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UNITED STATES SENTENCING COMMISSION  
REGIONAL HEARINGS ON THE TWENTY-FIFTH ANNIVERSARY OF  
THE PASSAGE OF THE SENTENCING REFORM ACT OF 1984

NOVEMBER 19, 2009

AUSTIN, TEXAS

VOLUME 1 OF 2

COMMISSIONERS PRESENT:

Chair: Judge William K. Sessions, III

Vice Chairs: William B. Carr, Jr.

Judge Ruben Castillo

Commissioners: Dabney Friedrich

Judge Ricardo H. Hinojosa

Beryl A. Howell

Jonathan J. Wroblewski

STAFF PRESENT:

Judith W. Sheon, Staff Director

Brent Newton, Deputy Staff Director



1 Federal sentencing policy is just extraordinarily  
2 complicated. It involves all three branches of  
3 government, the Judicial branch, the Legislative branch  
4 and the Executive branch. Essentially, each of those  
5 branches of government has a vested interest in the  
6 sentencing policy of the United States. Judges and the  
7 Judiciary clearly have a vested interest in making sure  
8 that the sentences that they impose are fair and just,  
9 protect the public, as well as provide justice for  
10 individual defendants. The Legislature or Congress also  
11 has a clear vested interest in sentencing policies.  
12 It's their responsibility to establish the laws and to  
13 set general penalties for those offenses, and they have  
14 a clear stake in sentencing policy. And of course, the  
15 third branch, the Executive branch, also has a clear  
16 responsibility in terms of sentencing policy. They are  
17 required to enforce the laws. And what happens is that  
18 all three branches, at some times, have a sense that  
19 their role in the sentencing process should be, in fact,  
20 the dominant one. The Sentencing Commission, the U.S.  
21 Sentencing Commission, is right at the intersection of  
22 all three branches of government. Obviously, we are  
23 selected by the President. We're confirmed by the  
24 Senate. All of the input that we receive come from all  
25 three branches of government, and it's our

1 responsibility, frankly, to set sentencing policy in  
2 light of the input of all of the branches of government.

3 Now, we hold our last hearing in Phoenix  
4 in January, but also, we intend to supplement what we  
5 hear from the various witnesses across the country with  
6 a survey of all federal district court judges throughout  
7 the country beginning in January. That survey will  
8 supplement the information we already have learned  
9 during the last year of regional hearings, and help us  
10 meet our statutory mission to ensure the goals of  
11 sentencing policy are being met.

12 This is just an extraordinarily exciting  
13 time to be on the Sentencing Commission. I've been on  
14 it now for ten years. This is clearly the most exciting  
15 time that I've experienced to be a member of this  
16 Commission. We're very excited by the commitment that  
17 everyone appears to be making in the criminal justice  
18 community to review sentencing policy, and we're ready  
19 to take a very active leadership role in shaping policy  
20 that remains fair and certain, that protects and  
21 promotes public safety, and ensures equal justice for  
22 everyone involved in the process.

23 Ultimately, the Commission is in the best  
24 position to work with other policymakers on a  
25 comprehensive review of federal sentencing. Congress

1 has directed the Commission to thoroughly review  
2 statutory mandatory minimum penalties and their role in  
3 the system. Congress has also recognized our very  
4 important role by including us in pending legislation  
5 creating blue ribbon panels to review the criminal  
6 justice system. We are also closely working with the  
7 Department of Justice as it also conducts a  
8 comprehensive review of its role in the sentencing  
9 process.

10 We're using all of our resources to  
11 encourage Congress to end the current sentencing  
12 disparity between crack and powder cocaine. For over a  
13 decade, the Commission has called upon policymakers to  
14 act in this area. The Commission is pleased that its  
15 data and reports are informing the debate, and it stands  
16 ready to act the moment Congress does act on this very  
17 critical issue.

18 So on behalf of the Commission, I'd like  
19 to thank all of the panelists for sharing their wisdom  
20 and their time over the next two days, and we look  
21 forward to hearing from all of you.

22 So first, this is my first opportunity,  
23 having just been confirmed as chair, to introduce the  
24 other members of the Commission. No, that's actually  
25 not right. I did introduce the other members of the

1 Commission, but at one of these regional hearings.

2 To my left is Judge Ruben Castillo, who  
3 served as vice chair of the Commission since 1999. He  
4 served as a U.S. district judge for the Northern  
5 District of Illinois. He has been a regional counselor  
6 for the Mexican American Legal Defense Fund, and served  
7 as a U.S. attorney. He graduated from Loyola and  
8 Northwestern University School of Law. And despite his  
9 tender youthful appearance, he has been on the  
10 Commission for ten years.

11 Next, to my right is Will Carr. He  
12 served as vice chair of this Commission since December  
13 of 2008. He served as an assistant U.S. attorney in  
14 the Eastern District of Pennsylvania from 1981 until his  
15 retirement in 2004. That is he actually retired.

16 Looking at his youthful appearance, one would be  
17 shocked, but in fact, he has retired, although he now  
18 is an adjunct professor at Widener Law School in  
19 Wilmington, Delaware, and he did attend college and law  
20 school. Oh, he actually attended Swarthmore and Cornell,  
21 is it?

22 VICE CHAIR CARR: Yes.

23 CHAIR SESSIONS: Okay. Next, Judge  
24 Ricardo Hinojosa served as chair of this Commission for  
25 five years, from 2004 to 2009. All of us on the

1 Commission have respected tremendously the leadership  
2 and vision that he has contributed to his position.  
3 Again, he became chief judge of the U.S. District Court  
4 for the Southern District of Texas on Friday the 13th,  
5 having served on that court since 1983. He actually is  
6 a graduate of the University of Texas, and also attended  
7 law school at Harvard, graduating in 1975.

8           Next, to my left is Beryl Howell. She's  
9 served on the Commission since 2004. She served as  
10 executive managing director and general counsel with  
11 Stroz Friedberg, which is an international consulting  
12 and technical service, services firm, as former general  
13 counsel of the Senate Committee on the Judiciary, and  
14 has been an assistant U.S. attorney in the Eastern  
15 District of New York. She received her degree from Bryn  
16 Mawr and Columbia Law School.

17           Dabney Friedrich, to the far left, served  
18 as the associate counsel at the White House until her  
19 appointment to the Sentencing Commission in December of  
20 2006. She was previously counsel to Chairman Orrin  
21 Hatch of the U.S. Senate Judiciary Committee. She  
22 served as a U.S., an assistant U.S. attorney in the  
23 Southern District of California, and also the Eastern  
24 District of Virginia. She received her bachelor's from  
25 Trinity University in San Antonio, is it not?

1                   COMMISSIONER FRIEDRICH: (Moved her head  
2 up and down.)

3                   CHAIR SESSIONS: San Antonio. Her  
4 diploma in legal studies at Oxford, and her law degree  
5 from Yale.

6                   And finally, Jonathan Wroblewski,  
7 recently designated an *ex-officio* member of the U.S.  
8 Sentencing Commission, representing the Attorney General  
9 of the United States, serves as director of the Office  
10 of Policy and Legislation in the Criminal Division of  
11 the Department of Justice. He served as a trial  
12 attorney with the Civil Rights Division, deputy general  
13 counsel and director of legislative and public affairs  
14 for the Sentencing Commission. He received his degree  
15 from Duke and his law degree from Stanford.

16                   Now, before I introduce the panelists, I  
17 turn to other members of the Commission for any  
18 additional comments that you would like to make.

19                   Now, this doesn't portend we will not ask  
20 you questions at the end of your testimony, but let me  
21 introduce the panelists first. We're very honored to  
22 have the three of you testify before us.

23                   First, Robin Cauthron is a U.S. district  
24 judge in the Western District of Oklahoma since 1991,  
25 serving as chief judge in the district from 2001 to

1 2008. She previously served as a federal and as a  
2 special district judge for Oklahoma's 17th Judicial  
3 District, and a staff attorney for Legal Services of  
4 Eastern Oklahoma. She received her bachelor of arts  
5 degree and law degree from the University of Oklahoma.  
6 She also holds a Master of Education from Central State  
7 University.

8           Next, Jay Zainey has been U.S. district  
9 judge in the Eastern District of Louisiana since 2002.  
10 Prior to that, he was engaged in private practice of  
11 law. Judge Zainey received his Bachelor of Science  
12 degree from the University of New Orleans and his law  
13 degree from LSU.

14           Now - Oh, I'm sorry. And then also  
15 Keith Starrett, I skipped over you, has been U.S.  
16 district judge in the Southern District of Mississippi  
17 since 2004. Previously he served as a circuit court  
18 judge for the 14th Circuit Court District of  
19 Mississippi, and practiced privately from 1975 to 1992.  
20 Judge Starrett earned his bachelor's degree at  
21 Mississippi State University, and his law degree at the  
22 University of Mississippi School of Law.

23           Again, thank you all for attending. Who  
24 wishes to go first? Judge Cauthron, is that you?

25           JUDGE CAUTHRON: Well, if we're going

1       alphabetically, I suppose it makes sense. I suppose  
2       somebody will tell me if I need to move the microphone  
3       closer.

4                       I want to thank you for taking the time  
5       to hear our views on the sentencing guidelines, after 25  
6       years of experience under the Sentencing Reform Act, and  
7       particularly for letting me be on this panel.

8                       I'll start out by telling you, I am a  
9       complete wreck. I left my glasses at home, so I am able  
10      to read with these, but I can't really see. So forgive  
11      me if I appear a little addled.

12                      VICE CHAIR CARR: Did you leave your OU  
13      season tickets?

14                      JUDGE CAUTHRON: No. In fact, appearing  
15      in front of the star is a little intimidating.

16                      COMMISSIONER HINOJOSA: Most of us wear  
17      glasses. Would you be more comfortable if we removed  
18      ours?

19                      JUDGE CAUTHRON: I don't think so. In  
20      preparation for this panel, I have polled all of the  
21      district judges in the State of Oklahoma, federal  
22      district in the State of Oklahoma, and all of the  
23      magistrate judges in my district, and there is really an  
24      amazing consensus of views about the guidelines.

25                      I think I can say what was wrong with the

1 guidelines, and so difficult for sentencing judges to  
2 live with, has been fixed by *Booker*. We now have the  
3 ability to vary from the guidelines in the appropriate  
4 case, while still having a baseline or a national  
5 average against which to compare our sentences. I think  
6 this results in the best of both possible worlds. We  
7 have consistency in sentencing and a clear statement of  
8 the facts and circumstances to take into consideration,  
9 together with the ability to find additional facts and  
10 circumstances which might suggest a different sentence.  
11 I think the present system enhances the perception of  
12 fairness in sentencing from the viewpoint of all  
13 participants.

14                   The analysis to be undertaken by  
15 sentencing judges is clearly set out in § 3553,  
16 and it works. Calculate the guidelines and consider  
17 other factors as listed by statute. It seems to me that  
18 offense characteristics, more often than not, are  
19 sufficiently taken into account in the guideline  
20 calculation. For me, it's usually offender  
21 characteristics, which would not have justified a  
22 guidelines departure, but which lead me to vary. As an  
23 example, I sentenced a 23-year-old young man, not long  
24 ago, who was considered a career offender based on three  
25 felonies which were relatively minor, but still

1 felonies. They had all been committed before he reached  
2 age 18, but he was certified as an adult, and he  
3 received a sentence of probation on all three prior  
4 felonies. He appeared before me, 23 years old, in a  
5 drug conspiracy, for which, as a career offender, he  
6 faced a minimum of 183 months. I had previously  
7 sentenced the leader and organizer of that same  
8 conspiracy to a 90-month sentence. The ability to vary  
9 from the guidelines in his case gave me the opportunity  
10 to consider his age, the over-representation of his  
11 criminal history, the fact he had received no prior  
12 imprisonment, and also to avoid sentence disparities.

13                 In my experience, the guidelines  
14 adequately cover the majority of crimes and offenders,  
15 but where, in cases where offender characteristics might  
16 suggest a different result, it is far preferable to give  
17 the judge discretion, rather than to make an attempt to  
18 cover all contingencies in the guidelines themselves.  
19 There are simply too many variables to make this work.

20                 The recent Supreme Court cases regarding  
21 the standard of appellate review have, in my view,  
22 reached a proper result, which is considerable deference  
23 to the sentencing judge's determination. That deference  
24 seems wholly appropriate. Part of what I have to do, as  
25 a sentencing judge, is look into the eyes of each

1 defendant and try to determine, given a number of  
2 variables, whether his assurances that he's learned his  
3 lesson are any good. This is more than just a  
4 credibility determination. It's partly a matter of  
5 predicting the future, which, on my best day, is not  
6 much more than a shot in the dark, but I think I have a  
7 better ability to do it than the appellate judges.  
8 There's nothing wrong with expecting me to articulate  
9 the reasons for what I have done, but I'm certainly in a  
10 better position to make that determination than an  
11 appellate panel.

12                   One benefit of the *Booker* change that may  
13 not be fully appreciated by the judiciary is the  
14 opportunity for effective advocacy on the part of  
15 defense counsel. The chance to actually influence the  
16 sentencing judge, which has been virtually absent for  
17 the last 25 years, is bringing a renewed energy to the  
18 defense bar and hopefully will result in a more frequent  
19 and a more enthusiastic participation on our CJA panels.  
20 A recent *Oklahoma Bar Journal* article is directed  
21 specifically at effective advocacy in federal sentencing  
22 hearings, which would have been far too esoteric for  
23 publication prior to *Booker*.

24                   My suggestions for change, or at least  
25 further thought, are these: First, is a departure under

1 the guidelines an anachronism, at least apart from  
2 5K1.1? Given the different standard of review for  
3 departures and variances, does any sentencing judge  
4 actually depart now, instead of vary.

5 Second, I urge you to continue to work  
6 for fewer statutory minimums. Besides those cases in  
7 which they are excessive, too often the discretion is  
8 given to the prosecutor to charge bargain these away,  
9 while the sentencing judge has no such ability.

10 Third, the guideline sentences for child  
11 pornography cases are often too harsh where the  
12 defendant's crime is solely possession, unaccompanied by  
13 any indication of acting out behavior on the part of the  
14 defendant. It's too often the case that a defendant  
15 appears to be a social misfit looking at dirty pictures  
16 in the privacy of his own home, without any real  
17 prospect of touching or doing anything to any other  
18 person as a result of it. As foul as child porn is, I  
19 am not persuaded that a direct link has been shown  
20 between viewing child porn and molesting children. I  
21 have two specific suggestions. First, keep the  
22 guidelines in this area flexible, recognizing that a  
23 broad range of conduct is encompassed within them, some  
24 of which is truly evil deserving of great punishment,  
25 and some is less so. Second, consider whether the

1 enhancement for use of a computer makes sense. As  
2 widespread as computer use is now, enhancing for use of  
3 a computer is a little like penalizing for speeding, but  
4 increasing that if you're using a car.

5 Similarly, the guideline for  
6 manufacturing methamphetamine includes an enhancement  
7 for unlawful release into the environment of a hazardous  
8 substance, which is a necessary part of the  
9 manufacturing process. This, too, seems redundant.

10 Fifth, I expect you've heard a lot about  
11 this, or will hear. I am often taken aback at the  
12 relatively low offense levels for fraud and financial  
13 crimes as compared to drug offenses. For years, I  
14 thought the fraud guidelines were too low. I think now  
15 the drug levels are too high. Either way, I think  
16 they're out of whack when compared to each other. You  
17 may not think they can be compared to each other. I  
18 have some reasons for that, which I hope somebody will  
19 ask me a question about.

20 And finally, from my magistrate judges,  
21 particularly the one in Fort Sill who is, who sentences  
22 300 Class A misdemeanors a year, he says make the  
23 guidelines for misdemeanors less complicated and  
24 consider eliminating them for assimilated crimes.

25 Those are my comments. I'm happy to be

1 here, and happy to respond to questions.

2 CHAIR SESSIONS: Thank you, Judge.

3 Judge Starrett, do you want to go next?

4 JUDGE STARRETT: I will. First of all,  
5 I'd like to thank the Commission for inviting me. It's  
6 An honor to be here and present testimony before you.

7 I'd like to give you a little background,  
8 also. For 12 and a half years, I served as a state  
9 court judge in Mississippi. Over the course of my  
10 career, I have sentenced in excess of 10,000 people to  
11 state penitentiaries, and have continued doing that in  
12 the federal system, certainly not that number, but have  
13 a lot of, a lot of felony offender appear before me in  
14 the five years I've sat on the federal bench. I've  
15 listened to hundreds of victims and I've listened to  
16 thousands of defendants speak for advocating one way or  
17 the other.

18 Over the course of my career, I've spent  
19 a great deal of time studying the psychology of  
20 corrections. This is very interesting and intriguing.  
21 I have a daughter that's a psychologist and a wife  
22 that's a psychologist, and I'm sure I get evaluated a  
23 lot, also. But I've studied and looked at the different  
24 reasons people offend, the way that rehabilitation  
25 occurs. There's a lot of sick people and sick minds out

1       there, unfortunately. But, and as a sentencing judge, I  
2       have had to face many of them, and mete out punishment  
3       to them.

4                       I've also, as a state judge, witnessed  
5       the gross disparities in sentencing. In Mississippi,  
6       where there is just – most crimes have open-ended  
7       sentences – I've seen defendants in the same district,  
8       different judges in the same district get sentences, one  
9       may get probation or a year or two in prison, and the  
10      other one may get 20 or 30 years, literally 20 or 30  
11      years to serve for identical behavior, and disparities  
12      like that are terrible, and are continuing,  
13      unfortunately, in some of our state courts. What I've –  
14      when I became a federal judge, I obviously was  
15      indoctrinated to the guidelines, and I have sentenced  
16      under the guidelines for five years. Sentencing is much  
17      simpler under the guidelines. I think it's fair. I  
18      think what the Commission has been charged to do has  
19      been, has been accomplished, but there are some things I  
20      would like to suggest.

21                      The guidelines are thorough, and they're  
22      well thought out. Lots of research has been put into  
23      them, and they accomplish the purpose which they were  
24      intended for, consistent fair sentencing around the  
25      country.

1                   But as my years as a judge have  
2 progressed, I've become more discouraged with the entire  
3 criminal justice system. I've seen things that have not  
4 worked. I've seen a nation, we've become a nation that  
5 incarcerates almost a million, over a million people,  
6 and up to one percent of our adult population is  
7 incarcerated today. In some demographic groups, it's  
8 higher than one percent. Most states have recidivism  
9 rates of up to 75 percent. So obviously, ladies and  
10 gentlemen, what we're doing in corrections is not  
11 working. There needs to be a change in the paradigm.  
12 We need to change the way that we think.

13                   Out of a sense of frustration, it's  
14 pretty ironic that this, almost as an epiphany, came to  
15 me about a drug court, but it was 12 years ago in the  
16 same room I was in this past, this week, in New Orleans,  
17 where I learned about a drug court, learned what one  
18 was, and it was strange that I would be there the day  
19 before yesterday, and I would be here today talking  
20 about what I've learned as a drug court judge. I  
21 started drug court in state court in 1999. In  
22 Mississippi, it was the first one, and there was no book  
23 to follow. There was no statutory authority. There was  
24 no guidelines. And I looked to the national  
25 organizations, and patterned my program based on the

1 research that I could come up with. I did this out of a  
2 sense, as I said, of frustration. I had watched, over  
3 my career. I'd sentence people to the penitentiary.  
4 They'd go off. They'd come back to the community. They  
5 would recidivate. They would go back again. They would  
6 come back. It was a revolving door. People coming back  
7 into the community. I would ratchet up the punishment,  
8 but it was to no avail. The offenders would go and come  
9 back. Most of the offenders were drug addicted. They  
10 were, in state court, about 90 percent of the offenders  
11 had some sort of alcohol or drug problem, and I really  
12 believe that that was the genesis of the, of the crime.

13                 This program was run in addition to my  
14 regular docket, I have a significant trial docket, civil  
15 and criminal, and I watched as the dynamic of what I was  
16 doing changed the people's lives. The program changed  
17 people's lives. I saw the recidivism rate flip. It  
18 went from about 75 percent to about 25 percent, based on  
19 the people's completion of this program in state court.

20                 When I started the program, as I said,  
21 there was no book to go by, other than the national  
22 organizations, and I followed it to a T. And what I  
23 have seen is that if you base your sentence and conduct  
24 your program on what has been proven to work, that it  
25 works. Follow the research that's out there. There's

1 now, that was 11 years ago, ten, 11 years ago, and there  
2 is a lot more research out there today that shows us  
3 what works in the criminal justice system.

4           We need to change the way we do business  
5 in the criminal justice system. A lot is currently  
6 going on around the country – evidence based practice. In  
7 fact, it's a lot more than I realized. A huge push has  
8 been made for these programs to be implemented in  
9 district courts. For several years, in most district  
10 judge trainings, there has been a program on evidence  
11 based practices, or what we call, in the federal system,  
12 reentry programs. Evidence based practices simply means  
13 practices that have been shown by the evidence to work  
14 and to reduce recidivism.

15           We are good at punishment. The criminal  
16 justice system is good at punishment. We need to change  
17 our focus, though. It needs to be changed from  
18 punishment to reducing recidivism. Punishment is part  
19 of that. Punishment needs to occur. It's one of the  
20 reasons that we have a criminal justice system is to  
21 punish wrongdoers. But we need to change what our goal  
22 is. Our goal should be to reduce recidivism. If the  
23 programs, these reentry programs, are properly  
24 administrated and follow the guidelines, they will be,  
25 they will reduce recidivism. I've had a program up in

1 Hattiesburg, up and running in Hattiesburg for about  
2 three and a half years. I did not know there were  
3 reentry programs at the federal system when I started  
4 it. It was started because I knew it was something that  
5 would work, that this type of program would work. We  
6 began it without any sanctions. I thought it was better  
7 to ask for forgiveness then permission, and went ahead  
8 with it, and it's up and running. And it's working. We  
9 have about 60 participants. A lot of the people who  
10 come back from prison come into our reentry program.  
11 They're admitted by one of two ways. One, if they have  
12 a high RPI. We don't cherrypick, but the offenders that  
13 you would think that would be successful, we take the  
14 drug addicts, the ones who have the serious abuse  
15 problems, we take the child pornographers, which is, in  
16 my opinion, a very serious crime, and we, we put them  
17 all in the program.

18 We've seen a dramatic improvement in our  
19 probation revocation petitions. They have decreased.  
20 And the other reason that people come into the program  
21 is if they have violated. If there's a violation, maybe  
22 not a violation worthy of penitentiary time, but some  
23 sort of technical violation or something that they're  
24 not doing, they are brought into the program.

25 The Criminal Law Committee has

1 recommended some form of evidence based practices. I  
2 know there's a lot of controversy out there. There  
3 is - it's not unanimous. I've talked to several  
4 members of the committee, and the jury is still out as  
5 to whether or not the evidence based practices will  
6 succeed. I will tell the Commission from my experience  
7 from, what I have seen, and I've, I've done this not in  
8 a willy-nilly way, but in the way that I, from a serious  
9 studious way, I've tried to study the criminal justice  
10 system. I've studied what will work. I've tried every  
11 program. As a state judge, I've tried every program  
12 that was available. I found some that would work, some  
13 that wouldn't work, but I've never found anything that  
14 works as well as judicial intervention with a  
15 defendant's success, and that's what a reentry program  
16 or drug court or evidence based practices, whatever you  
17 want to call it, that's what it does. You have judicial  
18 supervision or judicial intervention, and it produces a  
19 dynamic. Why it works, I just don't know. I can't tell  
20 you why it works, but I can tell you, from my experience  
21 over a number of years, that it does work.

22 Now, what it, what this will do for you  
23 as a Sentencing Commission, what you would consider,  
24 one, reentry programs are primarily for the back end of  
25 sentences. People have been to the penitentiary.

1 They've come back. They've come into the reentry  
2 programs. There should be something considered on the  
3 front end. There should be some consideration for  
4 credit for time served, if someone, if a defendant would  
5 come back into a qualified certified reentry program,  
6 one that follows the evidence, and I know that there's  
7 not a - there's just not a model program there. There  
8 have been model programs. They're being studied. The  
9 AO is trying to come up with a model program now that  
10 will say this is what's shown by the evidence will work,  
11 this is what we recommend to the district judges, and if  
12 you implement it like this, you're doing did it the  
13 right way. Hopefully that will come down soon. But if  
14 an offender comes back into a program that has been  
15 proven to work, then there should be some credit, some  
16 reason, some reduction in his or her sentence because of  
17 the time they would spend in the reentry program.

18 Also, the Sentencing Commission should  
19 consider some form of front end program. I don't know  
20 exactly what the, what I could suggest, but there are  
21 instances when the guidelines do not meet the needs of a  
22 particular defendant. All of you know that there are,  
23 as Judge Cauthron has said, everybody is not the same.  
24 You have different circumstances that you need to  
25 address as a sentencing judge. We look at, we look at

1 the person's record and their history, we look into  
2 their eyes, and we try to determine what is fair, what  
3 is reasonable, what serves the needs of the, of the  
4 community, what will make the community safer, but yet  
5 what will reduce recidivism, what will get this person  
6 back on the right track, and we'll not see them back in  
7 our courtroom and see them in our prisons again.

8           With the technologies that are available,  
9 GPS technology is amazing. You can, you know, day  
10 before yesterday I had a case where this person was  
11 tracked by GPS technology going to somewhere where she  
12 wouldn't or shouldn't have gone, and she was revoked and  
13 sent to prison because of that. There are technologies  
14 that should be taken into consideration by the  
15 Sentencing Commission. Some credit or some time should  
16 be considered because of, if someone is on some kind of  
17 monitoring by the, by some GPS technology. Some  
18 consideration of a front end, an allowance to put judges  
19 into a reentry program or a, whatever you want to call  
20 it, evidenced based practice program on the front end,  
21 prior to going to the penitentiary, should be  
22 considered.

23           Our ultimate goal in sentencing, yours,  
24 mine, everyone that's in this room, our ultimate goal is  
25 a safer community. We want the community to be safer.

1 If there's less recidivism, then the community will be  
2 safer. It won't have as many defendants, but more  
3 importantly, we won't have as many victims.

4 Evidence based practices will work. They  
5 do work if they're probably implemented. And I urge the  
6 Commission to consider some form of evidence based  
7 practices in the guidelines. And I would look forward  
8 to any questions that you may have.

9 CHAIR SESSIONS: All right. Thank you,  
10 Judge Starrett.

11 Judge Zainey.

12 JUDGE ZAINNEY: Thank you, Judge Sessions.  
13 And like my colleagues, I'd like to thank you for the  
14 important role that you play in the system, as well.

