of putting people into  
12:36:17 14 treatment that doesn't work are ones that we are familiar  
12:36:19 15 with, and we will only repeat that cycle if we expand the use  
12:36:24 16 of alternative sentencing with supervision and treatment  
12:36:27 17 programs that don't work. So the key, I think, is to have the  
12:36:30 18 ability to do this work well.

12:36:32 19           Now, today, unlike 20 or 30 years ago, we know how to  
12:36:36 20 do this work well. There is a voluminous body of research  
12:36:39 21 that teaches us what works and what doesn't work to reduce  
12:36:46 22 offender recidivism. And at the state level, there are  
12:36:50 23 experiences over the last three years in a number of states  
12:36:54 24 that have experimented with implementing evidence-based policy  
12:36:58 25 and practice and have done so effectively and have good

12:37:05 1 results.

12:37:06 2           But it's true that we have a long way to go on the  
12:37:08 3 state side in fully implementing evidence-based practice in  
12:37:12 4 supervision and treatment. I have tried to outline in my  
12:37:16 5 written statement some of the basic principles of  
12:37:19 6 evidence-based practice to reduce recidivism. Mr. Van Dyke  
12:37:22 7 has given you a terrific summary of what those practices  
12:37:27 8 consist of at the ground level, and what I tried to do was  
12:37:30 9 just outline some of the basic principles that have emerged  
12:37:34 10 from the research.

12:37:35 11           And I'm not going to take the time to cover material  
12:37:40 12 that Mr. Van Dyke has already covered or to discuss the  
12:37:44 13 principles in particular further in my oral testimony, but  
12:37:49 14 what I do want to emphasize is that the benefits of using  
12:37:57 15 evidence-based practice and having sentencing policies and  
12:38:02 16 practices that promote reducing the risk of offender  
12:38:06 17 recidivism are significant. We can realistically reduce  
12:38:12 18 offender recidivism by 10 to 20 percent just applying what we  
12:38:16 19 now know about how to do this.

12:38:22 20           One of the most, I think, persuasive discussions of  
12:38:27 21 the benefits of evidence-based practice comes from the  
12:38:30 22 Washington State Institute For Public Policy. Now, this is a  
12:38:34 23 group created by the Washington legislature who, when it has  
12:38:38 24 public policy issues before it, wants to turn, wants to be  
12:38:42 25 able to turn to its own research center for data and



12:38:46 1 information and research that surrounds the public policy  
12:38:51 2 issues affecting society.

12:38:55 3           So when the day came when the corrections department  
12:38:57 4 told the Washington legislature that they needed to build two  
12:39:01 5 new prisons over the course of the next 20 years to house the  
12:39:05 6 increasing prison population, they asked the Washington State  
12:39:08 7 Institute to take a look and see whether or not there was a  
12:39:12 8 realistic possibility of expanding the use of evidence-based  
12:39:17 9 programming for criminal offenders in lieu of building some or  
12:39:20 10 all of the new prison beds.

12:39:22 11           At the end of that research, the Institute reported  
12:39:25 12 that if the State of Washington modestly increased its use of  
12:39:31 13 existing evidence-based programs in the State of Washington,  
12:39:35 14 it would not have to build the two new prisons, it would save  
12:39:40 15 \$2 billion, and, most importantly from my point, it would  
12:39:43 16 reduce the crime rate by eight percent.

12:39:46 17           So the central reason why evidence-based practice is  
12:39:51 18 important is not just that it's cheaper, it's not just that it  
12:39:56 19 reduces the economic and social cost of crime, not just that  
12:40:01 20 it reduces the cost of families and communities and to the  
12:40:11 21 offenders themselves, not just that it frees up prison bed  
12:40:16 22 space that can be used for the more serious offenders, but it  
12:40:19 23 reduces crime, and it reduces crime more effectively than our  
12:40:24 24 current crime control policies.

12:40:28 25           What's particularly noteworthy about the Washington

12:40:31 1 study is that it took into account the extent to which the use  
12:40:36 2 of incarceration and incapacitation and general deterrence  
12:40:40 3 reduces crime in making its projections, and it found that the  
12:40:46 4 crime reduction impact of evidence-based practice outweighed  
12:40:51 5 the crime increasing tendency of the less frequent use of  
12:40:58 6 incarceration for deterrence and incapacitation purposes to  
12:41:03 7 the extent that the use of evidence-based practice was  
12:41:06 8 resulting to some extent reduced use of incarceration. But  
12:41:11 9 primarily because there were fewer crimes being committed in  
12:41:14 10 the future, fewer people going into incarceration on new  
12:41:20 11 crimes, found that it outweighed that to the extent that it  
12:41:22 12 reduced crime from the current level in Washington by eight  
12:41:26 13 percent.

12:41:27 14 So the primary reason why alternative sentencing is  
12:41:31 15 important is not the things I mentioned earlier, but because  
12:41:34 16 it reduces crime, and that's what we should be about in the  
12:41:38 17 criminal justice system, public safety.

12:41:42 18 It also better holds offenders accountable. It  
12:41:48 19 certainly holds offenders better accountable than we currently  
12:41:51 20 do in probation and parole situations. It expects and  
12:42:01 21 anticipates offenders to become responsible for their own  
12:42:03 22 behavior, something that doesn't happen with a prison  
12:42:07 23 sentence, where offenders are not in a position to make  
12:42:11 24 independent decisions in their life and be held accountable  
12:42:13 25 for the decisions that they make. So it encourages the

12:42:17 1 development of skills and abilities and thinking on the part  
12:42:21 2 of an offender that allow the offender to live a more  
12:42:27 3 law-abiding life in the community. And it is not an  
12:42:31 4 alternative punishment, which is why I wince a little bit at  
12:42:36 5 the phrase "alternatives to incarceration."

12:42:39 6 Evidence-based practice, effective probation  
12:42:43 7 supervision is not an alternative punishment. From the  
12:42:47 8 judge's point of view in having an offender before you at  
12:42:52 9 sentencing, the judge's responsibility certainly is to impose  
12:42:58 10 a punishment on the offender that's fair and proportionate to  
12:43:02 11 the gravity of the offense that has been committed on the one  
12:43:06 12 hand. That's looking back at what has happened and exacting  
12:43:10 13 some accountability for past conduct on the part of the  
12:43:12 14 offender by imposing a fair and just punishment.