15 There's advantages and disadvantages of  
16 having the last name of Zainey. Usually, with the last  
17 name of Zainey, I go last. The advantage, of course, of  
18 that is I get to listen to my esteemed colleagues and  
19 hear all of their wonderful ideas, and of course, I  
20 would love to take credit for those ideas, but of  
21 course, they take a lot of the things I'm about ready to  
22 say and they say them a lot more eloquently than me.

23 I am going to repeat some of the issues  
24 that my two colleagues have stated, and I plan to go  
25 into some others as well, but thank you for this

1 opportunity.

2 I'd like to share with you, in our  
3 post-Booker lives, some statistics. Being involved now  
4 in the federal judiciary for close to eight years, we get  
5 so much statistics to orient us. For the year 2008, for  
6 example, I wanted to see, I was very curious, in  
7 preparing for today, the percentage of sentencings that  
8 are within the guideline range on a national basis, and  
9 also the percentage of sentencings within the guideline  
10 range, as well as above and below, in the Eastern  
11 District of Louisiana where I preside.

12 Nationally, now this is for the year  
13 2008, sentences imposed within the guideline range  
14 nationally are 59.4 percent; in the Eastern District,  
15 76.6 percent. So we tend in New Orleans, or in the  
16 Eastern District of Louisiana, to rely, a lot more to  
17 sentence people a lot more within the range.  
18 Nationally, sentences imposed above the guideline range,  
19 and this would, of course, include not only departures,  
20 but variances, as well, and for variances, as well,  
21 nationally, the sentences imposed above the guideline  
22 range is approximately one and a half percent. In the  
23 Eastern District of Louisiana, we are at 3.9 percent.  
24 So again, we're above the national range there. I guess  
25 we are a very conservative court. In looking at the

1 sentences imposed below the guideline range, nationally,  
2 it was 13.4 percent. In the Eastern District it was 6.9  
3 percent. So again, in the, for above the guideline  
4 range, the Eastern District of Louisiana is higher than  
5 the national norm, 3.9 percent versus 1.5 and below the  
6 guideline range, we're lower than the national norm of  
7 13.4 nationally, whereas we're at 6.9. I just found  
8 those very interesting, that even though we are in the  
9 post-Booker era, nationally, there's still more than 50  
10 percent of the time the guidelines certainly are, must  
11 be taken into consideration in imposing what is  
12 considered to be a reasonable sentence, but I was just  
13 intrigued by some of these figures.

14 I would like for you to consider, in the  
15 realm of the statutory minimums, making a recommendation  
16 to Congress to eliminate them. We all agree that there  
17 is a need for sentences to be as uniform as possible.  
18 Again, that's why we have the guidelines, that's why the  
19 guidelines play such an important role, and that's why,  
20 again, guidelines should certainly always remain to be  
21 the baseline for our consideration. But I believe that,  
22 you know, it is our role as district court judges, as  
23 sentencing judges, in which, as Judge Cauthron had  
24 stated, that we are in the best position. We're in a  
25 better position than Congress on a national basis.

1 We're in a better position than appellate courts. We're  
2 in the best position possible to, on a local basis, you  
3 know, to look the defendant in the eye, to inquire of a  
4 probation officer, to really delve into the person's  
5 background, but as well as delve into the crime itself  
6 as it relates to the victim.

7 Quite candidly, sometimes I don't think  
8 that enough attention is paid to the victim, and to the  
9 impact to the victim. Of course, certainly there is, on  
10 presentence reports, the victim impact. But what I find  
11 so amazing is that when you look at the criminal history  
12 of the defendant and you look at just the family history  
13 of the defendant, it can go on for two or three pages,  
14 and I dare say that I've rarely seen more than one  
15 paragraph discussed of the victim. And again, I feel  
16 that we, as the sentencing judges, are in the best  
17 position to do that.

18 When we're dealing with statutory minimum  
19 sentences, you know, obviously, we are bound under the  
20 law to follow those. However, the only time we, as  
21 sentencing judges, can go below the statutory minimum is  
22 when? When the government allows us to do so. And  
23 we're very fortunate in the Eastern District of  
24 Louisiana, we have a fantastic office in the U.S.  
25 Attorney's Office. The U.S. Attorney for the Eastern

1 District - and I'm a former criminal defense lawyer. I  
2 was a criminal defense lawyer for 25 years before I was  
3 appointed by President Bush. But we have a wonderful  
4 United States attorney, and we have very wonderful and  
5 dedicated assistant U.S. attorneys. But it seems to  
6 me - and Judge Sessions, at the beginning you said  
7 everyone wants to have it their way, be it the Judicial  
8 branch, the Legislative branch or the Executive branch.  
9 It seems to me, though, that it is the role of the  
10 court, of the Judicial branch, to take suggestions of  
11 everybody into consideration, be it the guideline range,  
12 on the one hand, any suggestions, comments made by the  
13 government, but it should not be the ultimate  
14 responsibility or power of the government to let, to  
15 allow us or to enable us to go below the statutory  
16 minimum. It just doesn't seem right. As we know, the  
17 only way that we can go below the statutory minimum is  
18 either if the government files a 5K motion or also, of  
19 course, we must take into consideration any  
20 recommendation made by the government by way of a safety  
21 valve. But if we are truly an independent branch of  
22 government, and if Congress, if the President has  
23 thought enough of the district court judges to nominate  
24 us, with the advice and consent of the Senate, I think  
25 we should be given more authority to go ahead and not

1 have to live with statutory minimums.

2           The risk of unfairness associated with  
3 mandatory minimums has been recognized by Justice  
4 Breyer, in particular. I'd just like to make a couple  
5 of quotes of what he has said in various cases. Justice  
6 Breyer feels that these type of statutes in which  
7 there's minimum mandatory, mandatory minimum sentences,  
8 that they generally deny the sentencing judge the  
9 discretion to depart downward, regardless of any special  
10 circumstances that might call for leniency. He also  
11 stated, these sentences rarely reflect an effort to  
12 achieve sentencing proportionality, which is crucial to  
13 fairness in sentencing. He's also stated that mandatory  
14 minimum sentences transferred sentencing power to  
15 prosecutors, while also encouraging subterfuge, thereby  
16 making them a comparatively ineffective means of  
17 guaranteeing tough sentences.

18           And as I said, given that Congress has,  
19 authorizes us to impose a sentence now below the  
20 statutory minimum, of course because of *Booker*, Congress  
21 should have enough confidence in us to forego a  
22 statutory minimum, not require us, not require the law  
23 to have a statutory minimum, and allow us to have the  
24 discretion in imposing a sentence that is reasonable.

25           I'd like to give you a couple of

1 examples, and these examples have already been alluded  
2 to by my colleagues as it relates to drug issues and as  
3 it relates to child pornography issues. As it relates  
4 to drug issues, of course, we're all very familiar with  
5 the ongoing debates between the crack versus powder.  
6 And even U.S. Supreme Court has acknowledged in the  
7 *Kimbrough* case that it is reasonable, in reviewing or  
8 considering the 3553 factors, to take that into  
9 consideration. And this is pending before Congress now,  
10 and who knows what's going to happen. We all have a  
11 sense for what's going to happen, but what do we do in  
12 the meantime? So the problem for the sentencing judge  
13 is not necessarily a downward variance, possibly even an  
14 upward variance on that issue, but if it is appropriate  
15 to downward, have a downward, impose a downward  
16 variance, yet our hands are tied because in many of  
17 these cases there's a statutory minimum, and it just  
18 doesn't seem fair. If we are allowed, now, to go below  
19 the guidelines in a particular case, take into  
20 consideration the history of the defendant, take into  
21 consideration, if it's child pornography, it's impact to  
22 the victim. If we're allowed to do that, if we're given  
23 the authority and responsibility to do that, our  
24 authority and responsibility is stymied, quite candidly,  
25 by the fact that there are going to be certain cases

1 that would, justice could dictate to go below the  
2 statutory minimum. We can't do that now, of course. So  
3 again I implore you to follow the suggestion and to make  
4 a recommendation with that.

5 Let's talk about child pornography.  
6 There, of course, is absolutely no excuse for child  
7 pornography, and of course, should be absolutely no  
8 tolerance for child pornographers. However, there's a  
9 difference, in my humble opinion, between the user,  
10 slash, viewer, and the person who actually exploits  
11 children. Now, of course, the argument, and it is a  
12 very good argument, that if you dry up the viewer, if  
13 you dry up the user, there's not going to be any  
14 exploitation, or reduced exploitation, and I tend to  
15 agree with that. However, that same argument is used in  
16 narcotics. If you, if there's no market for the user of  
17 drugs, then there's not going to be the market for the  
18 distributor of drugs. Yet there's no, that I'm aware  
19 of, there's no statutory minimum for possession of  
20 narcotics. So if there's no statutory minimum for that,  
21 for the user, then why should there be a statutory  
22 minimum for the user of pornography. Again, I'm not  
23 defending that whatsoever.

24 And actually what I'll do is, if we're  
25 not faced with the statutory minimum on child

1 pornography cases, after I read one, if I'm inclined to  
2 go below, to impose a sentence below the guideline  
3 range, to be quite candid with you, I call in the  
4 prosecutor and I ask the prosecutor. I'm reading this  
5 report. It seems to me, by reading the presentence  
6 report, that this person is not merely, okay, because  
7 that's not, but, you know, if it's solely a user, solely  
8 a viewer, is this person solely a viewer or do you have  
9 any information that has not been made a part of the  
10 presentence report which might indicate that he's ever  
11 tried to exploit children, that he's ever tried to  
12 distribute this harmful material, or is it in your file,  
13 in, you know, everything that you know about the  
14 investigation of this case, is this person solely a  
15 user. And they'll tell me. And they'll tell me.  
16 Because, in my humble opinion, there is a great  
17 difference between a person - if I have a 70-year-old  
18 defendant, for example, who's never been in trouble  
19 before, a lonely old man, not justifying what he does at  
20 all, but if I have to impose upon him a mandatory  
21 minimum of five years or ten years, that could in and of  
22 itself be a life sentence. Now, some people might think  
23 that people who have used child pornography or viewed  
24 child pornography should have life sentences, but I  
25 truly believe that there has to be, if we're to do our

1 jobs the proper way, our hands cannot be bound, and we  
2 have to look at each defendant on a case by case basis.  
3 That's what our obligation is.

4 I'd like to talk a little bit about,  
5 also, the alternatives to incarceration. Judge Starrett  
6 has talked quite extensively about the reentry program,  
7 which I believe is an incredible program. As I stated,  
8 I look upon my job again now, I mean post-*Booker* world  
9 especially, as imposing a sentence in which the  
10 punishment must fit the crime. Now, of course this  
11 takes on many forms. Of course, incarceration and  
12 recommendations being made to the Bureau of Prisons. In  
13 other words, if I have to sentence somebody, a  
14 23-year-old young man who has to go because of perhaps a  
15 statutory minimum or just because even under the  
16 guidelines his case warrants incarceration of five or  
17 ten years, what I tell every offender who appears before  
18 me is, you know, for the next five or ten years you can  
19 do one of two things: You can hate me, you can think  
20 your lawyer did a bad job, you can be angry with the  
21 government, or you can do something to rehabilitate  
22 yourself. And I say that the federal system, unlike the  
23 state systems, unfortunately, does provide the resources  
24 in which offenders, if they take advantage of the  
25 resources, can, can actually receive vocational

1 training, can receive, of course, drug rehabilitation and  
2 well treatment, mental health treatment and everything  
3 else, so I think that's very good. As I understand, the  
4 only way a person can be released from imprisonment  
5 besides good time, before his time, is, before he serves  
6 his full time and before he would be released on good  
7 time, the only one instance would be under the 500-hour  
8 intensive drug rehabilitation program. There might be  
9 others. If there are others, I don't know about it, I'm  
10 embarrassed to say. I think that should be expanded,  
11 and I think what we should do, and this goes into the  
12 part of rehabilitation, if a person is in jail, he needs  
13 to have some incentive that when he gets out of jail he  
14 will be a better citizen. And whether his motives, when  
15 he gets into a program, are honorable or not honorable,  
16 if he gets enrolled in the programs and if he can  
17 successfully complete these programs, he might very well  
18 become a better, a better member of society when he gets  
19 out. So I'd like for the Sentencing Commission to  
20 consider making a recommendation that would allow  
21 offenders who are incarcerated to be able to not only be  
22 enrolled in these programs, because they already are,  
23 but to give them some incentives that while in these  
24 programs, if they successfully complete the programs,  
25 such as in the 500-hour intensive drug treatment

1 program, that they be allowed to earn some credit so  
2 they can possibly get out earlier.

3 We do not yet have a formal reentry  
4 program in the Eastern District of Louisiana. Where I  
5 first met Judge Castillo was in a conference, I believe  
6 in California, in which I learned for the first time  
7 about the reentry program. What we are doing now,  
8 Judge, former Chief Judge Ginger [Berrigan] and I are,  
9 although not to the level that we'd like to be at this  
10 point, we will meet with offenders once they get out of  
11 jail, and when they have their first meeting with the  
12 probation office, we'll generally meet with them, and no  
13 longer come to them as big brother constantly looking  
14 over their shoulder, but letting them know that we'd  
15 rather speak with them now. They've paid their dues.  
16 We'd rather now speak with them, and let them know that  
17 before they have to come see us on a formal basis by way  
18 of a rule to revoke their supervised release, that we  
19 address any issues that they feel need to be addressed  
20 up front, and that seems to have been, worked out quite  
21 well.

22 I'd like to now turn to the topic of  
23 relevant conduct. One of the most frustrating things  
24 for me, when I was practicing criminal defense work, is,  
25 and then more frustrating for me, but more frustrating

1 for the defendant, quite candidly, if a defendant is in  
2 state court, by in large he or she knows what their  
3 sentence is going to be before they plead guilty. Of  
4 course, in the federal system it is not that way at all,  
5 and there's many good reasons for that. And the only  
6 way that one would have an idea of what their sentence  
7 is going to be is if they enter into 11(c)(1)(C) guilty  
8 plea. Of course that is still nonbinding on the court,  
9 but they can get out of the plea, can withdraw from the  
10 plea, as can the government, in the event the court does  
11 not go along with it. A problem, I believe, you might  
12 hear this this afternoon by criminal defense lawyers,  
13 but this isn't a liberal approach or even a conservative  
14 approach, because for a plea to work, there has to be  
15 negotiations between the government and the defense  
16 attorney, and the defendant, of course.

17           The problem with relevant conduct is if a  
18 minor player in a conspiracy is involved, and he or she  
19 might think that they are going to be at one level, but  
20 then, you know, a week or two before sentencing they  
21 receive the presentence report, and the probation  
22 officer feels justified in the relevant conduct aspect  
23 on it, which would completely change, you know, it could  
24 increase three or four or five-fold what the guidelines  
25 would be, and the problem with that is, and it's a

1 problem, as I said, for both the government and the  
2 defense, there is a way to get around that, but the way  
3 to get around that could lead to fact bargain by the  
4 parties. In other words, you can have the government,  
5 you can have the defense attorney agree on a factual  
6 basis that the government is able to prove only X, okay,  
7 and quite candidly, if I had that in front of me when  
8 I'm sentencing, if I see in the factual basis that the  
9 parties agree that the government can only prove X, if a  
10 probation officer, in the presentence report, comes up  
11 with Y, which is, you know, what they consider to be  
12 relevant conduct, generally that's a lot greater than  
13 the X, to be quite candid with you, I go with the X.  
14 Now, is that considered fact bargaining? It very well  
15 could be. But the problem is that, or then the down  
16 side of that, though, of course, is would the  
17 government, you know, would defense lawyers perhaps  
18 engage in something that might very well be inaccurate  
19 information to the court so that they can get a plea,  
20 and that's not right either. So fact bargaining is  
21 really not the way to go. I think the way to go for  
22 that would be possibly to, you know, to avoid surprise  
23 to the defendant at the time of sentencing, and to avoid  
24 the fact bargaining, which I don't really think is  
25 appropriate, I would think that the best way to approach

1 that would be to include this type of bargain as part of  
2 the 11(c)(1)(C) plea agreement.

3 I'd like just to talk, finally, and I  
4 know there just isn't any answers to this, Judge  
5 Starrett, a state court judge, talked a little bit about  
6 this, the sentencing guidelines, and you all have done  
7 an incredible job in minimizing disparity among  
8 sentencings by federal courts across the nation. That's  
9 a very good thing. What's very frustrating to me, and  
10 I'm not saying that we have any answers, but what's  
11 frustrating to me is the disparity between the state and  
12 the federal court. Let me just give you three examples.

13 Convicted felon with a firearm, under the  
14 federal system, as we know, the statutory maximum is ten  
15 years. In Louisiana, the - if you're talking about  
16 the statutory maximum ten years, sometimes the  
17 sentencing guidelines are as little as 18 to 24 months  
18 in federal prison. In Louisiana, you're looking at a  
19 minimum of ten years, without benefit of parole,  
20 probation or suspension of sentence, and a maximum of 15  
21 years. For the same crime that a person would get a  
22 minimum of ten years with no parole, in the federal  
23 system that person could get as little as 18 months,  
24 maybe even less with the downward variance. I don't  
25 think that that's fair. I don't know what to do about

1 it, but I just would like to express that with you.

2 Two other examples, armed bank robbery.

3 Under the federal system, it's a maximum of 25 years,

4 again with the flexibility, of course, with the

5 guidelines to even go below the guideline range.

6 Louisiana, it's from ten to 99 years, without the

7 benefit of parole, probation or suspension of sentence.

8 But a case closer to home. When I was a

9 criminal defense lawyer, I represented somebody for

10 distribution of heroin. I was appointed by the federal

11 court to do so. The law then in Louisiana was even for

12 a small amount of heroin which had been distributed,

13 mandatory life imprisonment. My client, in the federal

14 system, received 18 months. So if my client was in the

15 state system, he would have received 99 years, but in

16 the federal system he was only receiving 18 months.

17 I don't know what we can do about it. We

18 certainly can't be the federal government looking over

19 the state. But when we talk about disparity, I think

20 the picture has to be a broader picture. And again I

21 wish I had more answers than, you know, problems I'm

22 presenting to you, but I would, I do appreciate the

23 opportunity to be able to discuss those with you.

24 CHAIR SESSIONS: Thank you, Judge Zainey.

25 So let's open up for questions. Mr. Wroblewski.

1                   COMMISSIONER WROBLEWSKI: Thank you, Judge  
2 Sessions. And thank you all for being here. I  
3 appreciate everything that you said. I've written down  
4 lots and lots of questions. I'm going to try to limit  
5 myself to one for each of you.

6                   First of all, Judge Zainey, on relevant  
7 conduct that you talk about in your testimony, and you  
8 just spoke about the concern about surprise to the  
9 defendant, but at the same time you also testified, and  
10 you've talked about the need for more information about  
11 the victim, for more information about the defendant.  
12 We've heard over and over again during these hearings  
13 how much richer the sentencing conversation is now that  
14 we're hearing much more about the crime, the defendant,  
15 the victim, and of course, there being much more  
16 discretion to the judges. Isn't a surprise the natural  
17 byproduct of all of that, of more information being  
18 presented?

19                   For Judge Cauthron, you said you had  
20 something to tell us about fraud offenses versus drug  
21 offenses. I'd love to hear it.

22                   And finally, for Judge Starrett, I want  
23 to take advantage of your experience and interest in  
24 psychology. What you described in your testimony was  
25 really a reengineering of the federal sentencing and

1 correction system, going from a system that focused on  
2 punishment, for the last 20 years or so, to a system  
3 that focuses somewhat on punishment, but also somewhat  
4 on reducing reoffending or reducing recidivism.

5           To make that kind of systemic change in a  
6 nation as large as ours would mean changing the role of  
7 the courts, district courts, the appellate courts, the  
8 Sentencing Commission. It would require cooperation  
9 from judges, Congress, prosecutors, et cetera. And I  
10 think right now there is a great opportunity to do the  
11 kind of reengineering that you're talking about, to  
12 change the focus, but it means that there's compromise.  
13 So there are people in Congress and there are people in  
14 the Justice Department who think something of mandatory  
15 sentencing, despite the fact that there are many  
16 district judges who don't think much of mandatory  
17 sentencing. And there are varying points of view all  
18 across the government and across the public about these  
19 issues. How do we bring these groups together to find  
20 some sort of compromise so that the vision that you have  
21 may not be the vision that's ultimately enacted, but  
22 that it's moving in that direction, and there is some  
23 sort of compromise from all the people? How do we, how  
24 do we bring that about, as opposed to having a panel of  
25 judges who said, you know, there should be a mandatory

1 minimum, we should lower this, we should lower this, we  
2 should have a panel of defense attorneys who will say  
3 their point of view, we'll have a panel of prosecutors  
4 who will say their point of view? So those of my  
5 questions.

6 JUDGE STARRETT: Who do you want to  
7 answer first?

8 COMMISSIONER WROBLEWSKI: In whatever order.

9 JUDGE ZAINEY: The first shall be last.  
10 The last shall be first. Two things, number one -

11 CHAIR SESSIONS: You've had to deal with  
12 this all of your life. You've always gone last.

13 JUDGE ZAINEY: It's been very beneficial  
14 to have had to go last, quite honestly. I'd like to -  
15 two things. One thing that I forgot to mention, I would  
16 like to see 3553 factors, there be a specific subsection  
17 on victim impact, because I think that's very important.  
18 And I think, again, a lot more time could very well be  
19 spent on that.

20 But I think the element of surprise can  
21 be handled very simply. And again, this wouldn't  
22 necessarily be anything, you know, that you all can do,  
23 but on a local basis, there be a, and I used to do this,  
24 again as a defense lawyer, I would ask to set up a  
25 meeting with the probation officer and with the U.S.,

1 assistant United States attorney handling my case before  
2 a plea, again, and - but I just don't see that  
3 happening a lot, okay, but before a plea, so that we  
4 could sort of talk about it so that I would have a  
5 better understanding so that I could explain to my  
6 client exactly what that relevant conduct may or may not  
7 be.

8           The only other thing I would recommend  
9 that would assist, as I appreciate the law, notice must  
10 be given if there is going to be a downward departure.  
11 However, there is no requirement that I'm aware of that  
12 notice must be given before there is being considered by  
13 the court either an upward or downward variance. I  
14 don't believe that is required. I do that as a matter  
15 of course. Perhaps, also, to avoid the element of  
16 surprise as much as possible, if, if the requirement  
17 notice be expanded so that it also include variances, as  
18 opposed to solely departures.

19           COMMISSIONER WROBLEWSKI: But the Judiciary  
20 has been resisting that for the past, you know, three  
21 years. I don't know how happy -

22           JUDGE ZAINEY: I'm on record now,  
23 obviously, of being in favor of it, so. It's just fair,  
24 in my opinion.

25           JUDGE CAUTHRON: I assume I'm next, if

1 we're going in the order of your questions.

2 My problem with the financial crime  
3 offense levels started out being that I thought they were  
4 too low, as I said earlier, and then I decided they're  
5 not too low, drug offenses are too high, and I'm now at  
6 a place where I can finally look at these and say how  
7 can you compare the two. You can't compare financial  
8 fraud and drug offenses.

9 Well, here's why it bothers me so much to  
10 sentence the one so high and the other so low. And  
11 these are in no particular order of importance, but in  
12 drug offenses, the sentence can be manipulated as early  
13 as the investigative agents, and certainly by the  
14 prosecutor, depending on the charging decision. You  
15 really can't do that in financial fraud claims. When  
16 it's discovered, whoever it is is usually shipped out or  
17 fired or arrested or whatever. And in drug offenses,  
18 those agents can keep making hand to hand buys until  
19 they've got their one kilo. Now, maybe I'm cynical, but  
20 you can't tell me that that doesn't happen sometimes.  
21 So I think that the drug amounts can be manipulated, and  
22 sometimes are. You can't do that in fraud crimes.

23 The second reason is that in financial  
24 fraud crimes, you almost always have a victim, usually  
25 in the courtroom wanting to testify. Now, we call drug

1 offenses victimless offenses in the presentence report.  
2 We all know they are not. There are multiple many  
3 horrible victims, but there are no faces to those  
4 victims, and financial crimes we have faces to look at  
5 when we're sentencing.

6           And finally, and perhaps the most  
7 important to me is it ends up being a racial  
8 distinction. My drug offenders are mostly Black and  
9 Latino, and my financial fraud offenders are mostly mid-  
10 30s White women who work at banks, and end up getting no  
11 time under the guidelines, and I just don't think it's  
12 right.

13           JUDGE STARRETT: All right. My turn. I  
14 have been taught by my, the women in my immediate family  
15 who are psychologists that insanity is doing the same  
16 thing over and over and over, expecting to get a  
17 different result, and it doesn't happen. You, if you do  
18 the same thing over and over and over to get a, and get  
19 a bad result every time, you need to change.

20           What we're doing in the criminal justice  
21 system is not working. Seventy-five percent, or it's even  
22 higher in some crimes, some type crimes, drug crimes  
23 especially, a 75 percent recidivism or 50 percent  
24 recidivism rate is horrible, and if - you said bring  
25 all the players to the table. You've got Congress,

1       you've got the prosecutors, you've got defense  
2       attorneys, you've got the communities. Everybody should  
3       be at the table with one goal, safer communities. That  
4       should be everybody's goal. If you're doing something  
5       and it's not working, we're incarcerating, I don't know  
6       what the numbers are, up to, upwards of 2,000,000 people  
7       a year, in jails or prisons now in the country. It's a  
8       staggering number of people. It's a staggering cost.  
9       And you're sending the same people back on the street to  
10      reoffend, and you've got a new generation of criminals  
11      coming up, unfortunately, out of the social programs or  
12      whatever else that has contributed to our crime problem.  
13      If your goal is safer communities, everybody is at the  
14      table, hopefully you've got the same goal, you see the  
15      same things that you've been doing not working, you've  
16      got to come up with something different.

17                    COMMISSIONER WROBLEWSKI: This is sad.  
18      When you get all those people to the table, they're not  
19      all going to say that what we're doing is not working.  
20      There are some people who are going to say that we have  
21      the lowest crime rate now in generations, and something  
22      that we have been doing has been working. Can we agree  
23      on that, or not?

24                    JUDGE STARRETT: I disagree. They need  
25      to come sit in my courtroom or courtrooms, many

1       courtrooms around the country. They look at the  
2       statistics. I think some of the - your statistics may  
3       be right, but my suspicion is that there are many crimes  
4       that are unreported, that in some cities, even in  
5       Mississippi, where it doesn't do any good to report it  
6       because nothing is going to be done. There's still -  
7       if there's any crime it's too much, but there's still a  
8       tremendous amount out there, and if they disagree with  
9       that, I would say they're absolutely wrong. There's too  
10      much crime out there. I don't think that what we're  
11      doing is working. I would beg to differ with those,  
12      whoever would say that.