12:43:17 15 But what we have tended not to do as judges and what  
12:43:22 16 we should be doing much more of as judges is then looking  
12:43:25 17 forward and saying what can I do as a judge to reduce the  
12:43:28 18 likelihood of this offender committing another offense?  
12:43:32 19 That's what we tend not to do.

12:43:34 20 And that's where the whole topic of evidence-based  
12:43:37 21 practice is. There's no reason in most cases why a judge  
12:43:41 22 cannot impose a sentence that fairly punishes on the one hand  
12:43:45 23 and is also designed to reduce the likelihood of re-offense on  
12:43:49 24 the other.

12:43:50 25 If the seriousness of the offense in light of all the

12:43:54 1 circumstances requires a prison sentence, then the  
12:43:57 2 responsibility for recidivism reduction passes significantly  
12:44:02 3 to the folks running the prisons or doing re-entry or  
12:44:08 4 post-prison supervision. But in instances where the gravity  
12:44:13 5 of the offense does not require a prison sentence, then  
12:44:17 6 there's no reason why the judge shouldn't be equally focused  
12:44:20 7 on the public safety aspects of the sentence, looking forward  
12:44:24 8 what the judge can do to avoid further victimization.

12:44:29 9           Effective probation is punishment. I think we tend  
12:44:33 10 to have in mind images of probation from years ago, or maybe  
12:44:39 11 even in many places today with high caseloads, ineffective  
12:44:43 12 supervision, violations piling up until finally the probation  
12:44:50 13 officer has decided to do something about it, high recidivism  
12:44:52 14 rates, probation being ineffective. That is not  
12:44:57 15 evidence-based supervision today.

12:45:01 16           So let me just close with three comments about what  
12:45:03 17 this could mean, I think, for the federal courts.

12:45:07 18           First of all, if you want to be serious about  
12:45:12 19 recidivism reduction, establishing that as one of the purposes  
12:45:17 20 of the federal sentencing system, you need to say so. You  
12:45:21 21 need to have a policy that says that one of the principal  
12:45:25 22 goals of the federal sentencing system is recidivism  
12:45:29 23 reduction, which you don't currently do.

12:45:35 24           Acknowledging that this is not my field, I have  
12:45:37 25 looked at some of your work, and you acknowledge that among

12:45:44 1 the goals of sentencing, rehabilitation is not of the same  
12:45:47 2 priority as the other sentencing purposes: deterrence,  
12:45:53 3 incapacitation, sanctions, punishment.

12:45:58 4           You need to say at least that rehabilitation is  
12:46:03 5 equally as important. It's the one of those, other than  
12:46:06 6 incapacitation, and it's a stronger crime reduction strategy  
12:46:13 7 than incapacitation, so it is your strongest public safety  
12:46:19 8 objective.

12:46:21 9           And I quarrel a little bit with the use of the word  
12:46:24 10 rehabilitation because I think it tends to focus on making the  
12:46:28 11 person a better person, and that is certainly a laudable  
12:46:34 12 objective. But in the criminal justice system, I think what  
12:46:37 13 we should really be focusing on more specifically is crime  
12:46:41 14 reduction. And the real interest why we are interested in  
12:46:44 15 rehabilitation, our niche in this area is reducing crime and,  
12:46:48 16 through reducing crime, helping people to be rehabilitated and  
12:46:53 17 helping communities to be rehabilitated.

12:46:56 18           By using the phrase "reducing crime" or "recidivism  
12:46:59 19 reduction" or "risk reduction," I think you focus more  
12:47:02 20 squarely on the criminal justice interest in rehabilitation  
12:47:07 21 and you focus everyone's attention on that is what we want to  
12:47:11 22 try to do, not just rehabilitate, but we want to focus on  
12:47:14 23 crime reduction.

12:47:15 24           Secondly, as we've already talked about, it doesn't  
12:47:19 25 make any sense for you to have a significant policy support

12:47:26 1 for recidivism reduction if probation doesn't have the  
12:47:30 2 capacity to do that work. And so I think it's also critically  
12:47:35 3 important that you collaborate with the U.S. Administrative  
12:47:40 4 Office of the Courts and U.S. Probation to make sure that they  
12:47:43 5 have the resources, the training, the know-how, the policies,  
12:47:47 6 the leadership to do this work. Otherwise, we're into this  
12:47:53 7 vicious cycle again where you are -- where the system is kind  
12:47:58 8 of designed to fail.

12:47:59 9           And then thirdly, the question is, well, what is the  
12:48:02 10 role of the judge in all of this?

12:48:03 11           As I see, the work that has to be done to change  
12:48:07 12 offender behavior is primarily work that the folks that I'm  
12:48:10 13 flanked by are going to do, is the treatment providers and the  
12:48:14 14 probation officers that are to do that work.

12:48:17 15           Our role, I think, as judges, we're sort of the  
12:48:20 16 gatekeepers and we put people on probation and we take people  
12:48:23 17 off probation. So the question is, well, what is that  
12:48:26 18 gatekeeping role for the judiciary? And I think that in the  
12:48:29 19 federal courts, it could be expanded.

12:48:33 20           I noted, first of all, that you have about one person  
12:48:38 21 on probation for every 11 prisoners that you have. On the  
12:48:42 22 state side, we have three people on probation for every  
12:48:46 23 prisoner we have, about a 30-to-1 kind of disparity. Now, I  
12:48:49 24 acknowledge that federal offenders are a different lot than  
12:48:52 25 state offenders, but then I look at a statute which says that

12:48:58 1 your probation services focus on first-time offenders  
12:49:03 2 committing nonviolent offenses.

12:49:06 3 That is a pretty small subset of any offender  
12:49:09 4 population, and it relies exclusively on static risk  
12:49:14 5 assessment; that is, it purports, I guess, to weigh the risks  
12:49:21 6 to the public presented by the offender in the future based  
12:49:24 7 solely on what has happened in the past, the crime committed  
12:49:29 8 and the prior criminal record.

12:49:31 9 If that's all we were guided by, we wouldn't be able  
12:49:34 10 to reduce recidivism at all. Those things aren't going to  
12:49:37 11 change with anyone. That is not going to distinguish the  
12:49:39 12 person that doesn't commit any further crimes from the person  
12:49:42 13 that does. They both have the same past when they come before  
12:49:45 14 us.