13                     The goal is to have success. As a judge,  
14      I want to be successful in what I do. Everybody wants  
15      to be successful. You-all want to do a good job in what  
16      you do. But if you can literally vision and see and  
17      watch the successes come through these programs, like I  
18      have, dramatic successes, you want it to be expanded.  
19      You want to see it work on a national scale. You hope  
20      that everybody is at the table with the same goal. You  
21      hope they want safer communities. You look at ways to  
22      bring that about. What works? You go to the evidence.

23                     There are scads of studies and reports  
24      and statistics that are out there that show that the  
25      reentry programs and that type of program reduces

1     recidivism, not just recidivism of the, the low hanging  
2     fruit, the ones who are probably not going to recidivate  
3     anyway, but this is one thing that I learned is that if  
4     you have a drug addict and you want to bring him into a  
5     drug court program, the worse that person's addiction  
6     is, the better his or her chance of success is in a drug  
7     court. That's amazing. That's amazing. You have these  
8     horrible walking dead gutter crack addicts or  
9     methamphetamine addicts, those people will have a better  
10    chance of success than the housewife that's forging  
11    hydrocodone prescriptions.

12                     So the players are at the table. We  
13    hopefully will have the same goal, safer communities.  
14    You look for what works. Punishment is part of it. I  
15    don't - I've seen people in the penitentiary almost  
16    weekly, and have sent a lot of people to the  
17    penitentiary, and some people need to go and go forever.  
18    I don't have a problem with that. But 95 percent of the  
19    people we send away are coming back to your community  
20    and to my community, and I want them to be as good as  
21    they can be when they come back, and stay good. These  
22    programs not just ensure that they're doing okay when  
23    they come back, but they ensure long-term success,  
24    because when has accountability and responsibility ever  
25    been bad? That's not liberal. That's not conservative.

1 That's just common sense.

2                   These programs, the name of my program,  
3 AAA-1, "Attitude, Accountability and Action One Day at a  
4 Time." You know, change your attitude. We hold them  
5 accountable, and we require that they take the right  
6 actions. I don't think that's - I think that's what we  
7 all, all of our goals should be. I'm sorry. I didn't  
8 mean to get so longwinded.

9                   CHAIR SESSIONS: Judge Hinojosa.

10                   COMMISSIONER HINOJOSA: I have one  
11 question for Judge Cauthron, and then one for all three  
12 of the judges.

13                   All right. Judge Cauthron, you mentioned  
14 that you had seen an energy with regards to the  
15 arguments of the defense bar post-Booker. My question  
16 is do you see that same energy with regards to  
17 prosecutors? Obviously, we have an adversarial system  
18 in the courtroom, and my question is are you seeing the  
19 same kind of energy to try to convince you to go higher  
20 than the guidelines or to explain to you why a  
21 particular sentence is appropriate?

22                   JUDGE CAUTHRON: No, sir.

23                   COMMISSIONER HINOJOSA: What do you  
24 attribute that to?

25                   JUDGE CAUTHRON: I don't think they've

1 caught up yet, quite frankly. I don't think they - I  
2 should point out, I sound, I guess, like a wild-eyed  
3 liberal varying in every sentence in my remarks. I  
4 assume that this Commission knows that the Western  
5 District of Oklahoma, indeed all districts of Oklahoma,  
6 almost never vary and almost never departed before. I'm  
7 just talking about those two sentences where we can do  
8 now what we couldn't do before, and I think because of  
9 that, prosecutors - our district, actually, has a long  
10 history of the prosecutors saying nothing. They don't  
11 recommend a sentence. They never have. Until recently,  
12 they wouldn't even attempt to do a plea bargain, an  
13 11(c)(1)(C) plea bargain because they knew it would be  
14 rejected. So they really have not been brought up in  
15 our district to be advocates for a sentence. They are  
16 certainly very good advocates after that point, but I  
17 would think that out of fear of the judges, they don't  
18 go very far in sentencing advocacy.

19 COMMISSIONER HINOJOSA: The next question  
20 is to all three. One of the things we have heard from  
21 some, as we've gone across the country, is that the  
22 district court judge, for the most part, is in the best  
23 place to make a determination as to what the appropriate  
24 sentence should be, and some say more so than an appellate  
25 judge, more so than Congress or the Executive branch, and

1     some of us live in states where the juries make the  
2     decisions as to what the sentence should be.  And my  
3     question to you is:  If you compare this trial court  
4     judge, you know, one of the things I've heard from you all  
5     is that the trial court judge is the best equipped to  
6     determine what the appropriate sentence is, what do you  
7     think about the trial court judge, as opposed to a jury,  
8     making the determination as to what the appropriate  
9     sentence should be?  Is your view the same as opposed to  
10    an appellate court judge or Congress, who has written  
11    the laws, or the Executive [branch] who's familiar with  
12    the prosecution?

13                   JUDGE CAUTHRON:  Well, like my colleague  
14    in Oklahoma, the difference between state and federal  
15    sentencing is huge, and I think the reason is that the  
16    jury does the sentencing in state court.  When you let  
17    juries sentence, you give up all hope of consistency,  
18    and I think the guidelines are great for their  
19    consistency and their attempt to reach it, and I think  
20    jury sentencing is just, is just abandoning all of that.

21                   COMMISSIONER HINOJOSA:  What about those  
22    who say that once you give up any opportunity that you  
23    have, as trial court judges, that you give up all sorts of  
24    opportunity for consistency?

25                   JUDGE CAUTHRON:  Well, you do give up

1     some.  It's not as strictly consistent as it was  
2     pre-Booker.  But I'll tell you, as a state court judge  
3     before I was appointed to the federal bench, I also  
4     sentenced many people.  I had the opportunity, as a  
5     federal judge, to sentence in pre-guidelines cases.  So  
6     I had some experience in the use and abuse of discretion  
7     before the guidelines took over.  And frankly, I thought  
8     the worst part about the guidelines was that they took  
9     away my conscience searching in sentencing decisions.  I  
10    didn't have to worry about it anymore.  I didn't have to  
11    sit in my office and look at all the facts and think  
12    what is the proper sentence.  I waltzed into the  
13    courtroom and said you get 180 months, and I'll see you  
14    later.  I mean obviously I'm exaggerating, but after 15  
15    years of not having to sweat out those sentencing  
16    decisions, I felt like I'd had my sole returned when  
17    I - after Booker.  So I don't think that I'm varying  
18    wildly, but I feel like when I need to I can, and so I  
19    don't know what you all are finding about consistency  
20    nationwide among the judges, but it seems to me we're  
21    pretty much doing what we were doing before.

22                   JUDGE STARRETT:  Well, I've had very  
23    little experience with jury sentencing in Mississippi as  
24    a state judge.  There were only very limited crimes that  
25    the jury could pass a sentence.  In most of the cases in

1 my career, the sentence has been done by the judge.  
2 We're given the title of judge, and we're supposed to  
3 come and we're supposed to be dispassionate about what  
4 we do. We look at the facts, look at the circumstances  
5 and pass what, under 3553, is determined to be a fair  
6 sentence, certainly as, in district court, taking the  
7 guidelines for what they are.

8           The judge is the best person. The judge  
9 can be much more objective than most juries, and  
10 certainly judges aren't always right all the time  
11 either, but can be more objective than juries. Most  
12 federal felonies are plea bargains, so that the judge is  
13 going to be the one passing the sentence.

14           The guidelines, I sentence, most of the  
15 sentences that I pass are within guidelines, at least  
16 70, 60 or 70 percent, even today with after *Booker*. But  
17 I'm able to have some discretion. I am able, in the  
18 right circumstances, to do a variance, a significant  
19 variance, to take advantage of what I see as the real  
20 facts in that particular case, and to do not the  
21 guideline sentence, but the right thing, based on what  
22 my conscious tells me is the right thing.

23           JUDGE ZAINY: I agree that that is the  
24 role of the judge. Again, if one of the things that  
25 we're mainly interested in is to minimize disparity,

1 we're the only ones who are going to be consistent,  
2 because you have different juries in different cases who  
3 aren't going to necessarily be consistent. Jurors are  
4 the triers of fact, obviously, and we're the triers -  
5 you know, we're the ones that must impose a sentence  
6 that is reasonable under the law. So, you know, and  
7 we're supposed to do that without any emotion, we're  
8 supposed to do that, you know, in a fair and impartial  
9 way. Once the jury has decided, based on the facts, the  
10 innocence or guilt, if they find the person guilty, it  
11 is definitely our responsibility to sentence the  
12 defendant.

13 CHAIR SESSIONS: Commissioner Howell.

14 COMMISSIONER HOWELL: Yes. I appreciate  
15 all of your comments, and you gave us a lot of food for  
16 thought for a number of issues that we're considering,  
17 including issues on our priority list for the big  
18 research areas and specific guideline revision areas  
19 that we're looking at.

20 One of the areas on our priority list is  
21 looking at the departure provisions that are set forth  
22 in the *Guidelines Manual*, and taking a re-examination of  
23 those to see whether they should be up to the Federal  
24 Public Defender, or just to eliminate the modification,  
25 the departure provided in Chapter Five, or something

1 short of elimination, revise them in some way.

2                   So Judge Cauthron, I was very interested  
3 in your comment of [giving] the different standard of  
4 review for departures and variances, does any sentencing  
5 judge depart, rather than vary. And I just want to sort  
6 of turn that question around a little bit to all three  
7 of you, to see if - you know, there are some  
8 discrepancies in Louisiana, as you pointed out, Judge  
9 Zainey, that, where the judges, you know, are following  
10 the manual quite closely, I think also in Oklahoma, and  
11 in our minds, you know, the manual is a tool that we  
12 want to be useful for the judges, the sentencing judges  
13 who are turning to it. But do you think that this is a  
14 worthwhile exercise for us, given the question that you  
15 posed so bluntly, to revise the departure provisions in  
16 the manual, or is this going to be an exercise that  
17 though interesting for us, and judges can relook at the  
18 manual, it's not going to be, those departures are  
19 really not going to be used, because judges who want to  
20 sentence either outside the guidelines, either upwards  
21 or downwards, are going to use variances anyway? So I  
22 just pose that question to you, as we ourselves are  
23 struggling to figure out what to do about the departures  
24 in the manual. Is this a useful exercise or not?

25                   JUDGE CAUTHRON: Well, you know, we're

1 instructed to figure the guideline sentence, including  
2 the departures, before we go to the 3553(a) chapter, so  
3 I do that. In situations where five years ago maybe I  
4 would have tried to figure out a way to make something  
5 fit into a departure and say enough that it would pass  
6 muster on appeal, I'm not doing that now. I'm just  
7 varying. So I don't really know what to tell you. I  
8 don't think I would use it.

9 COMMISSIONER HOWELL: Judge Zainey.

10 JUDGE ZAINY: In talking to - quite  
11 candidly, you're less likely to be reversed on appeal by  
12 giving a variance as opposed to a departure. We all  
13 know that. So therefore, the tendency is going to be to  
14 give a variance. I think the guidelines, though, and  
15 the reasons for departure are incredibly useful, because  
16 I will even give, and I tend to go more with a variance  
17 than a departure, okay, but I will always use it as a  
18 grounds in increasing, or going above or below the  
19 guidelines, I will also include some of those, some of  
20 those reasons for a departure, although my legal reason  
21 is, or my legal basis would be the variance, but I will  
22 include those in my 3553(a) factors, as well.

23 COMMISSIONER HOWELL: And Judge Starrett,  
24 I just, I'd like to just interject something before,  
25 because I want to hear your answer -

1 JUDGE ZAINEY: Sure.

2 COMMISSIONER HOWELL: - but it is very  
3 interesting statistically that the length of departures,  
4 or particularly downward departures is what I've looked  
5 at more closely, the length of the downward departures  
6 are bigger if a judge depends on both the manual  
7 departure and the variance than if they just depend on  
8 either a departure alone or a variance alone. So it's  
9 interesting that psychologically that's what you are,  
10 that you feel most emboldened by, because that's what  
11 the statistics are showing. I just wanted to say that.

12 Judge Starrett.

13 JUDGE STARRETT: I do the same thing  
14 Judge Zainey does. It's a lot easier to do a variance  
15 than it is to do a departure.

16 CHAIR SESSIONS: Just to follow up on  
17 your question that when you look at the 5H factors, some  
18 are discouraged, family circumstances, et cetera, and of  
19 course, when we go to the 3553(a), some would say that  
20 those are not discouraged but should be considered, and  
21 I mean really, the task is to try to figure out whether,  
22 in fact, those criteria, those discouraged factors should  
23 be reviewed in light of the fact that many of the judges  
24 are going to 3553(a).

25 Now, all of you have said that you

1 actually consider departures. Would it be helpful,  
2 essentially, to have a criteria within the guideline  
3 manual which is relatively consistent or more consistent  
4 with the 3553(a) factors, so that essentially you're  
5 sort of blending, in some ways you're blending 3553(a)  
6 variances and departures? I mean that's, I think that's  
7 ultimately the question that we're dealing with. Do you  
8 think it would be helpful if, in fact, there were  
9 consideration of those factors?

10 JUDGE CAUTHRON: Are you looking at me?  
11 I can't see your eyes.

12 CHAIR SESSIONS: I do have a pair of  
13 glasses here, but this is actually the 25 cent glasses.

14 JUDGE CAUTHRON: Yeah, I got those.

15 CHAIR SESSIONS: Yeah, right.

16 JUDGE CAUTHRON: I can't see at a  
17 distance.

18 CHAIR SESSIONS: No. Actually I looked  
19 at all three of you, at one particular point, but I am,  
20 at this time, looking at you, Judge Cauthron, so.

21 JUDGE CAUTHRON: I don't want to be first  
22 every time, so somebody else go.

23 JUDGE ZAINEY: Yes, absolutely. I do  
24 that anyway. I think, again, they're both, they're both  
25 the law, you know, [Chapter] Five and the 3553(a), and I

1 think I try to take the best of both worlds.

2                   You all have given us a lot of guidance.  
3 The guidelines give us a lot of guidance on the  
4 departures, okay, so if we're going to impose a sentence  
5 that is reasonable under the law, not only, in my humble  
6 opinion, should we take into consideration the  
7 guidelines or the reasons for considering an upward or  
8 downward departure, that I think that definitely should  
9 be included in consideration, and I do so, at this  
10 point, include that in my 3553(a) factors.

11                   JUDGE STARRETT: In 75 percent of the  
12 sentences I pass, the guidelines fit right, and they're  
13 dead on what we need to do. But I think, just like  
14 Judge Zainey and Judge Cauthron said, that's what we do  
15 most of the time anyway. We combine some of the  
16 different factors for departure and some for variance,  
17 and come up with our reasons to hopefully pass appellate  
18 court muster.

19                   JUDGE CAUTHRON: And my response would be  
20 it could be very helpful, it could not be. I'm trying  
21 to envision it. If it ended up being a way to try to  
22 corral the judges back into uniformity and consistency  
23 where this is what you consider, and we expect you to  
24 consider nothing else, then I think no, it wouldn't be  
25 very helpful. But if it was a general statement on

1     which all of us could kind of compare our sentences  
2     with, for consistency and the amount of variance, for  
3     example, I don't know. I think, though, that you're  
4     getting, if you start doing that, you're getting into  
5     trying to take every variable offender characteristic  
6     into account in the guidelines, and I don't think you  
7     can do that. So my answer would be maybe yes, maybe no.

8                     CHAIR SESSIONS: Okay.

9                     VICE CHAIR CARR: Judge Cauthron, I think  
10    it's not surprising that the prosecutors in your  
11    district are not up to speed on 3553(a). All three of  
12    your districts, for the last fiscal year, I think were  
13    imposing guideline sentences in 70 to 80 percent of the  
14    cases. My home district of the Eastern District of  
15    Pennsylvania, last year, guideline sentences were  
16    imposed in 43.3 percent of the cases. In that district,  
17    the prosecutors are getting way up to speed. So again,  
18    this not only points out the kind of disparity there is  
19    around the country in terms of what judges are doing,  
20    but how prosecutors are going to react differently to  
21    it, and my guess is that if your numbers started to dip,  
22    the prosecutors would get up to speed.

23                     Judge Starrett, I wanted to say  
24    something. I'm a person who's interested in whether or  
25    not evidence based practices, in your experience with

1 reentry programs, can be moved to the front stage of  
2 sentencing. The district courts around the country that  
3 have been using reentry courts have been setting them up  
4 on an *ad hoc* basis. Some of them are just drug courts.  
5 Some are then are not just drug courts. Some of them  
6 participation is voluntary. Sometimes it's not. And  
7 while there's some very encouraging results coming from  
8 them, the District of Oregon, for example, the study  
9 found that the people who were in the reentry program  
10 actually had some worse outcomes than people who were  
11 not. You all may be aware that the probation arm of the  
12 Administrative Office is rolling out a new risk  
13 assessment tool, which I believe will be used informally  
14 around the country beginning in April, and while that  
15 risk assessment tool starts getting used uniformly  
16 around the country, some of the programs and vendors  
17 that the Administrative Office will have to engage  
18 around the country will not yet have been put in place  
19 and I'm, I think they predict it's probably going to be  
20 at least three years until we know what the recidivism  
21 results are around the country for a uniformly used  
22 reentry tool that is specifically designed for federal  
23 defendants and for all federal courts. So while I'm one  
24 of those people who's interested in seeing what we can  
25 do, in terms of the experience and research that will be

1 most valuable to us, it may be a while before we know  
2 what that is.

3 JUDGE STARRETT: Charles Robinson, I  
4 don't know if you know Charles, was the AO in  
5 Washington, is working, is one that has worked on this  
6 tool, the assessment tool, and he has been helping -  
7 well, let me give you a little background. In the Fifth  
8 Circuit, we're trying to come up with, and hopefully it  
9 will be proposed to the Fifth Circuit counsel in the  
10 next month or two, a set of minimum standards for  
11 reentry programs. There are only three in the Fifth  
12 Circuit now that are up and running, that I know about.  
13 And they're, we're trying to draft a set of minimum  
14 standards that are based on what we know to be the  
15 evidence, what works and what doesn't work. And I would  
16 suspect that the reentry programs, and I don't know all  
17 of the facts, but the ones that are following the  
18 evidence based practices, I would dare say that their  
19 statistics are good. The ones that are not following  
20 the evidence based practices, you may get a different  
21 result.

22 Charles is, Charles Robinson, and some  
23 people with the FJC, are working with this task force in  
24 the Fifth Circuit, coming up with our minimum standards.  
25 And I forwarded to Charles a copy of a letter with the

1 way we were going to draft, or we were assigning tasks  
2 as to who was going to draft what part of the minimum  
3 standards, to the different judges who are working on  
4 this thing, and he called me the next day, and he said,  
5 Judge, don't worry about this tool. We've got it.  
6 We're going to roll it out in a few months. Wonderful.  
7 We're going to use it. That's going to be part of our,  
8 of the backbone of the guidelines in the, in the Fifth  
9 Circuit, hopefully, if the counsel chooses to approve  
10 it.

11 But we need a baseline standard for  
12 reentry programs. This baseline needs to follow the  
13 research. It needs to be based on what works. There's  
14 a lot, the AO has wonderful people who are doing great  
15 research, but it largely goes unnoticed, unfortunately.  
16 People have to come to the table, bring it, put it into  
17 the backbone for a model program, and that the programs  
18 must meet minimum standards, in my opinion, the programs  
19 around the country. You can't tell an individual judge  
20 how to run his or her individual program, plus there are  
21 different populations. You have a heroin problem in one  
22 district. You have a crack cocaine problem in another  
23 district. A crystal meth problem, as in my area. You  
24 have different, different populations. You have urban.  
25 You have rural. Mine is a rural area. It's not the

1 same as Philadelphia, where there's one of the major  
2 programs, or Boston, where another one is running.

3           You have to have the ability to vary  
4 these programs for the particular population, but you've  
5 got, for everyone, in my opinion, nationwide, you have  
6 to have minimum standards that follow the evidence  
7 completely. And in addition to that, you have to have  
8 evaluations, and if judges aren't passing muster and are  
9 not following the guidelines and following the evidence,  
10 then there has to be some modification, however you  
11 choose to do that, but if you vary the least bit from  
12 what has been proven to work, you reduce your  
13 effectiveness of your program. You've got to -  
14 it's just a very thin path you have to follow. If you  
15 follow that path, it's going to work. Evidence has  
16 shown that if you get off the path, you're going to get  
17 lost and you're going to hurt your results.

18           CHAIR SESSIONS: I'm just aware of a  
19 number of districts that are actually trying this  
20 reentry concept presentence. It's just beginning to  
21 develop in a number of -

22           JUDGE STARRETT: Presentence?

23           CHAIR SESSIONS: Presentence.

24           JUDGE STARRETT: I don't know. Maybe  
25 presentence, but in my opinion, certainly not pre-plea.

1 It would be a disaster to do a, some sort of a reentry  
2 or diversion or whatever pre-plea. That's full of all  
3 potential, all kinds of potential problems, especially  
4 for people who don't make it. You give advantages to  
5 those that do make it, but for those that don't make it,  
6 you've got the witnesses gone, you've got case files,  
7 prosecutors moved on. Pre-plea, it would be a disaster.

8 CHAIR SESSIONS: And it's also quite  
9 complex when you're talking about waiver of Fifth  
10 Amendment rights, as well, to participate in the program  
11 in the first place. But they're being explored in  
12 various parts of the country.

13 JUDGE STARRETT: Well, part of what the  
14 guidelines need to have would be a, some sort of a  
15 contract regarding the ability of a judge to *ex parte*  
16 talk with the prosecutor or the defender, or in a  
17 meeting to discuss the defendant. There are things like  
18 that, nuances that need to be addressed, waiving your  
19 Fifth Amendment rights, that kind of - waiving Sixth  
20 Amendment rights to counsel, because all the time the  
21 attorneys don't appear, or most of the time, in my  
22 experience, the attorneys don't show up, and the judge  
23 still takes action, or should be able to take some  
24 action. But those things, they can be addressed. They  
25 may take a, some, I think some of the states have

1 modified their rules of, of conduct, the judicial  
2 conduct rules, to allow for special purpose courts, and  
3 I think that may be something that's one of the things  
4 that you're talking about that needs to be addressed.

5 CHAIR SESSIONS: Any further questions?

6 Well, this has been most informative. I  
7 really appreciate your coming. We all really appreciate  
8 you coming, and thank you for engaging in a rigorous  
9 discussion.

10 So let's take a recess. We are just  
11 slightly behind schedule, so let's go for ten minutes,  
12 and then start again.

13 (Recess taken from 10:17 to 10:25.)

14 CHAIR SESSIONS: All right. Good  
15 morning. Welcome, you all, on behalf of the Commission,  
16 to our sixth national seminar. We have had some  
17 discussion about alternatives, but I, for one, am really  
18 looking forward to the discussion of alternatives to  
19 incarceration, very much a central part of our focus  
20 this year, and also reentry programs, and the community  
21 impact of those programs. So I welcome you all.

22 First let me introduce, is it Diana  
23 DiNitto?

24 PROFESSOR DI NITTO: DiNitto.

25 CHAIR SESSIONS: DiNitto. Okay. She's

1 the Cullen Trust Centennial Professor in Alcohol Studies  
2 at the University of Texas at Austin's School of Social  
3 Work. She previously served on the faculty of Florida  
4 State University School of Social Work, for the Apalachee  
5 Community Mental Health Services, Tallahassee, Florida  
6 in its detoxification, halfway house and outpatient  
7 programs for individuals with alcohol and drug problems.  
8 She currently serves in a number of other capacities,  
9 including on the Commission on Educational Policy of the  
10 Council on Social Work Education, and the Board of  
11 Directors of the Texas Research Society on Alcoholism.  
12 She's earned her bachelor's degree at Barry College in  
13 Florida, and holds a master's degree and a Ph.D. from  
14 Florida State University. Thank you.

15 Adam Gelb directs Pew's Public Safety  
16 Performance Project, which works with states to advance  
17 fiscally sound, data-driven policies in sentencing and  
18 corrections. Previously, Mr. Gelb served as vice  
19 President for programs at the Georgia Council on  
20 Substance Abuse, overseeing drug prevention and juvenile  
21 offender reentry initiatives, as the executive director  
22 of the Georgia Commission on Certainty in Sentencing, as  
23 a policy director for the Maryland Lieutenant Governor  
24 Kathleen Kennedy Townsend, and as professional staff for  
25 Senator Joseph Biden on the Senate Judiciary Committee.

1 Mr. Gelb holds a bachelor's degree in history and  
2 government from the University of Virginia, and a  
3 master's degree in public policy from Harvard's John F.  
4 Kennedy School of Government. Welcome.

5 MR. GELB: Thank you.

6 CHAIR SESSIONS: Next, Eric Miller is an  
7 associate professor of law at the St. Louis University  
8 School of Law. His recent studies have focused on the  
9 ways in which criminal law, including the distinctive  
10 policing practices associated with the war on drugs,  
11 affects urban communities. He's argued for reforms that  
12 operate and divert, to divert addicts from prison and  
13 supervise their recovery, including the development of  
14 drug courts. Professor Miller earned a Bachelor of Laws  
15 at the University of Edinburgh, an LLM from Harvard Law  
16 School, and is a candidate for a Doctor of Philosophy  
17 from Oxford University, Brasenose, is it Brasenose  
18 College?

19 PROFESSOR MILLER: Brasenose College,  
20 yeah.

21 CHAIR SESSIONS: Brasenose College.  
22 Welcome.

23 PROFESSOR MILLER: Thank you.

24 CHAIR SESSIONS: And finally, Craig  
25 Watkins has been the criminal district attorney for

1 Dallas County District Attorney's Office in Dallas since  
2 the year 2007. Prior to his election to that position,  
3 he was a criminal defense attorney at the firm he  
4 founded. Mr. Watkins earned a Bachelor of Arts in  
5 political science from Prairie View A&M University, and  
6 a Juris Doctorate from Texas Wesleyan University School  
7 of Law. And thank you, Mr. Watkins, for coming today.

8 MR. WATKINS: Thank you.

9 CHAIR SESSIONS: So let us begin with  
10 Ms. DiNitto.

11 PROFESSOR DINITTO: Thank you very much  
12 for the invitation to testify at today's hearing. I am  
13 not an expert on the sentencing guidelines, and I  
14 haven't worked in the federal correctional system, but I  
15 have worked in the field of alcohol and drug problems  
16 for 35 years, starting off in treatment, and now doing  
17 research and teaching about these problems.