12:49:45 15 And the use of those static indicators also does not  
12:49:53 16 allow us to determine what are the characteristics about this  
12:49:57 17 offender that we need to target in order to be successful? It  
12:50:01 18 doesn't allow us to tell whether we're making any -- whether  
12:50:04 19 we're accomplishing anything or not.

12:50:06 20 So I think my final suggestion is that you consider  
12:50:14 21 complementing the current emphasis on the offense background  
12:50:18 22 of the offender with more offender-based information, where  
12:50:24 23 you're sentencing individual offenders based on information  
12:50:27 24 about them, not just what they've done in the past, but what  
12:50:32 25 they are likely to do in the future and what are the

12:50:35 1 criminogenic needs, the dynamic risk factors that you can,  
12:50:40 2 through your probation agents and treatment providers, the  
12:50:44 3 places where you can effectively intervene, and that you try  
12:50:47 4 to not only maybe change the statutory guidance about  
12:50:50 5 offenders that might be amenable for evidence-based  
12:50:53 6 programming, but also incorporate into guidelines risk  
12:50:58 7 assessment information so that in those category of offenses  
12:51:02 8 where it makes sense to consider sentencing in the community,  
12:51:06 9 the judge can be guided, not only by the offense information,  
12:51:09 10 but also by offender information that helps the judge and  
12:51:14 11 probation and the treatment providers predict the risk of  
12:51:18 12 recidivism by an individual offender and helps guide the  
12:51:21 13 supervision and treatment programming.

12:51:25 14 Thank you.

12:51:27 15 ACTING CHAIR HINOJOSA: Thank you, Mr. Warren.

12:51:28 16 Mr. Wicklund.

12:51:29 17 MR. WICKLUND: Thank you, Judge, and Commissioners.

12:51:32 18 Well, the good news is they said most of what I  
12:51:36 19 wanted to say, so I'll be brief and try not to be redundant.

12:51:41 20 A little background. The American Probation and  
12:51:46 21 Parole Association represents nearly 40,000 federal, state,  
12:51:49 22 local, tribal probation, parole and community corrections  
12:51:55 23 professionals. I have followed and am aware of *U.S. v. Booker*  
12:52:03 24 and have talked to our members who are federal probation  
12:52:07 25 officers about that.



12:52:10 1           Some other background, I started my professional  
12:52:12 2 career in Minnesota, which is one of the first places to have  
12:52:16 3 guidelines. And as director of probation and parole,  
12:52:20 4 including presentence investigations and looking at people  
12:52:27 5 that had not been into prison yet and those that were coming  
12:52:30 6 out of prison, we saw -- we had sort of a creed that prison  
12:52:37 7 was the alternative sentence.

12:52:41 8           We didn't see community supervision as an  
12:52:46 9 alternative. We saw prison as the alternative. And if you  
12:52:50 10 start from that standpoint, it gives you a whole different  
12:52:53 11 perspective on where you're going forward.

12:52:56 12           But with 20 years of experience in Minnesota and  
12:53:02 13 watching the guidelines come together, watching them being  
12:53:07 14 altered, knowing some of the commissioners on their guidelines  
12:53:12 15 committee and talking to them while I was a professional, I've  
12:53:18 16 come to believe that guidelines are not necessarily a bad  
12:53:21 17 thing if they're advisory.

12:53:24 18           In fact, I think mandatory guidelines is sort of an  
12:53:26 19 oxymoron, but I think that advisory guidelines can provide  
12:53:33 20 some uniformity and some certainty in sentencing, while also  
12:53:38 21 allowing some judicial discretion.

12:53:41 22           Certainty and uniformity should not get in the way of  
12:53:45 23 justice. One of my all-time favorite sayings, it's on my wall  
12:53:50 24 in my office, says that, "There can be no justice if rules are  
12:53:53 25 absolute."

12:53:55 1           That's attributed to Captain Jean-Luc Picard,  
12:54:00 2   Starship Enterprise, by the way.

12:54:01 3           Certainty and uniformity should not quell creativity  
12:54:10 4   or the aspiration for long-term public safety.

12:54:17 5           I was on a school board for a while when they  
12:54:20 6   implemented zero tolerance. And I thought that was okay until  
12:54:24 7   I found it meant zero creativity. It meant that any time  
12:54:28 8   someone did something that was part of their zero tolerance  
12:54:31 9   policy, they were expelled.

12:54:36 10          I had some very, very emotional arguments about that  
12:54:44 11   and prevailed in many cases because I said just because I  
12:54:48 12   don't tolerate something doesn't mean that I have to go to the  
12:54:51 13   extreme every time.

12:54:56 14          The federal system is very, very fortunate in that  
12:55:02 15   judges in the federal system get very comprehensive  
12:55:07 16   presentence investigation reports from the probation  
12:55:11 17   department. I can't say that all around the country. In  
12:55:15 18   fact, many places where mandatory minimums have come into  
12:55:18 19   play, guidelines have come into play, judges have pretty much  
12:55:22 20   eschewed presentence investigations.

12:55:26 21          And prior to the *Booker* case, many of the people that  
12:55:32 22   I know in the federal probation system used to refer to them  
12:55:36 23   as pre-incarceration reports because all you were doing was  
12:55:42 24   writing a report to help the prison system better understand  
12:55:45 25   this individual. It didn't have much to do with what was

12:55:48 1 going to happen if they were in the community. They now refer  
12:55:54 2 to them as presentence investigation reports.

12:55:56 3           And a good presentence investigation report is going  
12:56:00 4 to consider the totality of the individual, as Roger was  
12:56:03 5 saying, looking at the offender, not just the offense. They  
12:56:07 6 are going to consider victim impact. They're going to look at  
12:56:11 7 the role that that individual plays in a crime.

12:56:15 8           I can't tell you how many different times I saw drug  
12:56:21 9 agents and the prosecutor cut a deal with the most savvy and  
12:56:29 10 sophisticated person in a drug bust because they were smart  
12:56:35 11 enough to cut the deal first. The stooges, the lookouts, the  
12:56:39 12 people who were looking out are the ones that did the real  
12:56:43 13 time because they didn't know what to do and how to work the  
12:56:46 14 system.

12:56:46 15           And I think it's important to take a look at how  
12:56:49 16 people, you know, what their involvement in crime is while  
12:56:53 17 also weighing any victim impact along those lines, too.

12:56:57 18           I'm not going to get into all the assessment tools.  
12:57:02 19 That's what they talked about earlier. But I think they're  
12:57:04 20 important as part of the sentencing process. And I think  
12:57:09 21 departures are a very, very important part of sentencing  
12:57:16 22 guidelines. I don't think that that's a failure of guidelines  
12:57:18 23 if there are departures. I think the guidelines is where you  
12:57:23 24 start. If you can defend a departure based on mitigating or  
12:57:28 25 aggravating factors, I don't see that as a failure, but you're

12:57:33 1 all starting from the same place.

12:57:38 2           And I think it would be helpful, and I don't know to  
12:57:41 3 what degree this occurs, to even encourage the people doing  
12:57:45 4 the presentence investigations when they're making  
12:57:49 5 recommendations that if they think that there should be a  
12:57:51 6 departure based on aggravating or mitigating factors, that  
12:57:56 7 they should include that.

12:58:00 8           As for the actual sentencing, Roger does a wonderful  
12:58:06 9 job of talking about evidence-based sentencing, but I'd like  
12:58:11 10 to talk about the three Rs of sentencing: Is the sentence  
12:58:17 11 realistic? Is it relevant? And/or is it supported by  
12:58:21 12 research?

12:58:24 13           By realistic, I mean, I can't tell you how many -- in  
12:58:30 14 fact, I would be willing to bet that there isn't a person in  
12:58:33 15 this room that could live up to the conditions of supervision  
12:58:35 16 that a lot of people get put on. They're that onerous and  
12:58:41 17 that difficult to deal with, especially if you don't have the  
12:58:46 18 resources and the wherewithal that they have.

12:58:50 19           People have conditions placed on them to attend a  
12:58:58 20 drug treatment program. Does anybody know if there's even an  
12:59:01 21 open slot in that drug treatment program? What if they have  
12:59:05 22 to wait six months and they have an addiction? Chances are,  
12:59:09 23 you're going to see them back in front of you for a violation  
12:59:11 24 at that point.

12:59:13 25           Can the supervision agency even live up to the

12:59:18 1 conditions that are placed on them? Can a prison, if they're  
12:59:23 2 going to prison, live up to the conditions of the sentence?  
12:59:29 3 So I think it's important to look at, you know, whether, first  
12:59:32 4 of all, whether or not a sentence is realistic.

12:59:35 5           Is it relevant? Jim talked about consideration of  
12:59:42 6 age and gender and culture, proportionality, the type of  
12:59:49 7 treatment. Jim talked about gender considerations. I  
12:59:55 8 remember a woman being sentenced to a drug treatment program  
12:59:58 9 that was highly confrontational. She had been abused most of  
01:00:04 10 her life, sexually and physically. She became a puddle in  
01:00:09 11 that program and ran away and immediately started using again.  
01:00:17 12 You know, we have to look at the relevance of what we're doing  
01:00:20 13 through that process.

01:00:21 14           And are the sentences and the conditions research  
01:00:26 15 supported? They all did a wonderful job of talking about  
01:00:30 16 evidence based. I was here earlier though, and I was struck  
01:00:34 17 by something that U.S. Attorney Fitzgerald said about gaming  
01:00:41 18 for incentives. Yeah, that happens. The Bureau of Prisons  
01:00:47 19 staff are probably some of the best-trained prison staff  
01:00:51 20 throughout the country, much better trained than most state or  
01:00:55 21 private institution staff. But I also thought about the  
01:01:01 22 number of people in organizations that I've been in,  
01:01:07 23 businesses that I've seen that gain from incentives, and what  
01:01:13 24 we look at is the outcomes and base it on that.

01:01:16 25           So I wouldn't get too caught up on the gaming for

01:01:20 1 incentives because I've seen incentives, simple incentives  
01:01:26 2 like "geez, you did a nice job" work miracles. And so when  
01:01:31 3 we're talking about incentives, we're not always talking about  
01:01:35 4 cutting out time. We're talking about recognizing someone's  
01:01:39 5 actual doing something, catching them doing something right.

01:01:43 6 Jim talked about motivational interviewing. I don't  
01:01:47 7 know if you're aware of this, but the roots of motivational  
01:01:50 8 interviewing are in the medical field, getting people to  
01:01:52 9 follow their treatment regimens, which is sort of funny  
01:01:59 10 because I think if we held the criminal justice -- or if we  
01:02:03 11 held the medical profession to the same standards we hold the  
01:02:06 12 criminal justice system to, we probably wouldn't have open  
01:02:09 13 heart surgery, given how effective that was when they first  
01:02:13 14 started out, or we wouldn't be treating people with diabetes  
01:02:16 15 because they have a much higher failure rate than people going  
01:02:21 16 into drug treatment.

01:02:23 17 It's also important, you talked, Roger talked about  
01:02:27 18 probation being punishment. If I were to tell you right now  
01:02:34 19 that you had to go to drug treatment, my guess is that you  
01:02:38 20 wouldn't necessarily -- your first thought wouldn't be, oh,  
01:02:42 21 gee, thank you. Almost every condition that's placed on  
01:02:47 22 people, at least initially, is seen as punishment.

01:02:52 23 There are studies that show that people would rather  
01:02:55 24 be in prison or jail than out on probation having to live up  
01:02:59 25 to the conditions that are placed on them. They find it less

01:03:02 1 onerous. They don't have any responsibility.

01:03:06 2           So back to the sentencing guidelines. My experience  
01:03:11 3 with sentencing guidelines, you know, you have grids, correct?  
01:03:19 4 Is that correct? Why can't you have grids within grids, where  
01:03:23 5 you have a menu of options that can have some weight placed on  
01:03:28 6 them that judges can look at and they can assign those options  
01:03:37 7 within that grid within a grid, if you will, so that it's not  
01:03:41 8 simply you're in this grid and this is what happens. You're  
01:03:45 9 in this grid, and here's a whole set of options that you can  
01:03:48 10 take a look at. And then allow for administrative adjustment  
01:03:53 11 within the subgrid and administrative responses. That doesn't  
01:03:59 12 always have to come back to court.