18 Though alcohol remains the primary drug  
19 of abuse and dependence in the U.S., illicit drug use  
20 and dependence also pose serious problems for millions  
21 of Americans and substantial numbers of people, of  
22 course, have both alcohol and drug disorders.

23 Unfortunately, at least as far as back as the Harrison  
24 Act of 1914, U.S. laws have been conflating drug  
25 addiction and drug crime, creating an underclass of

1 people who, because they have a drug addiction, or as  
2 the American Psychiatric Association calls it, are  
3 dependent on drugs, are labeled criminals, and often  
4 become mired in the criminal justice system. Congress,  
5 the U.S. Congress, state legislatures, the criminal  
6 justice system, and groups like the Sentencing  
7 Commission can do much to untangle these problems and  
8 return drug abuse and dependence to the category of  
9 public health problems that are best addressed by  
10 health, substance abuse and mental health professionals.

11 I've grouped my remarks today under four  
12 headings that represent action steps that I think that  
13 we can all work to take to improve the situation. One,  
14 of course, is to treat offenders in prison and upon  
15 release, using, as you previously heard, evidence based  
16 practices, and to divert as many individuals with drug  
17 problems as possible from prison into treatment and  
18 other needed services. End discrimination against  
19 people with drug problems, including drug offenders,  
20 both during and after their involvement with the  
21 criminal justice system, and increase community based  
22 treatment and social welfare services as a means of  
23 reducing drug use and drug related crime.

24 First let me talk about treatment in  
25 prisons and upon release. We know that, from the Bureau

1 of Justice Statistics and other sources, that drug use  
2 and drug problems are pervasive among those involved in  
3 the criminal justice system. For example, in 2004, 46  
4 percent of those in federal prison for drug possession,  
5 and 59 percent for drug trafficking, had used drugs in  
6 the month before their offense, and large numbers were  
7 also using at the time of the crime. Most drug  
8 offenders in federal prisons, as you know, are there for  
9 trafficking, and the figures I just cited indicate that  
10 people that are involved in trafficking are even more  
11 likely than those who are incarcerated for possession to  
12 have, to be drug users, recent drug users. In addition,  
13 18 percent of all federal inmates, and one-quarter of  
14 those imprisoned for drug offenses, said they committed  
15 the crime to get money for drugs. And more important  
16 for my remarks today, of all federal prisoners,  
17 regardless of their offense, 64 percent were regular  
18 drug users, and that was up from 57 percent in 1997, and  
19 45 percent met the criteria for drug abuse or  
20 dependence, with the majority of 29 percent meeting the  
21 criteria for the more serious diagnosis of dependence.  
22 These figures are astonishing, given that according to  
23 the Substance Abuse and Mental Health Services  
24 Administration, less than three percent of Americans age  
25 12 and older met the criteria for drug abuse or

1 dependence in 2008.

2           Clearly the federal system is dealing  
3 with many people who have drug problems, and either  
4 convicted of drug crimes or other crimes. Excuse me.  
5 Two primary reasons, of course, that we're concerned  
6 about this issue are that federal inmates who meet the  
7 criteria for abuse or dependence are more likely to have  
8 a prior criminal history, 75 percent, than other federal  
9 inmates, 57 percent, and offenders who do not receive  
10 appropriate treatment are more likely to reoffend.

11           Virtually all federal prisons report  
12 having some kind of substance abuse services, but this  
13 does not mean that all incarcerated individuals in need  
14 get substance abuse services, or that they get the type  
15 and intensity of services they need. The number of  
16 federal inmates who had used drugs in the month prior to  
17 their offense, and participated in some type of drug  
18 abuse program while in prison, has increased slowly from  
19 39 percent in 1997, to 45 percent in 2004. And most of  
20 these people got self-help group participation, peer  
21 counseling, drug abuse education, and some got treatment  
22 by a qualified professional. However, the number that  
23 were treated by a qualified professional remained at 15  
24 percent over this time period. Of those who met the  
25 criteria for abuse or dependence, 49 percent

1 participated in some type of service, but again, only 17  
2 percent received treatment from a qualified  
3 professional. Thus, in 2004, less than half the federal  
4 prisoners who may have needed treatment received any  
5 help, and less than one-fifth received professional  
6 help. Of course, I hope these numbers have increased  
7 substantially since the 2004 data, but that was the last  
8 major report, it seems, on some of these issues.

9           Again, no single treatment modality will  
10 be effective for all people with drug abuse disorders.  
11 Combinations of evidence based psychosocial treatments  
12 outlined by organizations such as the National Institute  
13 on Drug Abuse may be necessary. The incorporation of  
14 various medications can also be very important or  
15 helpful in treatment. Methadone, buprenorphine, for  
16 opioid addiction, or medications that have different  
17 types of actions like naltrexone and acamprosate, that  
18 may reduce alcohol cravings or prevent people from  
19 continuing alcohol or drug use after they initiate use,  
20 should also be considered. But most people don't get  
21 this kind of help. As evidence based treatment  
22 approaches such as motivational interviewing also tell  
23 us, and as social work practitioners also know, patient  
24 involvement in choice in the types of interventions to  
25 be used is also important.

1                   Through education and self-help groups,  
2 we can certainly help people with alcohol and drug  
3 problems, and other low intensity services, but  
4 qualified professional treatment may also be necessary.  
5 I know the Federal Bureau of Prisons revised its  
6 residential drug abuse treatment program based on  
7 evidence of a cognitive behavioral therapy treatment  
8 model. The National Institute on Drug Abuse gives us  
9 lots of advice through publications called *Principles of*  
10 *Addiction Treatment*, and *Principles of Drug Abuse*  
11 *Treatment for Criminal Justice Populations* on how best  
12 to treat people who are involved in the criminal justice  
13 system, and also have alcohol or drug problems.

14                   But despite substantial information on  
15 treatments that can help individuals recover, many  
16 incarcerated individuals do not get the help that they  
17 need. The National Criminal Justice Treatment Practices  
18 survey reinforces this point, saying that nationally,  
19 about half of the offenders have drug problems, but less  
20 than ten percent of adults and 20 percent of juveniles  
21 with substance abuse problems in the nation's jails,  
22 prisons and probation programs can receive treatment on  
23 a given day.

24                   In addition to increased availability of  
25 treatment for incarcerated individuals, I think we all

1 recognize, too, the critical role of substance abuse  
2 treatment services for those inmates that make the  
3 transition from prison to the community upon release.  
4 Across local, state and federal correctional systems,  
5 much more must be done to reach incarcerated  
6 individuals, and to continue to assist them upon  
7 release. And just give a quote from Nora Volkow,  
8 Dr. Nora Volkow, who heads the National Institute on  
9 Drug Abuse, on this point, "Addiction is a chronic  
10 disease. Epidemiological evidence clearly shows that  
11 while science-based treatments are effective, many  
12 patients receive long-lasting recovery only after years  
13 of therapy, often including multiple treatment episodes.  
14 Continuity of care is key. Without it, patients are  
15 less likely to accumulate the sequential gains that  
16 ultimately result in long-term stable control over their  
17 condition."

18                   Chemical dependency professionals also  
19 refer to a very well known article by Tom McLellan, who  
20 is now with the Office of National Drug Control Policy,  
21 and his colleagues, about the chronic nature of drug  
22 problems and how they are very much like other problems,  
23 medical problems, that have genetic and environmental  
24 factors, such as type two diabetes, hypertension and  
25 asthma, where relapse is common, and nonadherence to

1 treatment and spells of illness occur quite frequently.

2           Let me just say a little bit about  
3 diverting people with drug problems from the criminal  
4 justice itself. Legitimate questions can be raised  
5 about where we should best treat alcohol and drug abuse  
6 and dependence among people who are involved in the  
7 criminal justice system. But if we believe that drug  
8 dependence has genetic, psychological and environmental  
9 origins, and is not by itself a moral failure or crime,  
10 then the current approach to imprisoning so many people  
11 who have drug problems, and imprisoning them for long  
12 lengths of time must be re-examined. The National  
13 Survey [on] Drug Use and Health indicates that nearly 47  
14 percent of Americans have used an illicit drug at some  
15 point in their lifetime. So given this figure, I think  
16 we can say that drug use is more normal, rather than a  
17 deviant experience among the American population, and  
18 that anyone who has ever tried a drug, of course, has  
19 risked committing a crime, has committed a crime and  
20 risked arrest.

21           I'm not sure the - I'm sure the  
22 Sentencing Commission doesn't need a review of the  
23 statistics on the large increase in the number of  
24 people, over the last years, that have been incarcerated  
25 for drug crimes, or a review of the statistics of

1 national arrests, 1.8 million arrests in 2007, and 18  
2 percent of those for sale or manufacturing, 82 percent  
3 for possession, and the large numbers of those arrests  
4 that are also for marijuana. And continuing in 2007,  
5 the most serious crime of more than half the federal  
6 inmates continued to be drug offenses.

7           Given the large numbers of federal  
8 prisoners incarcerated for drug crimes and also, of  
9 course, many people are incarcerated for nonviolent  
10 crimes, it seems that the federal system could do more  
11 to divert offenders to community based treatments,  
12 rather than prisons. However, according to a recent  
13 report of the Sentencing Commission, in 2007, only a  
14 very small percentage of U.S. citizens convicted of  
15 federal drug crimes were even eligible for an  
16 alternative sentence, and only two-thirds of those who  
17 were eligible for an alternative sentence received one.  
18 Thus, it would take substantial changes in policies and  
19 practices to make better use of alternatives to  
20 incarceration in the federal system.

21           And of course, there are many models  
22 available, drug courts, diversion programs, pretrial  
23 release programs conditional on treatment, and  
24 conditional probation with sanctions, so that offenders  
25 can participate in community based drug treatment while

1 under criminal justice supervision. I know the  
2 Commission has spent a great deal of time considering  
3 these alternatives, and that during the last year's  
4 conference on alternatives, that you heard about many of  
5 these different models.

6           The National Institute on Drug Abuse  
7 tells us that for every dollar invested in drug  
8 addiction treatment, there is a yield of between \$4 and  
9 \$7 in reduced drug related crime, criminal justice costs  
10 and theft. When savings relating to health care are  
11 included, these savings can increase by a ratio of 12 to  
12 one. They're a major savings to the individual and to  
13 society that also stem from fewer interpersonal  
14 conflicts, greater workplace productivity, and fewer  
15 drug related accidents, including overdoses and deaths.

16           Of course, community-based treatment does  
17 more than provide cost benefits. For many reasons, I  
18 agree with the Justice Policy Institute that it is  
19 better to treat people in the community whenever  
20 possible, and that community-based treatment encourages  
21 successful return, can encourage a greater incidence of  
22 successful returns to the community. In addition to  
23 reduced crime, community treatment increases the chances  
24 that offenders will pursue gainful employment, will  
25 improve or have opportunities, hopefully, to improve

1 parenting skills, maintain ties with their families, and  
2 also, that there will be, in general, better outcomes  
3 from things like reduced placement in foster care for  
4 children whenever possible.

5                   And I also want to talk about some of the  
6 discrimination that occurs against people with drug  
7 problems, and I'll just do this briefly, since my time  
8 here is short today. But what happens, of course, to a  
9 lot of offenders is that their drug crimes have  
10 repercussions after they pay the price in the criminal  
11 justice system. So in the Temporary Assistance for  
12 Needy Families program, in the, what was, in the old  
13 system, called the Food Stamp Program, now called the  
14 Supplemental Nutrition Assistance Program, people can be  
15 barred forever from participating in these programs or  
16 receiving benefits from these programs if they have  
17 felony drug convictions. So while their children may  
18 still be able to get benefits from these, the state has  
19 to opt out, and many states have opted out from that, or  
20 reduced the number of years that people would be  
21 ineligible to participate. But, of course, when this  
22 happens, it becomes more difficult for families to  
23 support themselves, their children, and also, they then,  
24 often times, might not be entitled to services that are  
25 associated with these programs or they may face more

1 barriers to participating. We know that on the  
2 Temporary Assistance to Needy Families program, which  
3 is, of course, the main public assistance or welfare  
4 program for families with children, in that program, the  
5 rolls have been slashed tremendously due to welfare  
6 reform, and many of the people that still remain have  
7 significant barriers to employment and leading respected  
8 lives, and many of those people have alcohol or drug  
9 problems. So that is one instance where people who have  
10 been convicted of drug crimes may find it difficult to  
11 participate in other social welfare programs. And that  
12 causes a lot of problems for their children, as well.

13                   The Higher Education Act singles out  
14 people who have committed drug crimes. That law has  
15 been changed so that if you have a misdemeanor or felony  
16 offense, it only counts against your federal financial  
17 aid if you committed that crime while you were receiving  
18 federal financial aid. And you can reduce the length of  
19 time that you aren't eligible to get financial aid by  
20 participating in a rehabilitation program. But  
21 sometimes it's difficult to enter those kinds of  
22 programs. And again, this is the only criminal offense  
23 that someone can be barred from receiving federal  
24 financial aid. And so that is another issue that  
25 remains.

1                   There have been other erosions of the  
2 social welfare system that also pertain to people with  
3 alcohol and drug problems, such as in the Supplemental  
4 Security Income program and the Social Security  
5 Disability Insurance program. These are not related to  
6 crimes, but people who have those kinds of disabilities  
7 are no longer able to get assistance through those  
8 programs. They also, those that were terminated earlier  
9 on in the programs, because that was their only  
10 disability, lost Medicaid and Medicare, and there are a  
11 lot of negative repercussions from that, such as reduced  
12 access to treatment for those individuals, reduced  
13 participation in treatment. They also were more likely  
14 to abuse substances and engage in drug, in crimes.

15                   And finally, you may know, as well, that  
16 even people who don't use illegal drugs, but who know  
17 people that do, can be punished, by being evicted from  
18 public housing if somebody in their family or a  
19 caretaker also engages in illicit drug use. So people  
20 can be evicted from public housing just for knowing  
21 somebody that engages in these activities.

22                   I also just want to talk briefly about  
23 increasing community based-treatment and services to  
24 reduce drug use and crime. The Justice Policy Institute  
25 also notes that states that have more access to drug

1 treatment send fewer people to prison, and we don't want  
2 to confuse correlation and cause, but I think we would  
3 agree that we could do a better job of serving people in  
4 the community with substance abuse services. So rather  
5 than prosecute and incarcerate first, we should think  
6 more about treating first. However, accessing needed  
7 treatment can be difficult. The Substance Abuse and  
8 Mental Health Services Administration mentions that 37  
9 percent of those who said they wanted treatment for  
10 illicit drug problems, and made an effort to get it, did  
11 not get it and the reasons they attribute to that were  
12 that they had no health insurance or could not afford  
13 treatment.

14                   And effective treatment also not only  
15 requires sometimes substance abuse treatment, but mental  
16 health services. Many people who have drug or alcohol  
17 problems also have mental health problems, and they find  
18 it also difficult to access those services in the mental  
19 health system as well.

20                   So I'm looking at this picture broadly,  
21 in terms of alcohol and drug problems, but we're  
22 engaged, the country is, in a great debate over health  
23 care reform right now. And everyone needs a good health  
24 care plan that includes substance abuse and mental  
25 health services, if we're going to more effectively deal

1 with alcohol and drug problems, and again, especially in  
2 being able to access high quality evidence-based  
3 treatment. Medications that can be helpful, as I  
4 mentioned, are often out of the reach of people, either  
5 because they have no health insurance or because their  
6 plan may not include them if they do have health  
7 insurance, or they're in a high-cost sharing tier. So  
8 oftentimes medications that can be helpful are not  
9 available. We have a new health parity law, health  
10 insurance parity law, going into effect in January in  
11 this country. It's the first one to include substance  
12 abuse services. However, because of various loopholes  
13 in the law, many people still, even if they have health  
14 insurance, might not be covered by substance abuse or  
15 mental health services.

16 I also want to just briefly mention the  
17 importance of auxiliary or adjunctive services in the  
18 treatment of people with substance use disorders.  
19 Oftentimes it's not just a substance use problem they  
20 have. They may need family services. In addition to  
21 legal problems, they may need help with education,  
22 employment, and so adjunctive services are also very  
23 important. It's often not just a matter of treating the  
24 substance abuse.

25 I'm also realistic about the barriers to

1 addressing drug problems, because of stigma,  
2 ambivalence, insufficient funding for treatment, and  
3 what we still need to learn about more effective means  
4 of preventing and treating drug problems, and motivating  
5 people to address drug problems. In addition to lack of  
6 insurance, many people do not get treatment because of  
7 fear of stigma and repercussions, perhaps at work.  
8 Others admit, of course, that they are not ready to stop  
9 using, and many more do not get treatment because they  
10 do not perceive that they have a problem. And of  
11 course, the criminal justice system has helped  
12 tremendously by directing people to treatment. But, as  
13 we also know, only one-third of the federal National  
14 Drug Control budget has as gone to treatment and  
15 prevention. Two-thirds has gone to law enforcement and  
16 interdiction, which by themselves do not help people  
17 address alcohol and drug problems. Treatment is also  
18 needed. And we must do more to help individuals with  
19 drug problems obtain appropriate drug education and  
20 treatment services and the adjunctive services they  
21 need. And we need to encourage, of course, more  
22 scientific testing of alternatives to incarceration that  
23 can better serve these individuals.

24 In closing, I would just like to say that  
25 the Harrison Act, the Controlled Substances Act of 1970,

1 the Anti-Drug Abuse Act, these were watershed events in  
2 the U.S. efforts to control drugs that have potential  
3 for abuse or dependence. These laws, however, put in  
4 motion forces that have had severe consequences for  
5 individuals who abuse or are addicted to drugs, their  
6 families and their communities. We need equally  
7 dramatic policies and practices to undo years of  
8 over-incarceration of Americans and under-utilization of  
9 effective treatment and social services. And we need to  
10 move closer to helping the country consider drug abuse  
11 and dependence as health or public health problems, as  
12 opposed to solely criminal justice problems. I ask the  
13 Sentencing Commission to help the criminal justice  
14 system move further to ensure fair and equitable  
15 treatment of those who have drug problems by encouraging  
16 the justice system to provide necessary education,  
17 treatment and alternatives to incarceration, based upon  
18 a clearer understanding of the problems of drug abuse  
19 and dependence, and the most effective methods for  
20 addressing them. Thank you.

21 CHAIR SESSIONS: All right. Thank you,  
22 Dr. DiNitto.

23 Mr. Gelb.

24 MR. GELB: Thank you, Mr. Chairman. Members of

1 the Commission, I very much appreciate the opportunity  
2 to address you. It's an honor. I very much appreciate  
3 your interest in what's happening at the state level.  
4 That's what we work on. The Public Safety Performance  
5 Project is, part of that is focused on state level, so  
6 that's where the Safety Performance Project is.

7           So I do also think that it is, I'll try  
8 to talk slower, it is very appropriate for us to be in  
9 Texas, because Texas is a state that obviously  
10 symbolizes law and order in this country, and it also  
11 symbolizes fiscal conservatism, and yet Texas is a state  
12 that has taken very significant and dramatic steps, over  
13 the last couple of years, to control the growth of its  
14 prison population and get taxpayers a better return on  
15 their investment, their significant investments in  
16 corrections. So what's happened here in Texas over the  
17 last couple of years, and what's happening in a number  
18 of states across the country that we're working with,  
19 does, we think, offer some suggestions for what we're  
20 looking to happen at the federal level. So I very much  
21 appreciate the opportunity to talk about that.

22           And so I'll just sort of do two main  
23 points. I think you have some materials in the  
24 presentation before you. I obviously won't go through  
25 that, but I wanted to pull out two main pieces of that.

1 The first is just to look at the landscape that we see  
2 at the state level, and then second, to pull out some of  
3 the main state reforms that are happening that might  
4 have some application at the federal level.

5           So in terms of the landscape, I think  
6 there's a, there's an assumption that all of this  
7 activity at the state level right now is it driven by  
8 the economy, it wouldn't be happening if state budgets  
9 weren't tight, and that's really not the case. Texas,  
10 for instance, the reforms that have happened here, which  
11 we'll talk about in some detail in a few minutes,  
12 happened in 2007, while the economy was still humming  
13 along. Same for Kansas. A number of things happened  
14 before, before the economy went south. And so here's  
15 what those things are. First and foremost among them is  
16 that we know now, a lot better than we did 25 years ago,  
17 when we sort of - 25, 30 years ago, when we got on this  
18 prison building path, we know what works to reduce  
19 recidivism.

20           We know, through research, that cognitive  
21 behavioral treatments, that motivational interviewing  
22 and other techniques and treatment tactics work a lot  
23 better than people sitting around in a group and sharing  
24 their problems and talking about their problems. That  
25 treatment sort of characterized much of what happened in

1 the seventies and eighties.

2                   We know much better what works. We have  
3 much better risk assessment tools that have really  
4 tightened down on criminogenic factors and the things  
5 that drive criminal behavior. It's not just well, I  
6 think, you know, self-esteem, low self-esteem is related  
7 to recidivism and criminality. We actually know now  
8 specifically what those criminal, criminogenic risk  
9 factors are. And we have technologies that did not  
10 exist even five or ten, 15 years ago, whether it's  
11 ignition interlocks or rapid result drug tests so that  
12 probation officers don't have to send off to some lab in  
13 California and wait three days for that to come back.  
14 Now we have very highly accurate real-time drug testing.  
15 We have GPS monitors and other things. Grab all these  
16 things together, you have what can be, and in some  
17 places is, including some places here in Texas, a very  
18 robust system of community corrections and alternatives  
19 on the front end, as well as the back end of the system.

20                   And what it's really done is, I think, is  
21 sort of exposed the debate that's gone on in the  
22 corrections field between law enforcement, on the one  
23 hand, and social work on the other hand. It's sort of a  
24 false debate. It's not one or the other, although  
25 people still like to have that argument sometimes. It's

1 both. We get the best results when we combine the care  
2 in the state, when we used evidence-based services and  
3 supervision strategies. And when we do that, when we do  
4 community corrections right, we can get a 20 to 30  
5 percent reduction in recidivism. That's the, I think  
6 that's the first and maybe most important point about  
7 that, the landscape that's out there.

8           Second is public opinion. As you're well  
9 aware, there are few things on the national agenda right  
10 now, and - other than crime and drugs. This issue has  
11 fallen off the radar, in terms of what's at the top of  
12 people's minds, and that provides an opportunity for  
13 states that were already taking, again, were already  
14 taking these steps, to move in to this issue and try to,  
15 and try to work on it.

16           There also have been a number of public  
17 opinion surveys at the state level, not enough, and our  
18 project is going to be doing some more, that, you know,  
19 ask people these direct questions about what would they  
20 like to see happen with the proverbial nonviolent  
21 drug-addicted offender. And not to just keep picking on  
22 Texas because we're here, but a couple of years ago  
23 there was a survey, actually two different surveys here  
24 in Texas, that asked, asked folks here that question,  
25 and you have, you know, three-quarters of people in

1 Texas, and similar findings in Georgia, conservative  
2 states, where the public is highly supportive of doing  
3 something else with low risk nonviolent offenders, and  
4 that actually is a result of cross-party affiliation and  
5 other demographic factors.

6 Third, you have a general trend in  
7 government towards managing for results, both at the  
8 federal level, of course at the state level as well.  
9 But governors, legislatures, particularly agencies, agency  
10 heads, are now talking much more about what we can get  
11 out the back end, rather than just what we put in.

12 And finally, there has been this  
13 assumption that if we kept building prisons, we would  
14 get safer and safer. You know, there's this X that you  
15 see in so many graphs of how the incarceration rate has  
16 gone up and the crime rate has come down, however that  
17 works, sort of etched in people's minds this notion that  
18 this would just continue forever. But I think we're  
19 seeing, particularly in the last few years, that states  
20 can reduce their incarceration rates and crime rates at  
21 the same time. Texas is actually one of seven states  
22 that, where that has happened over the past ten years,  
23 looking at the '97 to '07 numbers, you have those in  
24 your materials, and six other states have done it, as  
25 well. There's starting to be some questions about

1     whether or not it is just true, it should just be  
2     accepted that we will necessarily be safer if we  
3     continue to spend more and more taxpayer money on  
4     prisons.

5                     And that is an attitude, I think, that is  
6     not just sort of a researcher piece. We spent a lot of  
7     times in the states speaking with prosecutors, police  
8     chiefs and others, and I want to, I don't want to take  
9     comments away from Mr. Watkins, but there is really a  
10    striking consensus that we find around the country,  
11    among law enforcement and prosecution, that we cannot  
12    build our way out of this problem. They recognize it at  
13    this point, and would like to do something about it, and  
14    that the most, the thing that they want most is credible  
15    front-end alternatives. They say over and over and over  
16    again, if we had credible front-end options, we'd use  
17    them.

18                    And so that is, that's sort of the  
19    landscape, I think, that we see ourselves in. And we  
20    can layer the budget on top of that, the budget  
21    situation. That's why we see this explosion of  
22    activity, I think, in the state, on the state level.

23                    Prisons now account for one in 15 of  
24    state general fund discretionary dollars, doubling what  
25    it was 20 years ago. Corrections has been the second

1 fastest budget category at the state level, the second  
2 fastest growing budget category behind Medicaid, and  
3 states, unlike the federal government, have to balance  
4 their budgets. You know, they can't, they can't print  
5 money. So the push is coming to shove in a lot of ways.  
6 So that's the landscape.

7                   What are states, what are states doing?  
8 We see activity in three buckets. The first bucket is  
9 operating efficiencies. You see prison systems going to  
10 low-cost light bulbs, and videoconferencing for parole  
11 hearings and things to cut costs in that way, but many  
12 of which are sensible, of course, things to do that  
13 should be going on at any time, whether or not the  
14 economy is bad, but they're not sufficient at all, at  
15 this point, to get into the almost double digit cuts  
16 that governors are asking their corrections departments  
17 and all their departments to submit.

18                   The second bucket is recidivism reduction  
19 strategies. As you're all well aware, there's been a  
20 lot going on, for the past decade or so, on the reentry  
21 front and the Second Chance Act that President Bush  
22 signed last year has given that another boost and shot  
23 in the arm.

24                   But the, sort of the third bucket piece  
25 is the, you know, the policies that directly impact

1 admissions and length of stay. I'd like to spend a  
2 couple minutes talking about some of the things that  
3 states are doing to pull both of those levers, because  
4 they're obviously the most important ones that the  
5 states have in order to control the size and the cost of  
6 their prison populations.

7                   First, on the admissions side, a number  
8 of states are increasing the use of nonprison sanctions  
9 for lower risk offenders. They're doing this in a  
10 number of ways. First is to expand eligibility for, and  
11 as well as the availability of front-end community  
12 corrections alternatives and drug courts. The drug  
13 courts, for instance, eligibility used to be defined  
14 fairly narrowly in a lot of places, and still is, but  
15 some states, New Jersey is an example, has said you know  
16 what, we can't, we can't just take these first-time soft  
17 folks. We need to interrupt the cycle of recidivism for  
18 a larger group of offenders.

19                   The second piece, and the second piece  
20 I'd like to highlight again is from Texas, is the  
21 increased use of halfway houses on the front end for  
22 shorter sentence offenses. Let me just pause there on  
23 Texas for a second, because in the packet you see the  
24 materials both from Texas and Vermont, and I do just  
25 want to note here, again, that on the front-end piece,

1 that Texas, two years ago - am I -

2 COMMISSIONER HINOJOSA: We were just  
3 commenting that they're both border states. That's a  
4 matter between Judge Sessions and myself.

5 CHAIR SESSIONS: It's interesting that  
6 the states that you picked are well represented on this  
7 board.

8 MR. GELB: That's complete coincidence.

9 The Texas legislature was facing, in  
10 2007, a request from the TDCJ, the corrections  
11 department here, a plan that called for almost a billion  
12 dollars more prison spending, I believe it was  
13 \$904,000,000, and a bipartisan team that was Senator  
14 John Whitmire on the Senate side, a Democrat from  
15 Houston, and Republican Representative Jerry Madden from  
16 Plano, just get together, and with help from our project  
17 and particularly the Council of State Governments  
18 Justice Center, figure out a different path. And  
19 instead of spending \$904,000,000 on new prisons, up to  
20 eight new prisons, they, to borrow a phrase, they just  
21 said no. We're going to spend almost a quarter billion  
22 dollars on what has to be, and you can appreciate in  
23 your documentation that you have before you, but this  
24 has to be the largest one-time investment in community  
25 corrections ever, a whole buildout of a network of

1 community and residential treatment, I think is the  
2 language they used here, treatment and diversion slots.  
3 And it's really, it's really quite impressive, as you  
4 can imagine. It's making, causing quite a stir around  
5 the country for folks looking to see that, you know,  
6 Texas said, of all places, Texas, right, said we're not  
7 going to continue on the same path, we know how to do  
8 things better, we're going to, we're going to try.

9           There are a lot of folks who were  
10 concerned, in the 2009 legislative session, that those  
11 funds would be cut, but the support for them has been  
12 strong, and actually every penny of that, of that  
13 investment was retained in 2009. Texas overall, the  
14 crime rate is trending downward with the national  
15 average, and the prison population has leveled out here.  
16 So you will see in your packets that when the line  
17 looked like it was going to continue, Texas really took  
18 some steps to intervene, quite successfully so far.

19           On length of stay, the second lever, a  
20 number of states are moderating the length, the length  
21 of time that offenders are, that inmates are behind the  
22 walls. They're doing this in three ways. They're  
23 incentivizing program completion with modest credits.  
24 Kansas, for instance, again, in 2007, said we'll give  
25 you an additional 60 days if you complete substance

1 abuse and other, other programs. They are expanding  
2 eligibility for programming and the types of programming  
3 that is eligible for sentence reduction credits. Nevada  
4 is an example there. And then there are a number of  
5 states that are just dialing back the percentage,  
6 percentage of sentence that's required to be served. In  
7 some places this has been dramatic. Mississippi went  
8 from 85 percent to 25 percent for certain groups of  
9 nonviolent offenders, and all the way at the other end  
10 of the spectrum, Georgia has done two things. Their  
11 Parole Commission had voluntarily adopted a 90 percent  
12 standard for risk of pointed violent crimes. They  
13 dialed that back to 85, 75, and 65 for, for certain  
14 crimes that were on that list. And then the, the  
15 Legislature actually sort of bit into the state's two  
16 strikes law. Georgia enacted a two strikes law for  
17 which is called the seven deadly sins there, and there  
18 was a mandatory ten years for the first offense and a  
19 mandatory life for the second, and they just realized it  
20 just doesn't make sense to have somebody max out on that  
21 ten-year sentence to no supervision whatsoever. There's  
22 got to be a transition period. But instead of saying,  
23 okay, now we'll make it 11 years and keep them on  
24 supervision for a year, they actually bit out the year  
25 and just this past session allowed the last year of that

1 term to be served on supervision in the community. Mind  
2 you, again, these are seven deadly sins offenders, and  
3 this is Georgia.

4                   So there are a lot of specific policies  
5 and things that are happening at the state level that  
6 could have, could have some application here in the  
7 federal system, and it's important, but you know,  
8 perhaps most important is a philosophy which, at the  
9 state level, at this point, definitely seems to have,  
10 seems to have turned from one where the goal is simply  
11 to demonstrate that we're tough on crime to a goal of  
12 trying to get taxpayers a better return on their  
13 investments in public safety. And what that, what that  
14 could mean in the federal system is, or how it can  
15 translate could be the elevation of public safety or  
16 recidivism reduction as a, as a goal of sentencing  
17 policy. My understanding is that it is essentially not,  
18 at this point, and yet at the state level, that is the  
19 predominant theme.

20                   In fact, I'm not sure you all are aware,  
21 but there's a conference of Texas judges happening down  
22 the street here this morning, and I was there before  
23 coming over here, and the judge who is the chair of the  
24 Texas Judicial Advisory [Council] to the Texas  
25 corrections department just gave introductory remarks

1 this morning. And he said that public safety was far  
2 and away the number one reason, number one purpose  
3 behind sentencing, Judge [Gist], and he did not say the  
4 number one purpose is retribution, our job is to lock  
5 people up and put them away, period. Our job is to  
6 provide, is to provide public safety.

7                   So the Bureau of Prisons' six billion  
8 dollar budget may be a drop in the federal bucket, but  
9 that doesn't mean that the federal taxpayers are not due  
10 the same consideration that states are giving state  
11 taxpayers, which is an analysis of the system and  
12 identification of ways that we can get less crime at  
13 lower cost. Thank you.

14                   CHAIR SESSIONS: All right. Thank you,  
15 Mr. Gelb.

16                   Mr. Miller.

17                   PROFESSOR MILLER: Thank you, Mr. Chair,  
18 and thanks to the Commission for inviting me to testify  
19 here.

20                   My testimony addresses the use of drug  
21 and reentry courts, what are commonly referred to as  
22 treatment courts or problem-solving courts, although a  
23 better term is perhaps offender supervision courts. The  
24 various forms of offender supervision courts share the  
25 same core purpose, to channel offenders away from prison

1 and into some form of support or treatment. They also  
2 share a distinctive methodology, reconstituting the  
3 roles of judge, prosecutor and defense counsel into  
4 partners in a treatment team. The team's goal is to  
5 ensure that the offender stays in court-sponsored  
6 treatment programs throughout the supervision process,  
7 using an expressly therapeutic approach to courtroom  
8 practice.

9           Offender supervision courts are primarily  
10 interested in behavior modification through an  
11 intervention and regulation of the offenders's  
12 lifestyle. My central suggestion is that we refocus  
13 these courts away from a highly interventionist form of  
14 regulation and away from extended indefinite periods of  
15 supervision, and instead encourage them to adopt a more  
16 managerial posture. Accordingly, I recommend that the  
17 Commission support offender supervision courts that  
18 measure, that first measure their effectiveness in  
19 channelling offenders away from incarceration and out of  
20 the criminal justice system altogether; that consider  
21 removal and reentry, rather than only retribution and  
22 incarceration as effects of punishment; that the  
23 Commission recognize responsibility is a two-way street,  
24 one that imposes significant duties on both offender and  
25 government alike; that the Commission emphasize courts

1 that adopt a managerial, not interventionist model of  
2 court practice, one that is responsive, not directive;  
3 and collaborative, not simply coercive.

4           The central issue for an  
5 over-incarcerative criminal justice system is how to  
6 screen offenders out of the system, what might be  
7 thought of as a system's exit strategy for offenders.  
8 The exit strategy can operate at the front end, to  
9 ensure that individuals do not become part of the  
10 criminal justice system, and at the back end, to ensure  
11 finality and certainty in the punishment process.  
12 Offender supervision courts are one means of  
13 implementing these exits strategies. However, they pose  
14 the question of whether a court-based model in which  
15 judges play the primary organizing role is preferable to  
16 either, one, a system without judges, or two, a system  
17 in which judges play a subordinate managerial role, and  
18 it's this last that I prefer.

19           The single great advantage of offender  
20 supervision courts is that they respond to a failure in  
21 the guidelines that *Booker* does nothing to remedy. The  
22 guidelines presuppose incarceration as the organizing  
23 principle of punishment, to the exclusion of  
24 non-incarcerative sanctions. The guidelines focus the  
25 question of punishment on the moment of sentencing, as

1 applied to individual offenders, and fail to consider  
2 the direct and collateral consequences of imprisonment  
3 and reentry for both the offender and his, or  
4 increasingly her, family and community. In prison,  
5 offenders become less healthy, less employable, and more  
6 antisocial, through losing family contacts. After  
7 prison, offenders often lose a variety of state and  
8 federal benefits, as Professor DiNitto has pointed out,  
9 as collateral consequences of imprisonment. In  
10 particular, the offender's family suffers devastating  
11 effects, including loss of income, and long-term  
12 psychological damage to the offender's children. These  
13 can be avoided at the front end by channeling offenders  
14 away from incarceration.

15 Offender supervision courts seek to  
16 challenge the guidelines' overreliance on incarceration  
17 first by emphasizing treatment and behavior modification  
18 as a cure for drug addiction, mental health, and other  
19 chronic causes of antisocial behavior; and second, by  
20 claiming to channel offenders out of the criminal  
21 justice system. Their overarching goal is to end the  
22 offender's dependency on drugs, help them find housing,  
23 control their mental health problems, and re-engage with  
24 their community through a variety of court-sponsored  
25 treatment programs. The variety of these problem-solving

1 courts speaks to the myriad problems faced by  
2 offenders that fit uncomfortably, if at all, within an  
3 incarcerative system, and are better solved by public  
4 health or other social initiatives.

5           However, the strength of the offender  
6 supervision court movement is also its weakness: its  
7 insistence that such courts be run by judges using a  
8 court-based model. Offender supervision courts  
9 predominantly adopt an interventionist approach,  
10 premised on intense supervision of the client, aimed at  
11 restructuring the defendant's lifestyle. The offender's  
12 failure to take responsibility for his or her treatment  
13 and get with the program often results in short stints  
14 in jail.

15           The court-based model's emphasis on the  
16 offender's responsibility for her success fails to  
17 account for the fact that offenders often face  
18 significant social and legal obstacles to their health,  
19 housing and employment, as Professor DiNitto has  
20 explained, that are exacerbated, rather than  
21 ameliorated, by intensive scrutiny. Rather than  
22 screening offenders out of the criminal justice system,  
23 interventionist drug and reentry courts screen offenders  
24 back into the system for longer periods of time,  
25 resulting in harsher criminal penalties being imposed.

1 The court model thus, the interventionist court model  
2 thus replicates the central failings of the guidelines  
3 system because it understands reintegration or reentry  
4 as a one-way street in which the offender must take  
5 responsibility for his or her socially unacceptable  
6 conduct. Offender supervision courts grant the  
7 Government a free pass on the various direct and  
8 collateral consequences of incarceration that undermine  
9 reentry and reintegration of the offender into society.  
10 Interventionist courts are a well-meaning, but flawed  
11 exit strategy.

12 My proposals are not to abandon the idea  
13 of offender supervision courts, nor to ignore the  
14 importance of responsibility for criminal offenders, but  
15 to restore the normal hierarchy of probation and parole  
16 by removing the judge from the center of the picture.  
17 The goal of offender supervision courts should be to use  
18 the authority of the judicial office to facilitate and  
19 oversee the process of reentry and reintegration.

20 So as to promote a better matching of  
21 offenders to resources, I have six proposals.

22 First, measure the effectiveness of offender  
23 supervision courts in channeling offenders away from  
24 incarceration and out of the system altogether. There's  
25 two issues here. The first addresses a worrisome

1 feature of the supervisory process. It extends, rather  
2 than limits, an offender's contact with the criminal  
3 justice system, and does so in a manner that is often  
4 quite open-ended. The solution is to provide a clear  
5 and officially marked end to the direct consequences and  
6 certain collateral consequences of a conviction. The  
7 second is that rather than channeling offenders out of  
8 the system, offender supervision courts may have a  
9 substantial networking effect that channels offenders  
10 into the system. As currently constituted, the courts  
11 do not measure this net-widening effect. Doing so  
12 requires comparing offender populations charged with the  
13 same event. In addition, courts should track the  
14 ultimate sentences imposed, should the offender relapse  
15 out of the rehabilitation system and into the  
16 traditional one.

17                   Second, consider removal and reentry,  
18 rather than only retribution and incarceration as  
19 effects of punishment. Taking a more comprehensive  
20 approach to the goals of punishment places incarceration  
21 and sentencing decisions in the context of removing the  
22 offender from their family and community. A  
23 comprehensive approach requires the state to account for  
24 the significant social repercussions of incarceration,  
25 not only on the offender, but on families that must

1 survive without the offender's support, and the  
2 community that must reintegrate an offender.

3 Third, recognize responsibility as a  
4 two-way street, imposing significant duties on both  
5 offender and government alike. There's only a limited  
6 amount that offenders can do to ensure the successful  
7 completion of the court-sponsored treatment programs.  
8 They face significant obstacles and collateral  
9 consequences returning from imprisonment, in obtaining  
10 health care, welfare assistance, housing, education and  
11 job licensing. These individually and collectively  
12 virtually guarantee recidivism. Overcoming these  
13 obstacles requires courts to adopt, as a primary goal,  
14 the task of helping the offender traverse the agencies  
15 and officials that stand in the way of reintegrating the  
16 offender into the community.

17 Four, adopt a managerial, not an  
18 interventionist approach. The usual means of courtroom  
19 standard treatment, tough love, is one, but not the only  
20 means, of engaging with a drug user or ex-inmate. It's  
21 not clear that the often used one-size-fits-all approach  
22 is the best for the multitude of personalities and  
23 issues coming before the courts.

24 Five, courts that are responsive, rather  
25 than simply directive. Instead of controlling the

1 offender's treatment regime, courts should consider  
2 empowering individuals taking responsibility for  
3 changing their lifestyle to get the help they need.

4 This requires that courts be:

5                   Six, collaborative, not simply coercive.  
6 The goal of the court should be to end, not extend,  
7 criminal justice scrutiny of the offender. At the front  
8 end, courts should monitor the availability and efficacy  
9 of treatment, rather than operate as a source of  
10 treatment. So at the state level, drug court judges  
11 often see themselves as the primary treatment provider.  
12 My suggestion is that they take a back seat, instead of  
13 a front seat, in the provision of treatment. At the  
14 back end, courts should be available to manage the  
15 restoration of social services and legal rights. This  
16 entails that the courts are available to those that seek  
17 help negotiating administrative and legal obstacles to  
18 the reintegration. It also puts a lid on the sort of  
19 mandatory supervision imposed at, particularly, the back  
20 end of the criminal justice process. If the courts  
21 really are to solve problems, rather than simply engage  
22 in supervision, it should be available to all that need  
23 them, not forced upon every offender charged with drug  
24 crimes or exiting incarceration. Imposing lengthy  
25 scrutiny and shock therapy penal sanctions on

1 individuals who would otherwise escape criminal justice  
2 supervision is, itself, a recipe for recidivism. Thank  
3 you.

4 CHAIR SESSIONS: Thank you, Mr. Miller.  
5 Mr. Watkins.

6 MR. WATKINS: Yes. Thank you for having  
7 me today. I don't know if there's much left to be said,  
8 but I agree with everything they've said. But I'll try  
9 to give you an idea of what we do on the local level to  
10 try to deal with the effects of incarceration.

11 I think what we haven't addressed yet  
12 deals specifically with the front end of criminal  
13 activity, and when I say front end, I mean all of the  
14 things that we've talked about are somewhat reactionary.  
15 We're reacting to a person that offends. And as a  
16 district attorney, the philosophical approach that we're  
17 trying to implement, at least in Dallas County,  
18 hopefully throughout the State of Texas, is to, is to be  
19 proactive, and to try to instill how not to commit  
20 certain crimes. And if we look, you know, at the  
21 statistics, and look at who is committing these crimes,  
22 I think we can really get a grasp of what we probably  
23 need to do to prevent it from happening in the first  
24 place.

25 And so if you just take the general

1 prison population of the State of Texas, you will find  
2 that there are large numbers of individuals that have,  
3 that are uneducated and unskilled, and as stated here,  
4 they have issues with, with drug abuse.

5           So all of those things, you know, I  
6 believe, are things that should be coupled with the  
7 criminal justice system. We should work hand in hand  
8 with the different socioeconomic agencies and the  
9 educational agencies to ensure that a certain community  
10 may have the resources necessary so we won't see these  
11 individuals enter our system.

12           But when it does happen, there's, I  
13 think, certain things that we can do to safely have  
14 these individuals come back to our communities equipped  
15 to live and survive, and not be a threat to society  
16 anymore. And unfortunately, we still have a ways to go  
17 as it relates to that.

18           For example, you know, what we're dealing  
19 with on the local level, and I'm sure throughout the  
20 states in this country, deals specifically with the  
21 resources, and how we're going to best allocate these  
22 resources to get the best results. And at the end of  
23 the day, you know, the result is that, you know, we  
24 have to have public safety, our citizens are safe, and  
25 as it is, I think in most of the penal institutions

1 throughout Texas and the country, there is less likely  
2 of a chance of a person being rehabilitated, as opposed  
3 to just being incarcerated.

4           And when you're talking about a taxpayer  
5 getting a return on their investment, we spend so much  
6 money in the incarceration arena, you know, that that  
7 taxpayer is going to want to get a return on their  
8 investment. And so the ideas that we bring deal with,  
9 you know, with smart justice, you know, what's smart.  
10 And so I think the struggle that we are faced with is  
11 the public's sentiment on what it means to dispense  
12 justice.

13           And it's very hard to go and talk to  
14 people within our local community and say that we want  
15 to help this offender, or educate them, or rehabilitate  
16 them, because they're offenders, and the public, you  
17 know, they really don't have any sympathy towards those  
18 individuals that commit crimes. But the practicality of  
19 it is that we do have to use our resources a little  
20 bit better than we have, so when those folks come back  
21 to our communities, they're equipped to be a productive  
22 citizen. And again, at the end of the day, the goal is  
23 public safety.

24           And so some of the things that we've done  
25 on the local level, we've instituted some programs, over

1 the last two and a half years, and one of those  
2 programs, we call it the Memo Agreement. And it's  
3 specifically designed for low level offenders,  
4 nonviolent offenders, misdemeanor offenders, who never  
5 committed crimes before. There's an age limit on it.  
6 We deal with those individuals from the age of 17 to 25.  
7 And we look at, you know, some of the offenses that they  
8 may commit. For example, a theft, a possession of  
9 marijuana, as a youth, quote, indiscretion. And the  
10 reason we do that is really two-fold.

11 Lack of resources. You know, we're going  
12 through, as many states and localities, issues that deal  
13 with budget, and we don't have the resources to, you  
14 know, really prosecute all the cases that come through  
15 our office. And so this program is designed two-fold.  
16 It's designed to divert folks out of the system, which  
17 will save us money, because we don't have to use the  
18 resources to prosecute them, but it's also designed from  
19 a rehabilitative standpoint.

20 You know, if you take a 17-year-old and  
21 you take them through the system and convict them, that  
22 17-year-old, at some point, is going to be 25, 26 years  
23 old, and face the reality of trying to become employed,  
24 and that youthful indiscretion will follow that  
25 17-year-old for the rest of their lives. And so the

1 idea is is to have an intensive program that they go  
2 through. They have to meet all the requirements of it.  
3 Once they finish that program, then the case is  
4 dismissed. It's like it never happened.

5                   And over the last two and a half years,  
6 since we've implemented that program, the number of  
7 cases that we prosecute has been reduced tremendously  
8 and the number of offenders, repeat offenders, it's been  
9 reduced because of the intensity of the program.

10                   There's another side to this, also. You  
11 know, as always, we have those offenders who, for  
12 whatever reason, can't be rehabilitated, and we have to  
13 take measures to make sure that we swiftly prosecute  
14 those individuals and use our resources wisely to get  
15 them incarcerated. And those particular offenders are  
16 what we call impact offenders. Impact offenders, you  
17 know, on the local level, are those offenders that  
18 commit these low level crimes, car burglaries, thefts,  
19 and they continue to commit these crimes, and all of the  
20 programs that we've provided them, they don't work. And  
21 so that at that point, we have to swiftly deal with  
22 these individuals.

23                   And so what we did is we got with the  
24 different law enforcement agencies, and labeled certain  
25 offenders that will come through their municipality as

1 impact offenders. That impact offender would have been  
2 through the court system three, four, five times. And  
3 inevitably they will get probation, they go to jail for  
4 a couple of days, and that will just repeat itself. And  
5 so what we've decided to do was use all the tools that  
6 we have available to us by statute to enhance their  
7 punishment and to fast track that individual through the  
8 court system, be it a trial or a plea. And so that, in  
9 itself, provides what we consider adequate public  
10 safety.

11 Now, it's our position in Dallas County  
12 that, you know, the district attorney really is the  
13 manager of our, I will say the criminal justice system  
14 as a whole. We pretty much dictate, you know, how many  
15 individuals will be incarcerated within our county jail.  
16 And those incarceration rates today and over the last  
17 two years hover around 6,500 individuals. And when  
18 we're dealing, again, with the practicality of our  
19 system, we have to create ways to reduce that number  
20 because, you know, it's expensive to our taxpayers, and  
21 the resources are not there. And so you know, what we  
22 do is we look at these, we look for these innovative  
23 programs that will save money, from a budgetary  
24 standpoint, and provide adequate public safety, and to  
25 ensure that the individuals that we do have to run

1 through the system at some point never come back. Thank  
2 you.

3 CHAIR SESSIONS: Thank you, Mr. Watkins.  
4 Well, let's open it up for questioning.

5 VICE CHAIR CASTILLO: Thank you. It  
6 seems, in view of the Texas success stories, since we  
7 are here in Texas, it would seem to me that all four of  
8 you would support legislation that would expand  
9 community correctional centers in every federal  
10 district, just as a cost saving public safety measure.  
11 Am I wrong about that? That's my question. Isn't that  
12 sort of a no-brainer.

13 MR. WATKINS: I would tend to agree with  
14 that, that you would have to figure out how to  
15 reallocate your resources from what we're doing now.  
16 And you know, if you look in the system, and it is the  
17 federal system and in the state system, the goal is to  
18 get a return on that investment. And if, if we can  
19 reallocate those resources and have these I guess  
20 probationary types of facilities, it would be great.  
21 But at the same time, you know, I think on the federal  
22 level, you're probably a little bit better than we were  
23 as it relates to the rehabilitative tendencies of your  
24 institutions to not only have these probationary  
25 centers, but also, for those individuals that we do

1     incarcerate, that they, you know, have the ability to  
2     get rehabilitated. The goal is rehabilitation, as  
3     opposed to just punishment, and I, you know, I agree  
4     with that.

5                   PROFESSOR MILLER: My answer would be  
6     yes, but dependent on how they're structured. In other  
7     words, what they're trying to do. So the way, one of  
8     the ways, with drug courts in particular, problem-solving  
9     courts, what I call supervisory courts, is that  
10    they have a significant net-widening effect because they  
11    make it easier to deal with the large numbers of  
12    offenders at one time. So the idea is that if the  
13    system puts a squeeze, the traditional system puts a  
14    squeeze on the prosecutor to screen out - maybe even  
15    the police officer, to screen out low-level offenders,  
16    whereas if you make it easier to have, to prosecute,  
17    then it looks like the system channels people in that  
18    would otherwise be channeled out.

19                   So one thing that might be thought about  
20    is finding a way, a simple way, to just think about what  
21    sentences individuals would be given for the crime  
22    charged, while making sure that the net-widening effect  
23    doesn't happen, that low level people still get screened  
24    out of the system, and that resources are targeted  
25    appropriately at people who need it, people who would be

1 sentenced for drug use, drug crimes, and who do in fact  
2 benefit from the treatment, rather than people who can  
3 control their addiction, if indeed they are addicted,  
4 and remain, and are not so antisocial that they commit  
5 other types of crime.

6 MR. GELB: I'd like to say a couple of  
7 things. One, the federal criminal population is  
8 obviously different from the state population. So I  
9 think that's implicit in your question, that the answer  
10 is sort of empirical, based on what the population  
11 looks like in a particular district and, frankly, what  
12 the existing resources are that are there.

13 Second, I think the point about net  
14 widening, as successful as what's happened here in Texas  
15 has been, in terms of bringing that population down,  
16 there does remain the question about the extent to which  
17 some number of those residential centers are being used  
18 for people who actually don't even need that. There has  
19 been some net widening, and you're going to see that in  
20 any system that you do that has discretion, and there  
21 are going to be people who, you know, would have been on  
22 probation who do need to be in a residential center, as  
23 well as people who would have been going to prison and  
24 would be in a, in a different setting for a shorter  
25 amount of time.

1                   VICE CHAIR CASTILLO: Are you aware of  
2 anyone in Congress studying this Texas success story,  
3 Mr. Gelb?

4                   MR. GELB: Yes. As a matter of fact, on  
5 Monday, if not Tuesday, there was a piece of legislation  
6 introduced called the Criminal Justice Reinvestment Act  
7 of 2009. It is co-sponsored by Senator Cornyn from here  
8 in Texas, as well as Senator Whitehouse from Rhode  
9 Island and Senator Lungren, I'm sorry, Representative  
10 Lungren and Representative Schiff on the house side, and  
11 it's a piece of legislation that sort of acknowledges  
12 the growth in the prison population, as well as the  
13 growth in the federal probation population, and that  
14 there are states like Texas and Kansas that have  
15 successfully analyzed their populations, come up with  
16 policy options, and successfully implemented them, so  
17 that piece of legislation creates, essentially, a  
18 federal funding stream to fund the type of work at the  
19 state level that the Pew Charitable Trust and several  
20 other foundations have been working with the states on  
21 for the last few years. It's sort of a two, sort of a  
22 two-part process. The first part says the states can  
23 apply for funding to do the analysis of their  
24 populations and do the policy development piece, and  
25 then once that, once that is done, they can come back to

1 the DOJ and say okay, here's what we've come up with,  
2 here's our plan, can we have access to the second pot of  
3 funding, which is for implementation, which can pay for  
4 things like probation and residential centers, risk  
5 assessment, treatment resources and the like. So that's  
6 what -

7 VICE CHAIR CASTILLO: So this is a way to  
8 channel money to the states, but it is [not] a federal  
9 program.

10 MR. GELB: It is not a federal program,  
11 yes.

12 CHAIR SESSIONS: Any other questions?  
13 Commissioner Friedrich.

14 COMMISSIONER FRIEDRICH: Thank you.

15 Mr. Gelb, I have two questions for you.  
16 In your written testimony, you recommended accelerating  
17 the transition of prisoners from prison to halfway  
18 houses and the Bureau of Prisons has expressed the view,  
19 and we'll hear from the director later today, that you  
20 really don't need more than three or four months for  
21 offenders to get the benefits of reentry in a halfway  
22 house, and it can actually be counterproductive to have  
23 them, offenders in halfway houses for a longer period of  
24 time.