01:04:07 13           Just a couple of other quick comments. There was  
01:04:11 14 discussion about re-entry earlier, too. I was listening to  
01:04:16 15 the U.S. Attorneys speaking, and re-entry really begins at the  
01:04:22 16 time of arrest. The minute someone is placed in jail, their  
01:04:27 17 life's been disrupted significantly. The minute they're  
01:04:33 18 arrested, their life has been disrupted significantly, and at  
01:04:39 19 that point, they're going to be re-entered into society in a  
01:04:43 20 different way.

01:04:44 21           So I think that when we talk about re-entry at the  
01:04:46 22 federal level, it isn't simply when they're going to prison.  
01:04:49 23 It isn't simply when they're sentenced. It goes all the way  
01:04:52 24 back to how their lives are disrupted.

01:04:58 25           I think that, you know, one of the analogies I use of

01:05:04 1 this is that the Gemini astronauts, when they were shot up and  
01:05:09 2 when Carpenter was shot up into the outer atmosphere and came  
01:05:14 3 right back down, didn't do an orbit, his re-entry was just as  
01:05:18 4 traumatic as John Glenn's when he went around several times.

01:05:26 5 It doesn't take long for someone's life to get disrupted.

01:05:30 6 But, in closing, I would just like to say let's teach  
01:05:33 7 the research to the practitioners, the research that these  
01:05:37 8 guys talk to, and then let's let the research drive the  
01:05:41 9 practice.

01:05:42 10 Thank you.

01:05:43 11 ACTING CHAIR HINOJOSA: Thank you, Mr. Wicklund.

01:05:46 12 Now it's time for questions.

01:05:49 13 QUESTION AND ANSWER SESSION

01:05:49 14 COMMISSIONER WROBLEWSKI: Hello, Mr. Wicklund.

15 MR. WICKLUND: Hello.

01:05:54 16 COMMISSIONER WROBLESKI: Mr. Wicklund came to one of  
01:05:55 17 our discussions at the Department of Justice a month or so  
01:05:59 18 ago, but thank you all for being here and for participating in  
01:06:02 19 this.

01:06:02 20 First of all, let me say to Judge Warren, I hope it's  
01:06:06 21 at least a little bit of comfort that the President and the  
01:06:08 22 Attorney General have embraced reducing recidivism as a very  
01:06:11 23 important goal of sentencing and corrections, and I think this  
01:06:15 24 Commission will be embracing that, and so we appreciate your  
01:06:20 25 comments on that.



01:06:20 1           One concern that I have in the whole discussion of  
01:06:25 2 alternatives to incarceration is the nature of the federal  
01:06:30 3 docket and who is likely to benefit from the use of  
01:06:36 4 alternatives and how that plays into racial disparities. Our  
01:06:42 5 system, our federal system, is majority minority. It is  
01:06:49 6 almost a third immigration cases, a huge chunk of white collar  
01:06:55 7 cases, firearms and drugs. That's basically, you know,  
01:06:58 8 90 percent of the federal system.

01:07:00 9           If we use the risk assessment tools that I have seen  
01:07:05 10 that focus, in part, on age, on prior convictions, on the  
01:07:12 11 chaotic nature of someone's background and so forth, am I  
01:07:17 12 wrong to think that the majority of the people who are likely  
01:07:23 13 to be seen as appropriate candidates for alternatives to  
01:07:26 14 incarceration are those people who have a higher education,  
01:07:30 15 who are older, nonviolent offenders, and there may, it seems  
01:07:36 16 to me, there may be a racial impact on that.

01:07:39 17           Have you seen any of that in the state systems -- I'm  
01:07:42 18 specifically directing this to Judge Warren -- and should this  
01:07:45 19 be a concern of ours or not?

01:07:47 20           JUDGE WARREN: Well, it absolutely should be a  
01:07:50 21 concern.

01:07:54 22           In short, we have not really. As a matter of fact, I  
01:07:58 23 think one of the virtues of using the kind of risk assessment,  
01:08:03 24 risk/needs assessment tools that we're talking about is that  
01:08:06 25 it tends to -- the folks that wrote these and sponsor them

01:08:13 1 claim that it will reduce the adverse impact of race and  
01:08:17 2 ethnicity on sentencing outcomes.

01:08:20 3           One of the main contributors to racial and ethnics  
01:08:24 4 disparities and outcomes is the prior criminal record. You  
01:08:28 5 know, it's kind of a circular argument. If there are  
01:08:32 6 disparities in the system, and we know that there are, the  
01:08:36 7 question is why and where do they come in.

01:08:40 8           On the state side, we know that there's sort of like  
01:08:43 9 a four-to-one disparity at the time of pretrial commitment, arrest  
01:08:50 10 and confinement that turns into an eight-to-one disparity by the  
01:08:54 11 time we're looking at folks that are going to prison. So --  
01:08:59 12 and we know that it builds during the course of the criminal  
01:09:01 13 justice process.

01:09:03 14           And so by its nature, the criminal justice -- if  
01:09:06 15 you're relying on criminal justice history, you tend to build  
01:09:10 16 in those previous disparities. One of the virtues of the  
01:09:15 17 research that we're talking about is that it really is based  
01:09:18 18 more on social psychology than on sociology. It purposely  
01:09:23 19 does not use factors like social economic, you know, status.  
01:09:31 20 It doesn't even take race and ethnicity into consideration.  
01:09:34 21 That is not one of the factors that is measured on a  
01:09:39 22 risk/needs assessment instrument, the ones we're talking  
01:09:42 23 about.

01:09:42 24           So what it tries to do is focus on the mind of the  
01:09:47 25 offender and what is going on there. What are those

01:09:50 1 attitudes, what is that personality that is predisposing this  
01:09:58 2 person to be more likely to commit crime than someone else.  
01:10:01 3 And so it intentionally is trying to focus on factors that are  
01:10:05 4 as neutral as possible from kind of socio-economic status.

01:10:10 5           So I think that one of the reasons there is  
01:10:13 6 excitement about the use of these tools in the community  
01:10:16 7 corrections field is precisely because they are less likely to  
01:10:21 8 result in the kinds of disparities that you're wanting to  
01:10:24 9 avoid.