25 My first question is, is that fear

1 unfounded, in your view? Do you think that's a  
2 legitimate concern that the Bureau of Prisons has?

3           And the second question deals with  
4 incentives. You've suggested that it's a good idea to  
5 have modest incentives for individuals who participate  
6 in these programs, whether it's on the front or the back  
7 end. My question is, is does the research guide policy  
8 makers in what those incentives should be? I mean at  
9 least one witness at a hearing has cautioned, you've got  
10 to be careful that the incentives aren't so great that  
11 you have offenders gaming the system. So my question is  
12 how do you, how does a policymaker effectively calibrate  
13 those incentives for the offenders?

14           MR. GELB: They're great questions. And  
15 the calibration is something that you wish there were  
16 more research on and more experiments that have been out  
17 there with, you know, different lengths of time for  
18 different, different types of programming. So I  
19 wouldn't argue that there's precision, at this point, in  
20 terms of knowing whether, for instance, the Kansas  
21 program that said 60 days additional off for  
22 participation in certain programs is exactly the right  
23 amount of time. There definitely should be more  
24 research to, to establish, if that's what you're asking,  
25 sort of exactly what the level of incentive should be,

1 and there's obviously got to be very close and strict  
2 management of these situations to make sure that the  
3 inmates are not gaming the system.

4 COMMISSIONER FRIEDRICH: But it's a given  
5 that there has to be incentives, in your view, that  
6 simply an offender wanting to help him or herself is not  
7 enough, in your view, to achieve the benefits in terms  
8 of recidivism.

9 MR. GELB: I think it's, I think that's  
10 part of it, but I also think it's, I also think it's  
11 more than that in a couple of different ways. One is  
12 that there is, there's also great lack of clarity in the  
13 research about the relationship between length of stay  
14 and recidivism. So if you can't justify why getting out  
15 in July, as opposed to, you know, or getting out in July  
16 as opposed to June is a good investment for the  
17 taxpayers, then it's hard to see how a program that  
18 could help reduce recidivism by 25, 30 percent or so  
19 wouldn't be a, wouldn't be a good investment.

20 And second, let me just sort of shift  
21 gears, if I could, a little bit on this in terms of the  
22 incentives. One of the pieces that you see that we're  
23 suggesting is not just this earned time behind the  
24 walls, but to try to move that concept of earned time  
25 out into the community so the offenders on probation and

1 parole also have that positive incentive. You want to,  
2 one of the clearest findings in this, in the research is  
3 that, is that positive rewards work better than negative  
4 consequences in terms of shaping behavior. Yet we have  
5 a system that is almost focused exclusively on, you  
6 know, trail them, nail them and jail them, catching  
7 people when they slip up, and not providing positive  
8 incentives. And that's, that's a finding not just in  
9 the criminal justice literature, but that's child  
10 development literature, that's negotiating strategy, the  
11 whole series of, of findings that people just respond  
12 better to, to possibilities of rewards than particularly  
13 the sporadic and arbitrary imposition of threats.

14                   And so what we're seeing states start to  
15 to do is to say that people on supervision, not just  
16 people behind the walls, should have incentives. If  
17 they're complying with the terms of their supervision,  
18 they are current in their victim restitution payments,  
19 they're going to treatment, they're testing clean and  
20 they've done that, that they ought to be able to earn  
21 their way off supervision earlier.

22                   CHAIR SESSIONS: Is that term trail them,  
23 name them and jail them a term of art?

24                   COMMISSIONER FRIEDRICH: What about the  
25 second question, in terms of the transition from halfway

1 houses and the length of time? Is that a valid concern  
2 for the Bureau of Prisons that too much time in a  
3 halfway house is counterproductive?

4 MR. GELB: I don't think I can speak  
5 directly to that.

6 CHAIR SESSIONS: Mr. Wroblewski.

7 COMMISSIONER WROBLEWSKI: Thank you. A  
8 couple of quick questions. Thank you all, first of all,  
9 for being here.

10 Mr. Gelb, the legislation that was passed  
11 in 2007 here in Texas, was that a piece of legislation  
12 that not only provided the funding, on the one hand, but  
13 also channeled the funding away from the prisons? I  
14 mean was that one piece of legislation that did both and  
15 did the reallocation? Were there other components to  
16 that? And if we send you an e-mail, could you send us  
17 actually a copy of that legislation?

18 And then finally, for Mr. Watkins, these  
19 impact offenders, what are the tools that you have for  
20 those people, and what kind of sentences are we talking  
21 about?

22 MR. WATKINS: Well, you know, we have  
23 statutes that allow us to hand certain sentences, after  
24 you have committed and been charged and convicted of  
25 other crimes, like the three strikes you're out. It's

1 not on that level. These are all very low level, low  
2 level offenders, and so most of them will spend anywhere  
3 from six months to two years in prison, and most of the  
4 crimes that they're committing are misdemeanors, but  
5 they commit so many that they get up to the state jail  
6 felony rates. And practically, because of resources, a  
7 lot of times we wouldn't pursue the state jail felony  
8 crime because we just didn't have the resources to  
9 incarcerate those individuals, but with the impact  
10 offender program, we actually target certain individuals  
11 that we just can't rehabilitate, and the number goes  
12 down as to who we seek these enhancements on, and we get  
13 a quicker result.

14 MR. GELB: So, of course we can send it  
15 to you, but it's interesting how Texas has accomplished  
16 this, which was through the budget. It's actually not a  
17 statutory change here. So it's budget language that set  
18 out this very extensive array of new programming. And  
19 you know, it's a real credit to the judiciary, as well  
20 as the corrections department here that it has gone as  
21 well [as] it has without additional statutory direction about  
22 you know, who should go into these slots, because of the  
23 fear of net widening, something that's still being  
24 analyzed. And I think I had suggested before that there  
25 were some questions about whether or not some folks who

1 were making it into these residential beds didn't  
2 necessarily need to be there, and there has been a net  
3 widening.

4 COMMISSIONER WROBLEWSKI: Can I just follow  
5 up on that a second? And when you're building out, whether  
6 it, whether the program was set in motion to build out  
7 these programs across the state, was the idea to have a  
8 uniform set of, or a model program in each county?  
9 Because if we have a lot - the reason I'm asking is we  
10 have a lot of experimentation going on in the federal  
11 system, and I think one of the questions that we have  
12 here is how do we take it to the next level. Does there  
13 need to be something more uniform? Is there one piece  
14 of legislation that would create something that's more  
15 uniform and also to do with the reallocation? We're  
16 getting now to the sort of nuts and bolts of how to  
17 actually get something done.

18 MR. GELB: Right, right. So Texas is not  
19 a sentencing guideline state, as you know, and they're,  
20 they don't, there's not a mechanism there that exists,  
21 you know, like there does in the federal system to steer  
22 specific offenders into specific programs that way.  
23 However, my understanding of the way that they are  
24 trying to manage the cases in this, in this case is  
25 through the probation working with judges and using risk

1 assessment, and more, at more of an administrative level  
2 than a statewide policy that says these, you know,  
3 these beds should be used for specific purposes. So  
4 there's statewide direction, but in this state there's  
5 a significant local control in the courts, and so I  
6 expect that there's a good bit of variation in these  
7 respects.

8 CHAIR SESSIONS: Well, thank you very  
9 much for really a fabulous panel, and we really  
10 appreciate your dedicating so much time and energy to  
11 your submissions and testimony, and thank you very  
12 much.

13 MR. GELB: Thank you.

14 CHAIR SESSIONS: We are just a few  
15 minutes behind schedule, so if we could start again at  
16 ten of 12:00, I think we would be able to finish close  
17 to on time.

18 (Recess taken from 11:42 to 11:58.)

19 CHAIR SESSIONS: Okay. I think we're  
20 ready to proceed with the third panel of the day.  
21 Welcome. These are our probation officers. And  
22 frankly, I've been out of probation for a long time now,  
23 ten years now, and some of the most valuable input that  
24 we receive is from POAG, is from the Probation Officers  
25 Advisory Group. We also look forward to the impact.

1 There's three of you. You are on the ground in sensing  
2 how the guidelines are being applied in the real world.

3 So first, Becky Burks is the chief U.S.  
4 probation officer for the Southern District of Texas. I  
5 understand that you have a new chief judge.

6 MS. BURKS: Since Friday the 13th.

7 CHAIR SESSIONS: Since Friday the 13th.  
8 I think for the next seven years he'll be living under  
9 that shadow.

10 MS. BURKS: We're happy to have him.

11 CHAIR SESSIONS: In her 22-year career  
12 with the district, she served at all levels in the  
13 organization. Since being elevated to chief probation  
14 officer in 2004, Ms. Burks has served on the  
15 Administrative Office's Chiefs' Advisory Group, and is  
16 currently a member of the Federal Judicial Center's  
17 Training and Education Committee. Ms. Burks graduated  
18 magna cum laude from Sam Houston State University in  
19 1981, with a Bachelor of Arts degree in criminology and  
20 Spanish. She earned a master's degree in criminal  
21 justice management, also from Sam Houston State  
22 University in 2001. Welcome.

23 MS. BURKS: Thank you.

24 CHAIR SESSIONS: Next, Joe E. Sanchez is  
25 chief U.S. probation officer for the Western District of

1 Texas. He began his federal probation career in 1988 in  
2 the Del Rio Division, and has held several positions  
3 within the district, including sentencing guidelines  
4 specialist, presentence investigation supervisor in Del  
5 Rio, assistant deputy chief for the Austin and Waco  
6 Divisions, and deputy chief in San Antonio. Prior to  
7 joining the Western District of Texas, he was an adult  
8 probation officer for Maverick County in Eagle Pass,  
9 Texas. He received both a B.A. and a master's in  
10 psychology from Texas A&I University in Kingsville,  
11 Texas.

12 And welcome and thanks for both of you  
13 appearing here today. So have you decided among or  
14 between yourselves who wishes to go first?

15 MR. SANCHEZ: My mentor.

16 CHAIR SESSIONS: Your mentor?

17 MR. SANCHEZ: My mentor, yes.

18 MS. BURKS: Can you hear me now?

19 CHAIR SESSIONS: I didn't see that mentor  
20 in the introductions, but she is your mentor. Okay.

21 MS. BURKS: Can you hear me now?

22 CHAIR SESSIONS: Yes.

23 MS. BURKS: Okay. Thank you. Of course  
24 I've submitted my written comments, and I'll try to  
25 paraphrase in the interests of time and hit the

1 highlights.

2 First, obviously, I want to thank you for  
3 giving us the opportunity to be here today to provide  
4 comment and the view from the probation office. I  
5 personally appreciate it. My staff very much  
6 appreciates having the opportunity to provide input.

7 I also want to thank the Sentencing  
8 Commission for the support given to the field, through  
9 training and guidance, as well as something that's very  
10 near and dear to our hearts in the Southern District of  
11 Texas, and that is the improvements in the document  
12 submission system, the electronic submission that's been  
13 developed over the last few years. I've noted in my  
14 comments, we submitted 31,157 documents from Southern  
15 Texas in fiscal 2008, all electronically, and it's a  
16 fabulous success. And so credit goes to Judy and the  
17 Commission and the group and her staff for putting all  
18 that together and making it work. We very much  
19 appreciate it.

20 As you know, this is the sixth of seven  
21 regional hearings, and in preparing to come before you  
22 today, I read all of the comments of all of my  
23 colleagues that have appeared at the prior hearings, as  
24 well as I solicited input from a number of the officers  
25 in my district, across my district, that practice in the

1 guidelines every day.

2 My colleagues have raised a number of  
3 points, talking about things such as a need for the  
4 Commission to support a resolution of the disparity  
5 between crack and powder cocaine, the need to look at  
6 the mandatory minimum sentences, perhaps the elimination  
7 of such, the need for sentencing policy to incorporate  
8 what research has and is proving to be effective in  
9 reducing recidivism, the need to oppose the ABA's  
10 proposed amendment to Rule 32 and other areas. I don't  
11 see, the information I've gathered in my district  
12 doesn't reflect that we differ significantly in those  
13 views. However, we do differ quite substantially in the  
14 context from which we come to these issues.

15 So first I'd like to talk to you a little  
16 bit about that context, and then address two specific  
17 points that we feel pretty strongly about. The Southern  
18 District of Texas Probation Office is headquartered in  
19 Houston, and we have divisional offices in Galveston,  
20 Corpus Christi, Victoria, Brownsville, McAllen and  
21 Laredo. Three of those divisions are geographically  
22 located in immediate proximity, they sit right on the  
23 Texas-Mexico border. In FY 2008, the probation office  
24 completed 6,574 presentence investigations and  
25 supervised 5,470 offenders in the community. In

1 addition, the Texas Southern Probation Office is  
2 somewhat unique in that we produce all of the judgments  
3 in criminal cases and the statement of reasons for all  
4 felonies and Class A misdemeanors sentenced in the  
5 district. When we look at our cases that were sentenced  
6 in 2008, we see that the vast majority were male  
7 offenders, 90.6 percent, and were primarily Hispanic by  
8 race, 90.1 percent. Relative to the primary offense  
9 convictions, immigration comprised 72.5 percent of the  
10 cases that we dealt with. Drugs come in second at 18  
11 percent, and firearms and fraud are virtually tied at a  
12 very distant third, 2.9 and 2.2 percent. This  
13 percentage of immigration cases for our district is the  
14 highest percentage of the five border districts, and it  
15 is a significant increase over my tenure, the five years  
16 I've been chief. In 2004, our percentage was about 58.4  
17 percent immigration cases. And so clearly, we've had a  
18 significant increase.

19 As it pertains to sentencing practices,  
20 57.7 percent of our 2008 cases were sentenced within the  
21 guideline range. That's not drastically different from  
22 the national rate of 59.4 percent, but it was  
23 significantly lower than the Fifth Circuit [rate] of 70.4  
24 percent. This perhaps resulted from higher government  
25 sponsored below-range sentences. We do have early

1 disposition programs in our district. They accounted  
2 for 34.8 percent of the total below-range sentences  
3 imposed. Non-government sponsored below-range sentences  
4 totaled 6.5 percent.

5           So with that context, not surprisingly,  
6 given that description of that sentencing work load in  
7 our district, the first area that we urge the Commission  
8 to look closely at is one that the Commission has been  
9 looking at for several years, and that's simplifying the  
10 guidelines specifically in the areas of the definitions  
11 of crimes of violence, aggravated felony, violent felony  
12 and drug trafficking crimes. That's 72.5 percent  
13 immigration cases that equalled 4,700 presentence  
14 investigations that we completed in 2008 for immigration  
15 offenses, the lion's share of which are illegal  
16 reentries. Therefore, simplifying and clarifying that  
17 guideline application would result in a significant  
18 savings of time and resources for us.

19           Now, there are those who are unfamiliar  
20 with immigration cases, and they might be tempted to  
21 minimize the impact of that type of a case. I have  
22 heard, overheard statements to the effect, well, they're  
23 just immigration cases, when in fact, the Supreme Court  
24 and Fifth Circuit case law makes these presentence  
25 investigations some of the most laborious to produce and

1 the most complex of sentencings. The categorical  
2 approach required to establish the classification of a  
3 prior conviction to support the accurate calculation of  
4 the offense level has increased significantly the time  
5 needed to obtain and analyze the supporting  
6 documentation, which is of particular concern to the  
7 probation office. I'll use a statement that was  
8 included in one of the Commission's documents on a prior  
9 immigration round table, "The nature of the categorical  
10 approach often leads to exhaustive individualistic  
11 reviews because of the diversity and multiplicity of  
12 state criminal statutes and the inherently difficult,  
13 inherent difficulty in comparing the widely varying  
14 language of these provisions with a standard definition,  
15 whether that definition is composed from a common sense  
16 approach or otherwise." That, in my view, really  
17 captures how complex and how time consuming making these  
18 determinations [is], and being sure that the prior  
19 conviction that supports the upward adjustment or  
20 enhancement is for the probation office. And in fact,  
21 in Texas Southern, since 2006, the probation office  
22 includes the documentation that supports that prior  
23 conviction that supports the upward adjustment with the  
24 presentence report at disclosure for the majority of  
25 courts, and will provide it if there's an objection to

1 that prior conviction and apt disclosure for all courts,  
2 if it's objected to. That helps our process. That's a  
3 sound sense and practice, but it has further increased  
4 the burden on the probation office to secure those  
5 documents, and we find that, and I'm sure Joe can speak  
6 to this, as well, that those prior convictions, prior  
7 state convictions occur all over the United States. And  
8 in fact, I think it's somewhat curious, it's somewhat of  
9 an anecdote, when I travel to other districts for other  
10 meetings, when I meet probation officers from those  
11 areas, and the first thing they say to me is, "Oh, you're  
12 the district that sends us all the collaterals," a  
13 collateral investigation meaning we're asking them to  
14 help us obtain those documents, and they really don't  
15 have a full understanding of what the importance of  
16 those documents are for that review.

17 This is not a new area for the Commission  
18 to look at, and we have, our district has participated  
19 in numerous, I think there's been at least two round  
20 tables, if I'm not mistaken. I know I spoke on this  
21 issue, specifically options that were presented for  
22 comments, at the public hearing in San Antonio in 2006.  
23 My colleague, the chief in Kansas spoke to this  
24 specifically, in his comments at your last regional  
25 hearing. The POAG has weighed in on this, and most

1 recently, I think, in terms of the, in support of the  
2 need to study the issue that was identified in the  
3 Commission's priorities, I believe it was number six for  
4 this amendment cycle. We also support and urge the  
5 Commission to continue its work in this area.

6           The second area of concern that Texas  
7 Southern probation would like to comment on is the  
8 American Bar Association's proposed amendment to Rule 32  
9 of the Federal Rules of Criminal Procedure, which would  
10 require increased disclosure of probation's  
11 investigative information. It's our recommendation that  
12 no changes be made to the current provisions of Rule 32,  
13 and by reference, we'd like to adopt the 14 points that  
14 were made by our colleague Chris Hansen, chief of  
15 Nevada, in one of your prior hearings, and that's in our  
16 written comments.

17           There are two primary reasons, in our  
18 view, not to adopt the changes proposed. The results of  
19 the probation officer's presentence investigation are  
20 currently fully disclosed in report form pursuant to  
21 Rule 32, when we disclose that presentence  
22 investigation, and then opportunity is afforded for  
23 scrutiny, challenge and objection to the information  
24 contained in the report, and that's prior to that  
25 presentence report being submitted to the court under

1 the rule. Now, different districts may have different  
2 practices but in Texas Southern, we follow Rule 32  
3 pretty faithfully. So we disclose the presentence  
4 report to the parties. They're allowed to voice  
5 objections. We may meet and have face-to-face  
6 discussions to attempt to resolve information. We  
7 oftentimes make changes to the presentence investigation  
8 prior to submitting the final version to the court for  
9 sentencing. If the disputes are not resolved at that  
10 level, there's another opportunity, once that final  
11 report is submitted to the court, and any issues that  
12 have not been resolved will be resolved at sentencing,  
13 being addressed by the court. We think that's an  
14 adequate review. If there's additional scrutiny needed,  
15 and there are times when objections are made, we think  
16 the jury - the judge of jurisdiction is in the best  
17 position to make the decision on whether the supporting  
18 documentation should be disclosed. Because we conduct  
19 presentence investigations upon direct order of the  
20 court, and we are employees of the court, we don't  
21 really view it as our decision on whether or not to  
22 disclose the information. It's the judge's decision.  
23 Typically, what happens, we provide the information to  
24 the judge and the judge makes the review and makes the  
25 decision on whether or not it should be disclosed to the

1 parties, although in some cases some judges order that  
2 certain information automatically be disclosed to both  
3 parties, as a matter of course.

4           As illustrated in several of the points  
5 that Chief Hansen made, if there's increased disclosure  
6 of source information, if that becomes part of the rule,  
7 sources that currently share information with the court  
8 via the probation office will become unwilling to do so.  
9 In fact, we have law enforcement agencies that right now  
10 only release detailed offense information to us on  
11 promise that we will not redisseminate the information,  
12 and I think that if we went to a routine redissemination  
13 that they would not provide that information any longer.

14           Secondly, requiring the probation officer  
15 to submit a written summary of any information received  
16 orally, which is part of the proposal, would really  
17 delay the investigative process. We're already  
18 straining under the work load, particularly with 72 and  
19 a half percent of our cases being these immigration  
20 cases requiring that extreme individual review, and if  
21 we have to incorporate extra steps in the process, I  
22 think it's going to be, it will break us, frankly, in my  
23 view.

24           Finally, in our view, the overall result  
25 of the rule changes, if adopted, would be to diminish



1 are very, very similar in the types of cases that are  
2 processed, and in fact the size itself, I have very  
3 little to add of what, add to what Chief Burks has  
4 covered. What I bring on behalf of our district is the  
5 urging, and it's noted in my written testimony, is to  
6 look at §2L1.2, and try to reword it to make the  
7 application simpler, because Chief Burks speaks the  
8 truth. The majority of our offenders that are processed  
9 through the district, their priors are elsewhere.  
10 They're not in Texas. We have to rely on other  
11 districts to secure those documents, and sometimes that  
12 can be a daunting task.

13                   What we did for the purpose of this  
14 hearing was really focus more on post-*Booker*  
15 sentencings. We're very curious to see how our judges  
16 were applying the guidelines, now that they're advisory,  
17 and not surprisingly, our stats show that there's very  
18 minimal change in the way our judges have been doing  
19 post-*Booker* sentencings. We compared the numbers, and  
20 pre-*Booker*, within-guideline sentences, were at 81 to 83  
21 percent. Post-*Booker* now, are at 78 percent of the  
22 guidelines. Shows very little deviation. Of course, we  
23 are curious to see where our district stats will be  
24 three to five years from now. I must say that our  
25 judges do enjoy that flexibility when applying the

1 advisory guidelines. Again, they do use the guidelines,  
2 as noted in my written testimony, as a starting point  
3 for the sentence, and then either will deviate or  
4 depart.

5 I do bring some suggestions from the  
6 field that we would like for permission to consider, and  
7 the first one, and it is noted in my written testimony,  
8 is §2B1.1. Our officers feel it is too long and  
9 cumbersome, and that the guidelines for economic crimes  
10 are too low. It appears the Commission has attempted to  
11 include many of the nuances of economic crimes into one  
12 guideline for ease. It is suggested that the base  
13 offense level should be higher to reflect the harm to  
14 society, given the current economic phase we're in. Our  
15 courts have expressed frustration with very low  
16 guidelines, and expressed that in open court.

17 This is an interesting one, too. We ask  
18 that you consider doing away with the restrictive  
19 language in [ ] Zone B and C [of the] Sentencing Table, and  
20 consider an all-inclusive zone, say below offense level  
21 10, and all options for sentences could be considered.

22 I must reiterate what Chief Burks has  
23 said about §2L1.2. We hope it is reviewed,  
24 reworded, and simplify the application of the  
25 adjustments for these prior convictions.

1                   And I believe that's all I have. I do  
2 echo, again, what Chief Burks has covered, because we're  
3 very, very similar districts.

4                   CHAIR SESSIONS: Thank you, Mr. Sanchez.  
5 Let's open it up for questions.

6                   Judge Hinojosa.

7                   COMMISSIONER HINOJOSA: I have a question  
8 for Ms. Burks. When you look at the national statistics  
9 with regards to the departures versus variances on the  
10 below-guideline sentences, for fiscal year 2008,  
11 Southern Texas had, like you pointed out, 6.5 percent  
12 departure or variance rate below the guidelines, but in  
13 Texas, in Southern Texas, 3.5 percent were departures  
14 and three percent were either *Booker* or 3553(a). When  
15 you look at Western Texas, it was 2.2 percent departures  
16 and 5.4 percent under the 7.6 percent guideline range  
17 that were *Booker* or 3553(a). And when you look at the  
18 national statistics, Southern Texas is going contrary to  
19 the national statics in relying more heavily on  
20 departures versus the variance. Do you have any idea as  
21 to what that might be? There seems to be more of a  
22 higher percentage of use of actual departure language,  
23 as opposed to a variance in Southern Texas.

24                   MS. BURKS: Well, I -

25                   COMMISSIONER HINOJOSA: Even different

1 from Western Texas. Although they are at 81 percent, at  
2 least for fiscal year 2008, were within the guidelines,  
3 but they challenged their early disposition programs,  
4 they're either very small or nonexistent.

5 MS. BURKS: Judge, I haven't looked at it  
6 specifically, but I suspect, if I understood you  
7 correctly, that we have a higher rate of using  
8 departures versus variances, and I suspect that comes  
9 from perhaps the officers identifying the departure  
10 factors pursuant to the guidelines, maybe  
11 overrepresentation of the criminal history score, I  
12 think that's very common for us, and putting that in the  
13 PSI as, you know, to inform the court.

14 COMMISSIONER HOWELL: Thank you both for  
15 taking time out of your busy schedule to come and talk  
16 with us today.

17 I just wanted to talk a little bit about  
18 the illegal reentry guidelines that are 2L1.2. This is  
19 the guideline that the other commissioners have spent a  
20 lot of time looking at. POAG has given us, judges in  
21 this, in Texas and other states have obviously given us  
22 a lot of good ideas of things that we should consider,  
23 given the fairly complicated interplay between the  
24 statutory parameters that we have to operate under and  
25 directly to the Congress and how we reflect those in the

1 guidelines. The federal public defenders have given us  
2 testimony in connection with this hearing that also has  
3 given us a number of, you know, very interesting  
4 thoughtful ideas of ways that we should be considering,  
5 ideas that we should consider of revision to the  
6 guidelines. One of the things, in terms of the  
7 experience that you all have, is they've suggested that  
8 we add a remoteness cutoff for prior offenses used to  
9 increase the offense level, so that really old prior  
10 convictions would be ones that I guess we would make a  
11 policy determination how old, but wouldn't be included  
12 in determining, in determining the offense level at  
13 2L1.2.