01:10:25 10           COMMISSIONER WROBLEWSKI: And are those available  
01:10:27 11 through the National Center For State Courts? Because the  
01:10:29 12 ones I have seen before in terms of who would be more  
01:10:32 13 eligible, not in terms of what kind of programming would be  
01:10:35 14 the most appropriate, but who would be eligible, the ones that  
01:10:38 15 I have seen do take into consideration things like age,  
01:10:41 16 education, background, and those types of things.

01:10:44 17           Are the ones that you're talking about, are those  
01:10:46 18 available to us from the National Center?

01:10:49 19           JUDGE WARREN: They're available -- they're much more  
01:10:52 20 available through the National Institute of Corrections and  
01:10:55 21 the American Probation and Parole Association because they  
01:10:59 22 came out of the corrections field, not out of the judicial  
01:11:01 23 field, although you can get access to them through the  
01:11:03 24 National Center, also.

01:11:05 25           But I didn't mean to say, and almost all these

01:11:08 1 instruments do take age into consideration, and they do take  
01:11:12 2 educational background into consideration, but the finding  
01:11:16 3 from the research is that the things that we tend to now focus  
01:11:19 4 on are not the most highly criminogenic factors.

01:11:23 5           As I mention in my paper, we tend to focus on those  
01:11:25 6 kinds of factors, but the factors that are the most highly  
01:11:28 7 associated with likelihood of further criminality are the  
01:11:32 8 anti-social attitudes, the anti-social personality, the  
01:11:36 9 anti-social peers and associates, those things that we can  
01:11:39 10 change.

01:11:40 11           So it's not that you disregard all of the static  
01:11:44 12 factors and all the historical factors, but you balance them  
01:11:47 13 with other things you can do something about. If you're only  
01:11:51 14 going -- if you're going to give up on a young kid because  
01:11:53 15 he's a young kid as a high risk of recidivism, you're not  
01:11:58 16 going to get anywhere. That young kid is also probably the  
01:12:00 17 person that you will have the most likelihood of success with  
01:12:04 18 because if you look at all of the other factors, some of the  
01:12:08 19 adverse static factors get outweighed in the overall mix.

01:12:13 20           The risk category that the treatment providers and  
01:12:17 21 probation supervisors are the most effective with are the  
01:12:20 22 high-risk offenders. Now, you have to distinguish between --  
01:12:25 23 when we talk about risk here, we're talking about the risk of  
01:12:28 24 re-offense. We're not talking about the level of the  
01:12:31 25 seriousness of the crime that's being committed. But if

01:12:33 1 you're just focusing on the risk of re-offense, the high-risk  
01:12:37 2 offenders are the ones that you do want to tie to these  
01:12:40 3 programmings if the offense that the offender has committed is  
01:12:44 4 not so serious that they become ineligible for a community  
01:12:48 5 sentence because of the gravity of the offense.

01:12:49 6 COMMISSIONER WROBLEWSKI: But as you suggested in  
01:12:51 7 your testimony, there is this statute that we deal with that  
01:12:53 8 talks about first offender, nonviolent or otherwise  
01:12:57 9 non-serious offense. It's sort of a filter as to who should  
01:13:01 10 generally get a probationary sentence --

01:13:03 11 JUDGE WARREN: Yes.

01:13:04 12 COMMISSIONER WROBLEWSKI: -- and who should not get a  
01:13:06 13 sentence.

01:13:06 14 JUDGE WARREN: Yes.

01:13:08 15 COMMISSIONER WROBLEWSKI: What is your suggestion,  
01:13:09 16 you're suggesting we should go to Congress and see if we can  
01:13:12 17 change that.

01:13:13 18 What should be the filter in terms of getting into  
01:13:15 19 the program, as opposed to an incarceration sentence?

01:13:19 20 JUDGE WARREN: Well, you know, two answers, I guess.  
01:13:23 21 At least I think you would want to change the language of the  
01:13:26 22 statute so it doesn't focus so exclusively on first-time  
01:13:29 23 offenders committing a nonviolent offense.

01:13:32 24 In the state system, oh, I think something like  
01:13:36 25 20 percent of the felony probationers have committed a violent

01:13:41 1 offense. There are a lot of violent offenses in the state  
01:13:43 2 system that are misdemeanors. Domestic violence offenses in  
01:13:48 3 the state systems are misdemeanors. They're obviously serious  
01:13:51 4 crimes of violence, but they're not felonies in most state  
01:13:54 5 systems.

01:13:55 6 So there are violent offenses where the offenders are  
01:13:59 7 still amenable to treatment -- domestic violence, I think, is  
01:14:03 8 one of them -- and where imprisonment is not necessarily  
01:14:07 9 called for by the nature of the crime.

01:14:09 10 And then secondly, just because if you give up on all  
01:14:14 11 offenders who have committed one offense and say, well, we're  
01:14:18 12 not really going to focus on you anymore, we're just going to  
01:14:21 13 send you to prison, you're not doing everything you can do to  
01:14:26 14 protect public safety because there are many folks that have  
01:14:29 15 committed two, three and four offenses who are still prime  
01:14:32 16 targets where our practice has never been to try to change  
01:14:36 17 their behavior.

01:14:37 18 When you go into a new era, when you are actually  
01:14:40 19 investing in changing these folks' behavior, there are folks  
01:14:43 20 out there that have built up a record that if you put your  
01:14:47 21 mind to it, you can have some success in changing their  
01:14:50 22 behavior.

01:14:51 23 And then the long-term thing is I think that you  
01:14:53 24 would want to move away from defining eligibility based on  
01:14:58 25 offense characteristics, you know, first offender, nonviolent

01:15:02 1 offense, to more of the risk/need-assessment-based approach,  
01:15:06 2 where you're also considering the criminogenic needs that the  
01:15:13 3 treatment providers and probation folks are talking about.

01:15:15 4           If you're not looking at something that you can  
01:15:17 5 change about the offender, you're going to fail from the  
01:15:21 6 outset. I mean if you only look at things that you can't  
01:15:25 7 change about someone -- their age, their prior criminal  
01:15:28 8 record -- those things aren't going to change. I mean the  
01:15:34 9 person could be, you know, could be saved, and, you know, have  
01:15:43 10 a job, be married, have a family, have lived in the community,  
01:15:49 11 be president of the Rotary Club. All those things can be true  
01:15:53 12 and the person could have that same background.