14 Do you find that it is the older  
15 convictions and getting the paperwork for those that are  
16 more fairly burdensome, so that if we added a remoteness  
17 threshold to 2L1.1, that this would be a helpful  
18 addition?

19 MS. BURKS: I, in polling my officers,  
20 that issue has not been raised. Our difficulties in  
21 obtaining documentation have more to do with resources  
22 available to assist with that in other areas, or the  
23 documentation that's even just available, you know,  
24 abstracts out of California, I don't want to bash  
25 California, but there seems to be a common theme that

1 that's where we have the most difficulty getting  
2 documentation to support that prior conviction. But age  
3 of that prior conviction or remoteness has not been  
4 raised by any of my officers that I've talked to. Now,  
5 that doesn't mean that's not the case, but I would  
6 suspect that it would have come up in our discussions of  
7 difficulty in getting documentations if it was well,  
8 this, if the convictions that are the underlying are so  
9 remote that we can't get the documentation, I'm not  
10 hearing that.

11 MR. SANCHEZ: Same way here. Surely it  
12 would help, but I believe, just based on the  
13 prosecutorial practices in Western Texas, I would think  
14 that the, I'm taking a guess here, that the, most of the  
15 cases would be, are freshly new. I don't think they're  
16 very dated. That's just based on my experience.

17 MS. BURKS: You know, what's common in  
18 Texas is that the apprehension is happening in the  
19 detention facility. An immigration officer is  
20 stationed, and therefore, as they're coming in and being  
21 incarcerated on a new arrest.

22 COMMISSIONER HINOJOSA: You mean at the  
23 county jail, to make it clear?

24 MS. BURKS: Yes. In fact, in Harris  
25 County, the county employees, the jail employees have

1     been trained to do the paperwork, and so there's a  
2     fresh, you know, they've got fresh, a new population  
3     coming in constantly, and we're not hearing remoteness  
4     as being an issue on prior convictions.

5                   COMMISSIONER HINOJOSA:  Just to follow up  
6     on that, another thing that we're concerned about, and  
7     we're looking into at this point, relates to recent city  
8     and status points, and particularly how those factors  
9     impact the 2L1.2, in fact all of the immigration cases,  
10    illegal reentry cases in particular, though.  Do you  
11    think that that's an area of concern that we should  
12    address?  Particularly, the reason I ask the question is  
13    if you get a person in a county jail, then of course  
14    it's a continuing crime, is it not, so as a result,  
15    then, you know, you're going to get [a] fairly significant,  
16    well, three-point increase in most cases.  It impacts  
17    these cases more than, aside from 2K2.1, than any other.  
18    Any concern about those points?  Are they too many, too  
19    few?

20                   MR. SANCHEZ:  We have not heard of any  
21    concern from the field applying the points, but we are  
22    aware that sometimes one conviction can lead, obviously,  
23    to three points, but we have not heard any.

24                   MS. BURKS:  To be frank, officers come to  
25    this many times from the standpoint of how difficult is

1 it to move this volume of work, and the recency  
2 adjustment is not difficult to do. What's causing more  
3 of an issue is getting the documentation and doing the  
4 analysis and following the case law, which is much more  
5 dynamic, if you will, than perhaps the case law  
6 affecting the computations in the drug guideline, and  
7 just keeping up with that, in our circuit, is also a  
8 significant challenge.

9 COMMISSIONER HINOJOSA: I guess the  
10 question is more in the line of do you find that adding  
11 six points, for example, for the last illegal reentry,  
12 instead of three points -

13 MS. BURKS: Well -

14 COMMISSIONER HINOJOSA: - not that it's  
15 difficult -

16 MS. BURKS: It's too severe.

17 COMMISSIONER HINOJOSA: - but do you get  
18 comments either from what's reported to you as to what  
19 the judges are doing with regards to those points and  
20 how they're viewing them, is that too much or -

21 MS. BURKS: Is it too severe, sure,  
22 that's the question. I don't have feedback that it's  
23 too severe. Now, that's - I don't have feedback.  
24 That's the only answer I can give you.

25 COMMISSIONER HINOJOSA: All right.

1                   COMMISSIONER FRIEDRICH: Do you in the  
2 probation office typically, in those cases, recommend  
3 the state provide potential departure grounds? Is that  
4 a ground you might give in a case like that, to the  
5 overrepresentation?

6                   MS. BURKS: I don't think, in Texas  
7 Southern, that we're routinely recommending a departure  
8 based on overrepresentation of the criminal history  
9 because of those two adjustments.

10                   MR. SANCHEZ: Depending on the condition,  
11 yes, we sometimes will put the standard language that  
12 this can be. Well, we can alert the court and the  
13 parties, we won't recommend it, but we will alert the  
14 court and the parties that there should be a departure.

15                   MS. BURKS: Because of the recency  
16 factors.

17                   MR. SANCHEZ: Correct, correct.

18                   MS. BURKS: I'm not saying that they  
19 don't make, include that information because of an  
20 overrepresentation. I just don't have information that  
21 it's tied to the recency issue.

22                   MR. SANCHEZ: A perfect example would be,  
23 and we see this commonly in the border area, where one  
24 of the offenses could be a simple reentry, where he or  
25 she was attempting and was taken prisoner. Well, there

1 was a need. Before you know it, that's what, four, five  
2 points on a entry case. So at some point that would  
3 definitely be identified. So it varies, depending on  
4 the condition itself, the type of offense.

5 CHAIR SESSIONS: Mr. Sanchez, I was  
6 looking at your statistics and noticed that roughly two  
7 percent of your cases have a fast track. My guess is  
8 that probably -- is that right? Because there seems to  
9 be, at least in 2008, a two percent reduction for other  
10 disposition programs, departure, and I'm wondering  
11 whether that suggests that there must be a split among  
12 your courts as to whether some particular division of  
13 the Western District has a fast track and whether one  
14 doesn't, and I just wonder if that is the case, and then  
15 what does that mean for a district-wide, well, view on  
16 fast track? Because if there's a difference as to when  
17 are you going to fast track based upon where you crossed  
18 the border, how does that relate to your concern about  
19 fairness across the district or the circuit?

20 MR. SANCHEZ: In the Western District, we  
21 don't per se practice the fast track district points.  
22 There are some chambers that do practice the fast track.  
23 What we do have, though, which is, I believe, germane to  
24 Western Texas is, and we call these worksheets, we  
25 process simple immigration cases pretty fast in that we

1 don't, the judge does not order a full presentence  
2 investigation. They rely on us to prepare what you call  
3 a worksheet and sentencing script to process the case  
4 faster. But it would not come along with a downward  
5 departure. So it, we don't do fast tracks, but we do  
6 other expediting sentencings throughout the district at  
7 this time.

8 CHAIR SESSIONS: Well, did you say that  
9 some judges do that on their own? Is that -

10 MR. SANCHEZ: It's my understanding in El  
11 Paso, that's my understanding, that in El Paso they've  
12 done fast track.

13 MS. BURKS: Well, that would be a  
14 presentence waiver. Correct? They're waiving the  
15 presentence investigation, and that waiver? I don't  
16 know what you mean.

17 MR. SANCHEZ: You're saying faster,  
18 you're saying with a departure. Correct?

19 CHAIR SESSIONS: Well, right. Yes,  
20 that's what I was looking at.

21 MR. SANCHEZ: No, and that's not commonly  
22 practiced. What we do is we just expedite sentences  
23 pretty quick, but we don't apply the departure.

24 CHAIR SESSIONS: But there are some  
25 judges in El Paso that do that?

1 MR. SANCHEZ: Correct.

2 CHAIR SESSIONS: It varies? Is that the  
3 way -

4 MR. SANCHEZ: It varies, correct.

5 COMMISSIONER HINOJOSA: There may be a  
6 difference in the districts, and I want to ask you if  
7 you have this impression. My impression is that some  
8 districts in Texas, and certainly in some divisions,  
9 illegal reentry cases, we're not talking about  
10 transporting illegal aliens, but illegal reentry cases  
11 are not brought unless there's a serious prior record or  
12 several misdemeanors in the past, that the number of  
13 zero-to-six-month sentences is smaller than perhaps when  
14 you have operations streamlined where everybody's being  
15 brought in, and so my question is in your districts,  
16 what is the policy? It seems like in the Southern  
17 District of Texas, at least my impression is that there  
18 has to be some prior record in order to be brought as a  
19 felony.

20 MS. BURKS: Yes, sir. We don't often see  
21 illegal, simple illegal entry. Typically, there is an  
22 aggravated felony, looking at a ten-year or 20-year  
23 penalty, most often 20-year, because the volume, well,  
24 there's just too much to support going to the felony.

25 MR. SANCHEZ: In Western Texas, Operation

1 Streamline has had very little impact on our agency  
2 because the majority of cases processed are actually  
3 petty offenses, the majority of our cases that come in  
4 through at the border.

5 COMMISSIONER HINOJOSA: You mean the  
6 majority of Operation Streamline cases.

7 MR. SANCHEZ: Right, the majority are  
8 petty offenses, correct, so it does not impact us. It  
9 does not impact our work load.

10 MS. BURKS: And Texas Southern, as well,  
11 although we do provide some assistance to the Laredo  
12 Division for the magistrate on the petty offenses for  
13 sentencing purposes, but not, we don't do full PSIs. In  
14 Texas Southern, we have early disposition programs in  
15 Laredo and Brownsville and McAllen on transporting  
16 cases, according to the U.S. Attorney's Office. We do  
17 not have it in Houston or Corpus Christi.

18 COMMISSIONER WROBLEWSKI: Just one quick  
19 question. As you talked about something just now, there  
20 have been a lot of options that have been floated over  
21 many years about how detailed 2L1.2, but the same issues  
22 come up about criminal action, or about prior criminal  
23 convictions. Do you have a preference as to some of  
24 those options? We've heard everything from expand the  
25 list of crimes that are enumerated to looking at

1 sentence imposed, time served. Any comments?

2 MR. SANCHEZ: I recall several years ago  
3 we had, they were looking at several options, and I  
4 remember our district looking at the options, and what  
5 we found most appealing was the one that was pretty  
6 simple that applied a, an adjustment according to the  
7 disposition of the prior conviction.

8 COMMISSIONER WROBLEWSKI: I'm not sure I  
9 understand what that means.

10 CHAIR SESSIONS: The sentence.

11 MR. SANCHEZ: Correct. It was based on  
12 the sentence of the prior conviction, instead of looking  
13 at the offensive conviction, but that was, that was just  
14 a very simple option.

15 COMMISSIONER WROBLEWSKI: Yeah. I mean the  
16 problem with all these options is they're too broad, and/  
17 or too narrow.

18 MS. BURKS: Exactly. We looked at the  
19 same options, I believe that was in 2006 that was for  
20 the comments for the public hearing, and we weighed in.  
21 I think we ultimately decided on option four, which  
22 basically tweaked the definitions to try to make them  
23 more similar. Although there was an option five that I  
24 believe, if memory serves me, option five was very broad  
25 and it just started at a high offense level and then you

1 subtracted from there, but it really was not adequate to  
2 cover all of the possibilities. But frankly, it was  
3 pretty attractive to probation officers at the time,  
4 because then the burden would be in the opposite, coming  
5 from the opposite direction. Offense level would be  
6 established high, and then there would have to be  
7 justification to come down from it. At the time, I  
8 recall 40.1 percent of the cases in the Commission's  
9 data, 40.1 percent of the illegal reentries involved the  
10 16 level increase, so there seemed to be some  
11 justification, or at least some rationale, to reversing  
12 the guideline and starting with a high base offense  
13 level and then subtracting from it based on certain  
14 factors, versus increasing, but it wasn't fully fleshed  
15 out, and it really wasn't totally workable.

16                   And I was just speaking with Commissioner  
17 Friedrich before we reconvened, and we don't have an  
18 answer, and I recognize how awkward that is. We come  
19 and we say give us relief, we need some help, but we  
20 don't really know how to do that, but that, I mean  
21 we've - it's not an issue that just came up last week.  
22 We've all been looking at the struggle for a number of  
23 years, but it remains a very important issue because,  
24 from my perspective in Texas Southern, you know, a lot  
25 of the testimony today has been about evidence based

1 practices and reentry programs and other things that are  
2 happening in community corrections, and we struggle,  
3 given the responsibility that we have with these  
4 immigration cases and the amount of energy and work  
5 hours that have to go into doing them correctly, it's,  
6 it's difficult, then, to have adequate resources to do  
7 these other things. Now, that's not to say that we're  
8 not doing them. In fact, this week we actually have  
9 evidence based practice training going on in McAllen,  
10 we've done employment specialist training, we have a  
11 number, we have a reentry court program in one of the  
12 divisions. We are doing things. But it's, it's  
13 incredibly difficult to free up resources to look at  
14 those things and implement, because so much is going to  
15 this, and so we had to come to you today and say this  
16 continues to be the primary area, at least from Texas,  
17 my view, probation, Texas Southern.

18 MR. SANCHEZ: And it's the same for  
19 Western Texas.

20 CHAIR SESSIONS: All right. Well, thank  
21 you very much. And thank you for your forthrightness.  
22 We really appreciate you spending this valuable time  
23 with us and sharing your views, and thank you very much  
24 for coming. So let's adjourn.

25 (Recess taken from 12:38 to 2:10.)

1                   CHAIR SESSIONS: Let's call this to  
2 order. Again, first of all, to the three of you, I want  
3 to apologize for us starting late. I will say that we  
4 engaged in a really interesting discussion, and as is my  
5 habit, sometimes, I was just looking at the people  
6 talking and not looking at the watch, and so I apologize  
7 for the delay.

8                   We look forward very much, having read  
9 your presentations, to this panel. So let me begin by  
10 making introductions.

11                   First, Julia O'Connell is the Federal  
12 Public Defender for the Northern and Eastern Districts  
13 of Oklahoma. You must do a lot of traveling.

14                   MS. O'CONNELL: Oh, love it, love it.

15                   CHAIR SESSIONS: Prior to her 2007  
16 appointment as Defender, she served as an assistant  
17 defender in the same office from 2001 to 2007, and in  
18 1997 she was an assistant public defender in Tulsa  
19 County, Oklahoma from 1990 to 1996 and 1998 to 2000. And in 1998 she received a Bachelor  
20 of Science degree from the University of North Dakota,  
21 in 1980, and her law degree from the University of Tulsa  
22 in 1989.

24                   Next, Jason Hawkins is the first  
25 assistant federal public defender in the Northern

1 District of Texas. He previously served, from 1999 to  
2 2001, with the Federal Defender's Office for the  
3 District of Arizona. He clerked for the Honorable Royal  
4 Furgeson, a good American.

5 MR. HAWKINS: A great American.

6 CHAIR SESSIONS: That's what I hear.  
7 That's right. He's a great American.

8 MR. HAWKINS: Thank you.

9 CHAIR SESSIONS: Then United States  
10 district judge for the Western District of Texas. Now  
11 he's a senior judge. And he clerked with him from  
12 February of 1997 to May of 1999. Mr. Hawkins received a  
13 Bachelor of Arts degree from SMU in 1992, and a law  
14 degree from St. Mary's University School of Law in 1995.  
15 Welcome.

16 MR. HAWKINS: Thank you.

17 CHAIR SESSIONS: And next, William  
18 Gibbens, who's a CJA panel attorney, district  
19 representative from the Eastern District of Louisiana.  
20 He's been an associate at the New Orleans law firm of  
21 Schonekas, Winsberg, Evans and McGoey?

22 MR. GIBBENS: McGoey.

23 CHAIR SESSIONS: McGoey, thank you, since  
24 1996. He served as an assistant United States attorney  
25 in the Eastern District of Louisiana from 2002 to 2006.

1 He was a law clerk for the Honorable Edith Brown  
2 Clement. He received a Bachelor of Arts degree from the  
3 University of Virginia and a law degree from the  
4 University of Virginia School of Law in the year 2000.  
5 So welcome.

6 MR. GIBBENS: Thank you.

7 CHAIR SESSIONS: Unless you have, among  
8 the three of you, decided an order which is inconsistent  
9 with our order -

10 MS. O'CONNELL: We have.

11 CHAIR SESSIONS: Oh, you have?

12 MS. O'CONNELL: We have.

13 CHAIR SESSIONS: Okay. So who's going  
14 first?

15 MR. HAWKINS: I drew the black bean.

16 CHAIR SESSIONS: Great. All right.

17 Mr. Hawkins.

18 MR. HAWKINS: Good afternoon, Mr. Chair,  
19 and Commissioners. Thank you for giving me the  
20 opportunity to appear before you today.

21 In preparing my testimony, I looked over  
22 the list of questions that the Commission had submitted  
23 to us, and of course, the very first one was what effect  
24 did *Booker* have on the advisory nature of the  
25 guidelines. And I can tell you that in the Northern

1 District of Texas, the guidelines are doing, they're  
2 alive and doing quite well.

3 Following the Supreme Court's decision in  
4 *Booker* -

5 CHAIR SESSIONS: Even after Joe Kendall  
6 left the bench, they continue to do well?

7 MR. HAWKINS: Quite well. Not quite as  
8 well, but quite well.

9 Following the Supreme Court's decision in  
10 *Booker*, the Northern District of Texas has been much  
11 more reluctant to vary downward from the guidelines in  
12 most districts. In 2006, the non-government sponsored  
13 downward variance rate in the guidelines was about six  
14 percent, took place in about six percent of the cases.  
15 However, the latest statistics show that the rate's  
16 doubled, and it's up to about 12.5 percent, and we're  
17 still not quite up to the rate that the government is of  
18 15.8 percent, but we're getting a little bit better at  
19 it.

20 And to that end, I really attribute that  
21 to two main reasons. And it's actually something that  
22 Judge Conrad had testified to earlier in Atlanta, and  
23 Judge Cauthron testified to today. I think we in the  
24 defense community have been able to put the passion back  
25 in sentencing, in making our sentencing arguments. I

1 think that one of the unintended consequences of the  
2 mandatory guideline system was that all we had to argue  
3 about was whether a guideline subsection applied.

4           It's no secret that 95 percent of the  
5 defendants plead guilty, and at that stage of the  
6 sentencing process, under the mandatory *Booker*  
7 guidelines, I'd say my role as a defense attorney was  
8 reduced to that of pretty much a mere accountant, six  
9 plus six plus four minus three equals 13. Your criminal  
10 history category is three. That gives you a guideline  
11 range of 18 to 24 months. And I was there to argue the  
12 margins. And I say that I was there because during that  
13 time, at least in the Northern District of Texas, the  
14 assistant United States attorney would rarely say  
15 anything at the sentencing. He or she wouldn't have to,  
16 because the guidelines had done their job, and that was  
17 to put the defendant in prison. I think it's  
18 dramatically changed for the better.

19           No longer are we left to argue about  
20 whether a sentence of imprisonment is more appropriate,  
21 but we have the opportunity to argue that an alternative  
22 to incarceration is a better way of putting the  
23 defendant back on the right path so that he or she will  
24 never come before the court again. And you know, I  
25 guess I think that's in part because defense attorneys

1 are putting the passion back into sentencing.

2 I appreciate the fact that the Commission  
3 has made alternatives to incarceration one of its  
4 priorities for the amendment cycle. I believe that the  
5 reason the judges in my district do not sentence people  
6 to probation over other alternatives is because the  
7 guidelines don't encourage them to do so. Although  
8 about one-third of our cases, at least in the Northern  
9 District, involve clients that are not citizens,  
10 two-thirds of them are. The root evil of many of our  
11 clients' problems have to do with substance abuse, and  
12 now we're able to argue that there's an alternative  
13 sentencing involving treatment. As the Attorney General  
14 has recently stated, I think the low level of, the  
15 incarceration of low-level drug offenders is, I'm  
16 paraphrasing, but it's close to outrageous. We're  
17 putting nearly everybody in prison.

18 In Texas, we see a good number of  
19 methamphetamine addicts, and they distribute  
20 methamphetamine or supply pseudoephedrine to people who  
21 are cooking this horribly addictive drug to support  
22 their own habits. These offenders, we believe, should  
23 be given the opportunity to receive evidence based  
24 sentences geared towards addressing their addiction and  
25 increasing public safety, rather than a one-way ticket

1 to prison that existed previously.

2 Commissioner Wroblewski, I believe that  
3 you asked the earlier panel of district judges, you said  
4 we've got all these competing interests, and how do we  
5 bring all the parties together, and that's a difficult  
6 question, and I don't, I would not want to be in your  
7 position. But one of the things that I think that the  
8 Commission can do is to provide information to the  
9 district courts, provide information to Congress about  
10 what's working and what isn't. And I think it starts  
11 with the Commission here. I don't know that you can  
12 bring all the parties together, but I think the  
13 Commission can better inform people of what works and  
14 what doesn't.

15 In the past, there was little point in  
16 making argument that our client was deserving of a  
17 downward departure because the downward departure  
18 grounds were few. Some of those factors that people  
19 might consider mitigating were discouraged, and in our  
20 experience, if the government appealed any downward  
21 departure, there was an overwhelming possibility, in the  
22 Fifth Circuit, that that, that that sentence was going  
23 to be reversed. Indeed, I think that's probably, as  
24 stated today, that's why district judges are varying  
25 instead of issuing downward departures.

1                   And that brings me to the second point  
2     I'd like to make of why I believe that the downward  
3     variance rate has doubled since 2006, at least in the  
4     Northern District of Texas, and that's the standard  
5     review on appeal. District courts now have a very clear  
6     picture from the Supreme Court as a result of *Gall* and  
7     *Kimbrough*, that as long as they calculate the guidelines  
8     correctly and then provide substantial reasons for the  
9     sentence, whether it be within the guidelines or whether  
10    they're going to vary from the guidelines, the district  
11    court, the people that are there in the trenches that  
12    get to see the defendant, get to see his family, get to  
13    see the victim, that decision is not going to be  
14    reversed, and I think that puts us in a better place.

15                   I agree with the defenders that have  
16    testified, the district judges that have testified also,  
17    that the current abuse of discretion standard of review  
18    for sentencing decisions strikes me as the appropriate  
19    balance between the district and appellate courts.

20                   Procedural reasonableness review in the  
21    Fifth Circuit has made sure that errors that affect the  
22    kind or length of sentences, like improperly calculating  
23    the guidelines, or clearly erroneous fact finding, the  
24    Fifth Circuit is going to reverse those sentences and  
25    send them back down so they can be remedied, remanded

1 and recalculated. The Fifth Circuit has reversed  
2 sentencing where the district court failed to provide  
3 adequate reasons why it was giving the sentence it was.

4           The one thing that I have noticed is  
5 that, unfortunately, there have been some troubling  
6 decisions from the Fifth Circuit recently, where the  
7 district court improperly calculated the guideline  
8 range, but at the sentencing, the district court stated  
9 it would have imposed the same sentence anyway, under 18  
10 United States Code § 3553(a). Unlike other  
11 circuits, the Fifth Circuit doesn't require sentencing  
12 courts to explain in any detail why an alternative  
13 sentence, which often represents a substantial upward  
14 variance from the properly calculated guideline range,  
15 achieves the goals of 3553(a). This ruling by the Fifth  
16 Circuit, it acts to inoculate the district court's  
17 decision from appellate review, frankly, and I think it  
18 further masks to the Sentencing Commission whether the  
19 actual sentence given was a guideline sentence or an  
20 upward variance. I don't, I don't think the Commission  
21 will be able to, you know, perform part of its function  
22 of determining which guideline the judge disagrees with  
23 and revise the guideline accordingly under these  
24 circumstances.

25           But that said, the district courts that

1 do this are few and far between, and so are those  
2 decisions. And I make this observation not because I  
3 think the Commission can or should take action aimed at  
4 giving the appellate standard of review more teeth, but  
5 I think this practice violates the Supreme Court's  
6 decision in *Gall*, and we're seeking a review of these  
7 decisions before the Supreme Court now.

8 I think the Commission could hold a more  
9 meaningful review, excuse me, a more meaningful  
10 procedural review of sentences by providing relevant  
11 information to consider when determining the appropriate  
12 sentence under 3553(a). I note that the Fifth Circuit  
13 has affirmed a number of sentences where the district  
14 court cited the need for deterrence in support of an  
15 unexplained sentence, or what turned out to be a sizable  
16 upward variance. This decision is based upon, you know,  
17 the belief that a long term of imprisonment supports the  
18 goals of deterrence, when, in fact, the current body of  
19 research shows that that's just not true. Instead it  
20 shows that certainty of punishment, not the length of  
21 punishment, has much more significance.

22 I would urge the Sentencing Commission to  
23 publish a review of this research to better educate all  
24 of us about the current knowledge regarding the term of  
25 effective incarceration. I must admit that this is part

1 of my job as an advocate, but what I have found is the  
2 district courts are much more willing to listen to  
3 something that comes from an independent clearinghouse  
4 of information, like the Sentencing Commission, more  
5 than they would probably from me.

6 Judge Hinojosa, I repeatedly used your  
7 testimony before the Senate subcommittee -

8 COMMISSIONER HINOJOSA: But were you under oath?

9 MR. HAWKINS: No, but you were. I  
10 repeatedly used your testimony in the Senate subcommittee,  
11 arguing before the district court that look, they agreed  
12 that the crack to powder ratio isn't working. It should  
13 be, at a minimum, less than 20 to one. And the district  
14 courts listened to that.

15 The Commission has access to all of this  
16 wonderful data, and it can be used as a powerful  
17 independent clearinghouse of information as to what type  
18 of sentence does and does not work in stopping people  
19 from reoffending, and I think that's what the main goal  
20 should be.

21 To that end, I'm looking forward to the  
22 Commission's report on mandatory minimum sentences. I  
23 join a long line of judges, defenders and other  
24 witnesses who have urged the Commission to recommend to  
25 Congress that it repeal or at least significantly reduce

1 the mandatory minimum sentences.

2           Mandatory minimums, they are a powerful  
3 tool prone to abuse in the hands of untamed and  
4 unchecked prosecutors. The dramatic effect these  
5 mandatory minimums have on a sentence, and the  
6 powerlessness of a district court or appellate court to  
7 reduce the impact of these mandatory sentences can  
8 result in just barbaric sentences, in my estimation.  
9 The only check or balance on the mandatory minimum  
10 sentence is the decision of a prosecutor, who's a  
11 fallible human being like the rest of us.

12           These mandatory minimums promote  
13 disrespect for the law, and nowhere in my experience has  
14 this shown itself to be true more than in the case of  
15 Mary Beth Looney, which I provided in my testimony.  
16 Mary Beth Looney was a 53-year-old woman who had never  
17 been arrested, much less convicted. Her husband Donald  
18 Looney began transporting methamphetamine from Arizona  
19 to be distributed in Wichita Falls. Mary Beth Looney  
20 and her friend LaDonna Harris became involved in the  
21 sale of minor portions of this methamphetamine. LaDonna  
22 Harris and Mary Beth Looney drove just across the board  
23 from Wichita Falls to a casino in Oklahoma. They ended  
24 up selling some of this methamphetamine to customers,  
25 and one of those customers was an undercover agent.