01:15:55 13           So if you want to change people's behavior, you have  
01:15:58 14 to look at characteristics of the offender that you can do  
01:16:02 15 something about. And if you don't take that -- if a judge  
01:16:04 16 does not take that into consideration, you know, you're going  
01:16:08 17 to strike out from the get-go.

01:16:10 18           So you somehow have to give the judge discretion to  
01:16:14 19 look at offenders as human beings that can change their  
01:16:19 20 behavior in the same way that you and I and everyone else in  
01:16:23 21 this room has learned to change their behavior when you take a  
01:16:26 22 look at yourself and you wince and you say, you know, I don't  
01:16:30 23 like drinking this much, I don't like smoking this much, I  
01:16:33 24 don't like weighing this much, and we struggle, but we change  
01:16:36 25 our behavior.

01:16:37 1           Offenders can do the same thing, too, if they have  
01:16:40 2 the proper treatment and supervision.

01:16:42 3           VICE CHAIR CASTILLO: I want to thank you, all three  
01:16:44 4 gentlemen, for your testimony.

01:16:45 5           My question is for Mr. Van Dyke. First, let me start  
01:16:48 6 out by thanking you on behalf of our court for all the  
01:16:52 7 Salvation Army does for us.

01:16:54 8           As I understand it, there's basically three sources  
01:16:57 9 of business that you do with our court. One is re-entry  
01:17:03 10 people coming back from serving prison sentences in the  
01:17:06 11 Chicago area that you work with as you described.

01:17:09 12           Two is when judges on our court have people accused  
01:17:15 13 of violating their supervision, the Salvation Army offers an  
01:17:19 14 alternative to just re-incarcerating.

01:17:22 15           But isn't there a third source of clients for you;  
01:17:27 16 that is, aren't there judges on my district who are using the  
01:17:33 17 Salvation Army to create sentences right from the get-go, sort  
01:17:41 18 of a quasi-alternative to incarceration? Isn't that  
01:17:45 19 happening?

01:17:45 20           MR. VAN DYKE: That is, Judge.

01:17:50 21           VICE CHAIR CASTILLO: Can you expand on that a little  
01:17:51 22 bit?

01:17:52 23           MR. VAN DYKE: It's interesting to me because I would  
01:17:54 24 not be able to identify the individuals who fall into that  
01:17:57 25 category from the other two flows if I were to just take a



01:18:00 1 look at our population or talk to them.

01:18:02 2 I think this is one of the larger services that we  
01:18:05 3 can offer the court right now, referring back to previous  
01:18:10 4 discussion in the reports that it gives the court a bit more  
01:18:15 5 of an alternative -- it gives a bit more of an array of  
01:18:19 6 options to a judge who truly wants to have something useful  
01:18:22 7 happen for the benefit of the public, for the benefit of this  
01:18:25 8 individual, and, again, long term, not just while he or she is  
01:18:29 9 serving the sentence.

01:18:31 10 We think that the same types of services can be very  
01:18:35 11 effective, and, in fact, to piggyback on your remarks,  
01:18:39 12 sometimes it's an individual who has been in the system more  
01:18:44 13 than once who is ripest for a change because he or she now  
01:18:49 14 sees themselves as having a criminal conduct problem, as  
01:18:53 15 opposed to this was just a one-time mistake. And being able  
01:18:58 16 to work with those individuals from whatever source I think  
01:19:02 17 can be highly effective. And I know that those are some of  
01:19:05 18 the individuals that the court, the local court has sentenced.

01:19:09 19 VICE CHAIR CASTILLO: So instead of incarcerating  
01:19:11 20 someone, a judge would impose a sentence of probation with a  
01:19:16 21 condition of the probation that they serve some time in your  
01:19:20 22 program.

01:19:21 23 MR. VAN DYKE: That's right. The individual would be  
01:19:23 24 part of the residential population at our program for a time  
01:19:26 25 and have some of the same basic expectations placed on him or

01:19:30 1 her, regarding orientation and fundamental assessment, being  
01:19:37 2 tracked into whatever the appropriate interventions are, and  
01:19:39 3 so on.

01:19:40 4 VICE CHAIR CASTILLO: Okay. Thank you.

01:19:43 5 MR. VAN DYKE: Yes.

01:19:45 6 VICE CHAIR CARR: Is there any evidence that it's  
01:19:46 7 more difficult to have a successful re-entry experience with  
01:19:51 8 someone who has been incarcerated longer rather than a shorter  
01:19:55 9 amount of time?

01:19:56 10 MR. VAN DYKE: I wouldn't be able to cite statistical  
01:19:59 11 evidence, but certainly observational anecdotal evidence, yes.  
01:20:04 12 The longer a person's been out of the mainstream, the more  
01:20:07 13 severe the dislocation. Separation from family, from the  
01:20:12 14 community and so on, and just a feeling of not being in touch  
01:20:17 15 with the modern world. We have people who are still mystified  
01:20:21 16 by ATM machines, let alone computers or some of the other  
01:20:26 17 things that have come along.

01:20:28 18 It's not unusual for an individual coming to us to  
01:20:33 19 experience a minor meltdown the first time he or she is  
01:20:36 20 allowed out on a pass, say, to get personal credentials,  
01:20:42 21 because they just can't cope with the noise, the hurly-burly.

01:20:47 22 A favorite quote of mine from a gentleman who was  
01:20:50 23 with us about four years ago, he said, "There's just too much  
01:20:53 24 freedom out there, and I can't handle it," having come from  
01:20:56 25 the structured world of the prison to the far less structured

01:21:01 1 world, even with the structure that our program provided.

01:21:06 2 MR. WICKLUND: Just a quick comment on that.

01:21:07 3 There is some issues that show that there's some  
01:21:10 4 diminishing returns. The longer someone is in prison, the  
01:21:14 5 less likely they're going to be able to make a good adjustment  
01:21:18 6 when they come out, so I think you can look at that.

01:21:20 7 But there's also the issue that when they do come  
01:21:24 8 out, they just -- they have lost so many of their social  
01:21:29 9 skills that to come back out -- and it is. One of my favorite  
01:21:37 10 quotes is a person told me "I feel like my brain is throwing  
01:21:40 11 up" when he got out. He said, "I just can't handle it all,"  
01:21:44 12 and the research is pretty clear that those first three  
01:21:48 13 months, three to six months out, are critical. More people  
01:21:52 14 violate and end up back in prison within the first three to  
01:21:55 15 six months.

01:21:58 16 VICE CHAIR CARR: And to the extent that family  
01:21:59 17 support matters, I guess it's rather obvious that the longer  
01:22:03 18 someone is in prison, if they had a family support structure  
01:22:06 19 before, that may have dissipated.

01:22:10 20 MR. VAN DYKE: That's also true, plus the family's  
01:22:12 21 going to face additional challenges of its own as this  
01:22:15 22 individual comes back in deciding or figuring out just how to  
01:22:20 23 reincorporate the person into the family.

01:22:22 24 VICE CHAIR CARR: Judge Warren, I think you were  
01:22:25 25 about to say something.

01:22:26 1 JUDGE WARREN: Yes. I just looked up the citation.  
01:22:28 2 There is a 2002 study, a meta-analysis, that looked at all of  
01:22:33 3 the data sets they could find, I think they found 20 to 25,  
01:22:36 4 that compared the recidivism rates -- slightly different  
01:22:39 5 question -- the recidivism rates of folks that had served,  
01:22:42 6 like, 6 months in prison, 7 to 12 months, 12 to 24 and more  
01:22:47 7 than 24. And they found that the folks that, on average, the  
01:22:53 8 mean recidivism rate increased with a longer prison sentence,  
01:23:01 9 but modestly. I mean for those of you that follow research,  
01:23:06 10 the R value was like .03 for one group, .05 for the next, and  
01:23:14 11 .07 for the next. So the statistical relationship between  
01:23:17 12 length of incarceration and subsequent recidivism was a  
01:23:21 13 positive and escalating one, but relatively small.

01:23:24 14 VICE CHAIR CARR: Okay.

01:23:25 15 ACTING CHAIR HINOJOSA: Judge Warren, one last  
01:23:28 16 question, I guess. You quoted some figures with regards to  
01:23:32 17 the numbers on probation versus the number in prison in the  
01:23:36 18 state system. You said there are three on probation for every  
01:23:40 19 one person in prison in the state system. Does that include  
01:23:42 20 misdemeanors?

01:23:44 21 JUDGE WARREN: Yes, it does. This figure does  
01:23:47 22 include misdemeanors. About -- there are about 4.2 million, I  
01:23:53 23 think, on probation, state probation, in this country and  
01:23:56 24 about 1.2 in the state prisons.

01:24:00 25 ACTING CHAIR HINOJOSA: And of those on --

01:24:02 1 JUDGE WARREN: Half of them are felons. The last  
01:24:05 2 statistic I saw, about half of the folks on formal probation  
01:24:09 3 in the state system were misdemeanors, and about half were  
01:24:13 4 felons.

01:24:13 5 ACTING CHAIR HINOJOSA: So of the four-point-some  
01:24:16 6 million, two million or so are misdemeanors.

01:24:19 7 JUDGE WARREN: Yeah. We may have a slightly -- it's  
01:24:21 8 changing because increasingly, the misdemeanors are not being  
01:24:27 9 placed on probation because there just aren't the resources  
01:24:29 10 there, and the felons are taking up more and more of the  
01:24:31 11 slots.

01:24:32 12 MR. WICKLUND: The misdemeanor offenses are usually  
01:24:35 13 multiple DWI and domestic violence, so two very high  
01:24:43 14 recidivism rate classes. So you're not getting, you know, a  
01:24:51 15 lot of shoplifters that are on probation unless they've been  
01:24:56 16 picked up multiple times. Most of the misdemeanors that are  
01:25:00 17 being supervised are for your violent offenses or things  
01:25:04 18 like --

01:25:05 19 ACTING CHAIR HINOJOSA: This is strictly supervision  
01:25:06 20 or include somebody that's just on probation without  
01:25:09 21 supervision, these numbers that you quoted, Judge Warren?

01:25:13 22 JUDGE WARREN: Well, the numbers I quoted are on  
01:25:15 23 formal probation.

01:25:17 24 ACTING CHAIR HINOJOSA: So they are under  
01:25:19 25 supervision.

01:25:20 1 JUDGE WARREN: They are at least technically under  
01:25:22 2 supervision. In many states -- I spent a lot of time where I  
01:25:25 3 was a judge in California. Half of all of the folks on  
01:25:28 4 probation in California are not actively supervised at all.  
01:25:31 5 They're just on a bank caseload consisting of 1,000 or 2,000  
01:25:36 6 offenders, but all of the numbers I provided are people who  
01:25:40 7 are at least technically under supervision.

01:25:43 8 COMMISSIONER WROBLEWSKI: Judge Warren, I practice in  
01:25:45 9 California, also.

01:25:46 10 When someone gets their first DUI, they typically got  
01:25:50 11 a three-year probation, a fine, DUI school, a couple of days  
01:25:54 12 picking up trash. Does that person count in the numbers that  
01:25:57 13 you're talking about? If it was unsupervised probation,  
01:25:59 14 everybody knew it. It was just you're on probation, if you  
01:26:00 15 pick up a new offense, though, we can do something to you.

01:26:03 16 JUDGE WARREN: Yes, that person would count in the  
01:26:05 17 numbers that I had provided.

01:26:06 18 COMMISSIONER WROBLEWSKI: Thank you.

01:26:07 19 JUDGE WARREN: If they're on formal probation. A lot  
01:26:09 20 of times folks in California are on informal probation that  
01:26:13 21 is, in theory, supervised by the court and not by probation,  
01:26:16 22 and they typically are on informal or summary probation, it's  
01:26:20 23 called in many communities, where the main reason they're on  
01:26:23 24 that probation is to collect money, fines, fees, forfeitures  
01:26:28 25 and things like that.

01:26:30 1           ACTING CHAIR HINOJOSA: Well, thank you all very  
01:26:32 2 much. We certainly appreciate it.

01:26:34 3           MR. WICKLUND: Thank you.

01:26:34 4           ACTING CHAIR HINOJOSA: And on behalf of the  
01:26:36 5 Commission, I want to thank the Northern District of Illinois  
01:26:38 6 again and the Seventh Circuit for letting us use their courthouse  
01:26:45 7 and their facilities, the chief judge, the clerk and all the  
01:26:49 8 judges. Thank you all very much.

01:26:55 9       (Hearing adjourned at 1:27 p.m.)

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