1 They made approximately four sales to the undercover  
2 agent. The other undercover agent wanted a bigger  
3 supply. He wanted a bigger amount. And so they  
4 arranged for him to come back to Wichita Falls so they  
5 can sell him this amount.

6 Eventually, they showed up with this  
7 methamphetamine. Mary Beth Looney, her husband, and  
8 LaDonna Harris were all arrested.

9 LaDonna Harris was taken up to the  
10 Western District of Oklahoma, and she was indicted on  
11 three counts, a three-count indictment that did not  
12 contain a mandatory minimum, but contained a statutory  
13 maximum of 20 years. LaDonna Harris pled guilty, and  
14 she was given a sentence of 37 months.

15 Mary Beth Looney was not so lucky. She  
16 was charged with two 10-year mandatory minimum counts, a  
17 five-year gun count, and a 25-year gun count, in the  
18 Northern District of Texas by the prosecutor here. She  
19 had no choice but to go to trial. Mary Beth Looney  
20 received a sentence of 45 years, due to the mandatory  
21 minimums.

22 LaDonna Harris was released from prison  
23 in 2007. Mary Beth Looney won't be eligible to be  
24 released from prison in the Northern District of Texas  
25 until she's 98 years old. These are the same

1 transactions, the same drugs, the same guns that were -  
2 LaDonna Harris knew about the guns. She stayed in their  
3 house. She used the guns no more than Mary Beth Looney  
4 did. The only difference in this case was the  
5 prosecutor.

6 I would like to speak to the issue that  
7 has arisen previously about whether mandatory minimums  
8 invoke cooperation or that they're necessary. And I can  
9 speak from my experience. That has simply not been the  
10 case. As much as I generally try to talk my clients out  
11 of cooperating, and the reason why, because cooperation  
12 in the Northern District of Texas generally involves a  
13 moving target. There either has to be an arrest or you  
14 have to testify, and despite your best efforts, you're  
15 going to get no more than two to three levels off. My  
16 clients are still willing to testify, mandatory minimums  
17 or not, and I think the statistics bear that out.

18 With regards to some guideline changes,  
19 I'd like to, you know, briefly talk about two or three  
20 areas there. The child pornography guidelines, again, I  
21 join everybody who I've heard testify, and I see most  
22 recently the chief judge of the Fifth Circuit, Edith  
23 Jones has also asked the Commission to reconsider the  
24 guidelines for child pornography.

25 The ranges recommended in these cases all

1 too often reflect a life sentence. Just like Judge  
2 Moore testified in Georgia, just like the three district  
3 judges testified here today, the lion's share of my  
4 clients are middle-aged men that are simply social  
5 misfits. They have no prior convictions. When we have,  
6 you know, we try to determine whether or not they're a  
7 danger to children, we had them evaluated, it turns out  
8 that they're not, yet these guidelines punish them as  
9 though they have touched children, and it gives them a  
10 life sentence and something that they can never recover  
11 from. I urge the Commission to study and report on the  
12 possession of child pornography and whether it actually  
13 correlates with child exploitation, and to revise the  
14 guideline to distinguish between differently situated  
15 offenders on a rational basis grounded in research.

16 I'd also like to address the acceptance  
17 of the responsibility provision. In a fairly recent  
18 stance taken by prosecutors in the Northern District of  
19 Texas, prosecutors are routinely refusing to move for  
20 the third point for acceptance of responsibility,  
21 despite the fact that we've notified them that we're  
22 pleading guilty, and we've allowed the government to  
23 avoid going to trial.

24 Now that the power to grant this third  
25 point has been taken out of the hands of the judge to

1 make that independent determination, and put into the  
2 hands of the prosecutor, they're using this power to  
3 bludgeon our clients with a longer sentence. They  
4 require us to enter into plea agreements before we've  
5 seen the presentence report, before we know what the  
6 guideline calculations are, and if we refuse to do so,  
7 then they will deny us the third point for acceptance.  
8 I think that this is a corrosive practice that leaves  
9 our clients' belief and my belief in the system of  
10 justice just a little less than it should be.

11           Illegal reentry guidelines. Briefly,  
12 illegal reentry cases, they comprise 16.1 percent of our  
13 case load, and there are more illegal reentry cases in  
14 this district in 2008 than in half the districts that  
15 have applicable fast track programs.

16           The Commission recognizes that the  
17 government's selective use of the fast track program  
18 creates unwarranted disparity because people in  
19 districts without a fast program receive longer  
20 sentences by mere accident of geography. I found it  
21 extremely difficult to explain to my client that he  
22 should have gone to work up in the meat packing plants  
23 in Nebraska instead of chosen chicken packing plants in  
24 Amarillo, Texas. He could have gotten a lower sentence  
25 had he, you know, possibly made that choice.

1                   Troublingly, also, for us, is the fact  
2                   that the Fifth Circuit does not allow a district court  
3                   to account for whether or not the fast track program, if  
4                   it were in place, you know, to allow the district court  
5                   to vary downward. I think that the way the Commission  
6                   can take action to promote a fairer system is a  
7                   guideline comment stating that the district court may  
8                   depart from the guidelines to reduce the unwanted  
9                   disparity created by the absence of fast track programs.

10                   I think also within the illegal reentry  
11                   guidelines, other issues that the court should include,  
12                   excluding from the most severe offense level any prior  
13                   conviction that doesn't meet the definition of  
14                   aggravated felony. I think the Commission should try to  
15                   differentiate between the different levels of  
16                   culpability between 2L1 and [2L]2.2, and by that I mean the  
17                   reason for the defendant actually reentering the  
18                   country. What was his motivation, his or her motivation  
19                   for coming back in? Whether they ever lived in the  
20                   country previously. Have they lived in the country  
21                   previously to which they were deported? Were they  
22                   caught here committing a new crime? And the existence  
23                   or nonexistence of legal status in the country.

24                   I would also ask the Commission to add a  
25                   remoteness cutoff for prior offenses used to increase

1 the offense level. Currently, a prior conviction that  
2 does not count in the criminal history under Chapter  
3 Four, because it falls outside the applicable time  
4 frame, can still be used to increase the level under  
5 2L1.2.

6 Finally, I ask the Commission to  
7 reconsider the enhancement where prior convictions are  
8 double counted when the prior conviction is used to both  
9 increase the offense level, and in the calculation of  
10 the criminal history score. In these sentences, the  
11 ranges, they're almost entirely driven by the double and  
12 triple weighting of the same conduct without a showing  
13 that it serves any purpose in sentencing.

14 In closing, I agree with you Judge  
15 Hinojosa, that this is an exciting time in the  
16 sentencing guidelines, and the Commission has the  
17 opportunity to exercise a tremendous amount of influence  
18 over the system in part by revealing to the courts and  
19 practitioners alike what sentencing practices and  
20 factors work to create a more fair and balanced system.  
21 Excuse me. I think the hallmark of this Commission's  
22 work has been the balanced and diligent efforts to  
23 create true reforms. As an example, I would point to  
24 this court's tremendous work that it did in reforming  
25 the crack cocaine guidelines. Again, I thank you for

1 the work, and I thank you for allowing me to appear  
2 before you.

3 CHAIR SESSIONS: Thank you, Mr. Hawkins.

4 Who's next?

5 MR. GIBBENS: That's me.

6 CHAIR SESSIONS: Go ahead, Mr. Gibbens.

7 MR. GIBBENS: Judge Cauthron mentioned  
8 this morning that she felt her soul returned after  
9 *Booker* came down, and I think that's true of the whole  
10 sentencing process. In my experience, before *Booker*, I  
11 felt sentences were very clinical and technical. There  
12 was very little discussion of the defendants. Now there  
13 is. We talk about the defendants, the sentencings I  
14 think are more individualized. Even the, at least the  
15 process itself is more individualized, even, you know,  
16 regardless of what the outcome is, it's more  
17 understandable. It makes more sense to my clients. I  
18 think it makes more sense to the victims, to the public,  
19 to everyone that's involved, whereas before, you know,  
20 no one, no one would know, besides the judge, the  
21 defense lawyer, the prosecutor and the probation  
22 officer, really what was going on. And I think, I think  
23 that's all good.

24 But I do think there's still room for  
25 improvement. I think the best thing that the Commission

1 can do, I believe, is to remove the last impediments in  
2 the guidelines to downward departures, which I think is  
3 impeding courts from exercising their full discretion  
4 and their duties understand § 3553.

5 I'm in the same district as Judge Zainey,  
6 and I noticed the same statistics that he talked about  
7 this morning, where, in our district, it seems that we  
8 do have a very low departure rate compared to a lot of  
9 other districts in the country, and I think what's  
10 happening in our district is that judges are, they are  
11 being reluctant, they are reluctant to depart or give  
12 variance sentences without a guideline justification,  
13 and that, that's the number one thing that I heard from  
14 other defense lawyers and panel members in my district  
15 when I was telling them I was going to come testify  
16 here. The number one thing that everyone said was, "We  
17 wish there could be, something could be done that we did  
18 not always have to justify a guideline departure when  
19 the courts have the authority to give sentencing  
20 variances now." And I think that in the practice that's  
21 developing in our district, which I don't think is a  
22 good one, is that defense lawyers are always making  
23 their guidelines arguments first, and then sort of  
24 throwing in an argument for a variance at the end,  
25 because I think that what we're seeing happening is that

1 variances are not being granted unless there's a  
2 guideline justification for the departure. And I think  
3 the, all the restricted factors in §5H are still  
4 being, you know, used, are still, at least in a lot of  
5 judges' minds, are impeding them from giving variant  
6 sentences which they are allowed to do now. And I think  
7 to fully implement § 3553, the Commission could  
8 remove some of these restrictions, retool §[5]H of  
9 the guidelines, and I think that would make the process  
10 even better than it is now, than it's become after  
11 *Booker*.

12                   The second, the second problem that I  
13 have seen a lot of lately, and this is something that  
14 several of the district judges mentioned this morning,  
15 is that just over, over the years, so much of the  
16 sentencing, of sentencing power has been concentrated in  
17 the hands of the government, and that's through  
18 mandatory minimums, through §5K1.1 and the safety  
19 valve. Those are really all three things that are  
20 strictly controlled by the government, and they have the  
21 most impact of sentences overall.

22                   Judge Cauthron mentioned this morning  
23 that sentences can be manipulated at the investigative  
24 stage by agents who will just keep going back for hand  
25 to hand drug transactions until they reach a mandatory

1 minimum threshold. And I can say in my district, that  
2 seems to be the practice. And I think the reality is  
3 that the outcome of many of these drug cases is  
4 determined before, before there's even an indictment.  
5 They get the mandatory minimum amount. That's what the  
6 defendants are indicted with. And then unless they can  
7 get a 5K1.1 departure or unless they can get into the  
8 safety valve, they're going to get the mandatory minimum  
9 sentence.

10 I think what's very ironic about this is  
11 that most of the time the government is really the least  
12 interested in the sentencing when it finally occurs.  
13 You know, we now have the defense lawyers arguing  
14 variances and downward departures, and the judges are a  
15 lot more interested in hearing the arguments for  
16 variances and downward departures. Usually, the U.S.  
17 Attorneys don't say anything. They don't object. And  
18 you know, it's ironic that the reality of it is that the  
19 decisions that they make at the inception of the case  
20 are what's dictating the outcome. And I don't, I  
21 personally don't, don't feel in my district that it's  
22 because the U.S. Attorneys really want these mandatory  
23 minimums. A lot of times I don't think that they really  
24 care. I mean, as I said, by the time of the sentencing,  
25 we get to sentencing, they've got the conviction.

1 Whether the defendant gets five years, ten years, 15  
2 years, usually I don't think the assistants have, you  
3 know, a real strong belief on what it is, but just  
4 because of the way the system has been set up, we've,  
5 you know, we're getting, defendants are getting stuck  
6 with these mandatory minimums.

7                   And I mean I have lots of clients and  
8 lots of examples of cases where we have, you know, a  
9 defendant with a, you know, a single parent with a child  
10 who is, you know, going to have to go live with  
11 relatives or go into foster care because the parent is  
12 stuck in a mandatory minimum sentence. There may not be  
13 anybody to cooperate against. The willingness is there.  
14 You know, the meetings with the prosecutors and the  
15 investigators happen, but, you know, there's just, it's  
16 just the 5k motion is not going to come. The motion for  
17 downward departure is not going to come. The assistants  
18 a lot of times feel bad about that, but you know,  
19 there's nothing they can do.

20                   I think there are a couple things that  
21 the Commission can do to alleviate that problem, which  
22 would be, at the least, keep talking about the mandatory  
23 minimums and evaluate them, and maybe recommend to  
24 Congress that there need to be some changes in that.  
25 Also, allowing the government, allowing the defense or

1 the court on its own motion to initiate a 5K1.1  
2 departure I think would, would help in some of these  
3 circumstances, where there has been some cooperation,  
4 but, you know, in the eyes of the government it hasn't  
5 risen to the level of a downward departure, and also,  
6 to expand the safety valve, because very often there are  
7 defendants with one criminal history point who I think  
8 everyone involved would, would like to get them into the  
9 safety valve or like to get them out of the mandatory  
10 minimum, but just can't do it because of, because of one  
11 conviction that, you know, sometimes could be for  
12 something relatively minor.

13                   The third thing that I think the  
14 Commission can do now is offer more explanations and  
15 rationales for the provisions in the guidelines. At  
16 this point, at sentence, you know, sentencing is all  
17 about trying to convince the judge whether or not to  
18 apply certain guideline factors or to depart. I think  
19 if there were more rationales and explanations for why  
20 each of these factors existed, everyone would be better  
21 off, and able to make, you know, better sentencing  
22 arguments. The judges would, would be able to even  
23 give, you know, feedback to the Commission and to the  
24 lawyers in front of them about whether or not they agree  
25 with the rationales and the policies behind the

1 guidelines. And I think the more information that we  
2 all have about, you know, why certain factors and why  
3 certain guideline enhancements are in place would make  
4 it just a much, a much more understandable system and a  
5 much, a much fairer system over the long run.

6 I thank the Commission for the  
7 opportunity to testify, and I did address a few other, a  
8 few other issues in my written testimony that different  
9 members of our CJA panel have, have asked me to, asked  
10 me to include, and I'd be happy to address any questions  
11 that any commissioners have at the end.

12 CHAIR SESSIONS: Thank you, Mr. Gibbens.

13 MR. GIBBENS: Thank you.

14 CHAIR SESSIONS: Ms. O'Connell.

15 MS. O'CONNELL: Thank you.

16 In preparing for testifying, one of the  
17 first things I did was looked at the statistics for my  
18 two districts, and was a little alarmed to see this low  
19 government 5K1.1 below-guideline statistics, below-  
20 guidelines sentence statistics. For 2008, 1.1 percent  
21 of the cases are attributed to 5K1.1 motions, which  
22 equals one case. And I thought that to be odd. And I  
23 sat down with the lawyers that work in that district,  
24 and looked through our cases, and then realized that  
25 Rule 35(b) motions certainly were utilized a lot, and

1 for the life of me I couldn't figure out where I could  
2 get that kind of data. And I think that probably one  
3 thing that I would really like to say is it would be so  
4 helpful to practitioners, I think to the courts, as  
5 well, and to Congress if, if this data was tracked in a  
6 way that was understandable and readily accessible and  
7 not just as it pertains to Rule 35(b) motions, but that  
8 is an example of a place where I personally experienced  
9 just a little bit of frustration.

10 I would like to echo some of the things  
11 that were said this morning. Alternatives to  
12 incarceration is one of the things that I would very  
13 much like to talk about. As with many others who have  
14 testified, I'm very excited to know that that is a  
15 priority.

16 I note, as well, that the Department of  
17 Justice has an interest in alternatives to  
18 incarceration.

19 I was reading earlier Eric Holder's  
20 comments to the ABA at the general meeting, and found it  
21 notable that Eric Holder said that since 2003, our  
22 incarceration rate has continued to grow, although the  
23 crime rate has plateaued. Something is not working.  
24 And Eric Holder, in that speech, said that he, that the  
25 Department of Justice would be looking at many things,

1 including alternatives to incarceration.

2                   Alternatives to incarceration, I think  
3 everyone here recognizes that they are viable, that  
4 there are studies. There is plenty of research that the  
5 Commission could report. There's additional research  
6 that the Commission could do. Some alternatives to  
7 incarceration certainly could bear very directly on the  
8 purposes of sentencing in federal court, and I, for one,  
9 would like to see the Commission urging alternatives to  
10 incarceration.

11                   I do think that one of the most useful  
12 and relevant things that the Commission could do for  
13 practitioners and courts is to provide information,  
14 information that explains guidelines, information that  
15 explains what the guidelines' relationship to the  
16 purposes of sentencing are.

17                   In that regard, I would like to first  
18 talk about Chapter Five of the guidelines, as someone  
19 mentioned that this morning. It is the defender's  
20 position that Chapter Five should, in its current form,  
21 be rendered obsolete. I would urge the commissioners to  
22 suggest to replace Chapter Five with a suggested list of  
23 factors that may provide bases for departures, not to  
24 assign points or levels for those bases, but to instead  
25 provide information, as it becomes available, regarding

1 each of those bases potentially along the lines of other  
2 lists that can be found in the guidelines that are not  
3 meant to be exclusive. But it seems to me that those  
4 not ordinarily relevant factors that are contained in  
5 Chapter Five are, in fact, not consistent with the  
6 purposes, the sentencing, they're not consistent with  
7 the 3553(a) in many ways. And I believe that it would  
8 be appropriate to just inform courts of what the  
9 research says about how each of these various factors  
10 affects the purposes of sentencing.

11 For example, family ties and  
12 responsibilities. When parents are incarcerated, are  
13 the children likely to grow up to be offenders? Those  
14 are things judges want to know about. Does a long  
15 sentence in fact have a correlation, a deterrent effect,  
16 which the research indicates that it doesn't.

17 Mandatory minimum sentences, again, you  
18 know the defender position, but we recommend, we urge  
19 that the Commission recommend to Congress the abolition  
20 of mandatory minimums.

21 Judges find mandatory minimum sentences  
22 disturbing. They've resulted in overincarceration.  
23 They're easily manipulated and therefore prone to abuse,  
24 and they do not encourage cooperation, in my experience.  
25 They absolutely do not encourage cooperation.

1                   I would submit to you that a defendant  
2     who is facing a term of imprisonment, if that person  
3     wants to reduce their term of imprisonment and feels  
4     comfortable cooperating, they are going to do so, no  
5     matter how small the potential sentence is, no matter  
6     how large the potential sentence is. Mandatory minimum  
7     sentences have a corrosive effect on the process. I  
8     discussed, in a couple – from a couple different  
9     angles, the problems that I've experienced relating to  
10    mandatory minimums in my written testimony.

11                   But they are, mandatory minimums are the,  
12    if not the cause of overincarceration in this country,  
13    they're one of the major causes of overincarceration in  
14    this country. Mandatory minimum sentences do not reach  
15    the kinds of people that they are supposed to reach.  
16    Mules, drug mules get punished more because of large  
17    quantities that they're carrying, whether they truly  
18    know how much it is or not, in relation to a larger drug  
19    dealer. These kinds of problems don't result in just  
20    sentences. And I think everyone here has a tremendous  
21    interest in sentences that are just.

22                   Mandatory minimums do a lot of damage  
23    across, across the social realm, outside this room and  
24    outside of what we do. I know you've heard before from  
25    the Families Against Mandatory Minimums.

1                   There is value in rehabilitation, as  
2                   opposed to excessive incarceration, which is, in the  
3                   defender's opinion, over-incarceration is the result, the  
4                   unintended result, of mandatory minimums.

5                   I'd also like to talk about the drug  
6                   guidelines and safety valves. The defender position is  
7                   that the drug guidelines should not be tied to mandatory  
8                   minimum sentences. We would urge the Commission to  
9                   consider an across-the-board two-level decrease in the  
10                  drug guidelines.

11                  Drug quantity does not correlate to role  
12                  in the offense. The offender role in drug distribution  
13                  is something that isn't appropriately addressed,  
14                  accurately addressed by the guidelines now.

15                  Low-level offenders are often subject to  
16                  more severe penalties that were intended for higher  
17                  level offenders . The defenders would suggest that the  
18                  Commission consider the drug guidelines that take into  
19                  account role in the offense first, and potentially drug  
20                  quantity second, to effectuate the purposes of  
21                  sentencing.

22                  And as far as safety valve goes, we're  
23                  proposing that the Commission take some action to  
24                  suggest that the safety valve be expanded so that it  
25                  might also apply to persons who are in Criminal History

1 Categories II and III. There are, and I believe  
2 you've heard about it previously, there are offenders  
3 who are excluded from the safety valve because of  
4 offenses that are minor, that are very old, but they are  
5 nonetheless excluded, and their incarceration does  
6 little if any, anything to effectuate the purposes of  
7 sentencing. And so we would submit that the Commission,  
8 request that the Commission undertake that, as well.

9 I'd like to mention the career offender  
10 guideline and talk about it some. The defenders believe  
11 that the Commission should recommend that Congress  
12 repeal 28 [U.S.C.] § 994(h), and in the meantime, that the  
13 Commission should take some other actions to alleviate  
14 the irrational impact of the career offender guideline.

15 The career offender guideline, in our  
16 experience, does not more precisely focus on, to use  
17 guideline words, recidivist offenders for whom a lengthy  
18 term of imprisonment is appropriate. Often, [it] recommends  
19 harsh sentences for petty offenders. I think Judge  
20 Cauthron's example is a prime example of the type of  
21 case that I'm talking about, a person who has, who's  
22 instant offense is a drug offense, and whose prior  
23 predicate offenses, if you will, were minor drug  
24 offenses, whether small amounts, whether sentences that  
25 reflect that clearly the state court or whichever

1 jurisdiction imposed the sentence thought were minor  
2 offenses, as Judge Cauthron's case, I think she said  
3 probation was imposed in those sentences. Someone like  
4 the defendant who is in Judge Cauthron's example has  
5 never been to prison before, is not the kind of person  
6 that the career offender provision should hit.

7 In order to, in order for the guideline  
8 to effectively affect the persons that it's intended to,  
9 we make several suggestions. First, the definition of  
10 "controlled substance offense," it's the defenders'  
11 position that those should only be, those should be  
12 limited to federal offenses that are required in §  
13 994(h).

14 Second, the definition of "crime of  
15 violence" should be amended. Judges are already using  
16 the definition in *Begay* quite a bit, and we would  
17 propose that the Commission use that definition. In the  
18 alternative, the Commission could use an elements test.

19 The third proposition that we make is  
20 that the Commission should amend the definition of "prior  
21 felony convictions" so that it's consistent with title 21,  
22 § 802(13).

23 And lastly, we're suggesting that the  
24 Commission should remove the limit for departures from  
25 criminal history – departures in the career offender

1 guideline of one criminal history level. The limitation  
2 adopted in response to the PROTECT Act was not required  
3 by the Act, and it's our position that the Commission  
4 should remove it.

5           Child pornography is another guideline  
6 that I would like to talk about. You've heard plenty  
7 about that today. But the sentences that are meted out  
8 in child pornography cases do not bear a rationale  
9 relationship to the purposes of sentencing. They don't  
10 reflect what is generally the low recidivism rate for  
11 the people who are guilty of possessing child  
12 pornography.

13           This is an area in my practice where  
14 judges will listen and will impose sentences below the  
15 guidelines, if they are presented with the information  
16 relating directly to the defendant's propensity for  
17 recidivism or the defendant's amenability to treatment.  
18 Often, if not frequently, the defendants that my office  
19 represents in child pornography possession cases are  
20 people who have sometimes startling backgrounds, the  
21 victims of sexual abuse, victims of molestations, and  
22 almost always, when they are evaluated by the experts  
23 that we hire, we are told that they don't pose a risk,  
24 or if they do, they pose a low risk of actually touching  
25 a child. That is these people are not predators in that

1 sense, and the sentences that they get make them out to  
2 be.

3                   The consequences relating to the  
4 possession of child pornography, outside of the prison  
5 sentence and how the guidelines impact them, are so  
6 draconian, people can't integrate back into their  
7 communities, because they're restricted on where they  
8 can live. Oftentimes they cannot be reunited with their  
9 families unless everyone moves away from a school or a  
10 daycare center or a library, and in rural Oklahoma,  
11 that's very difficult to do. So many of the Eastern  
12 District communities are three or four or five blocks  
13 long, and someone who lives in one of those towns is  
14 inevitably too close to a school. Their names are on  
15 websites. They've got to register as sex offenders.  
16 They're identified on their driver's license as sex  
17 offenders. Consequences are tremendous. And the kinds  
18 of sentences that they receive as a result of the  
19 guidelines border on absurd.

20                   I'd like to talk about acceptance of  
21 responsibility. That's §3E1.1(b). Mr. Hawkins  
22 already mentioned this, but this is something that I  
23 really want to talk to you about, as well.

24                   I would urge that the Commission  
25 recommend that Congress repeal the government's motion

1 requirement for the third level for acceptance of  
2 responsibility. It is something that it has become so  
3 prone to abuse, and what originally we, defenders,  
4 thought was the ability to recommend an additional  
5 level, the government's ability to recommend an  
6 additional level for a defendant by assisting them to  
7 avoid preparing for trial, that's turned into doing  
8 almost any work.

9           The government and its use of the third  
10 point motion as a tool to extract a lot more than a  
11 guilty plea has risen dramatically. I talk about it in  
12 my written testimony, as well. This is something that  
13 the Commission certainly could remedy by explanation and  
14 commentary. What is the third level, what is the  
15 conduct that the defendant has to engage in? We've  
16 suggested some language, which is in my written  
17 testimony. But it's our position that any conduct that  
18 the defendant engages in or fails to engage in that  
19 doesn't cause the government to prepare for trial should  
20 not be a factor that allows the government to withhold  
21 the third point motion. And we would urge the  
22 Commission to clarify that.

23           I would like to also talk about some of  
24 the things that Judge Cauthron had to say regarding  
25 getting her soul back. I was pleasantly surprised to

1 hear her say that, because to answer the question that  
2 was put to us by the Commission when we were invited to  
3 testify, one of the benefits that I see to the system  
4 now, to the advisory sentencing guidelines system, is  
5 that it has given me my soul back.

6           It has been a difficult time, the last  
7 several years, walking with a man or a woman about to be  
8 punished and having to say to them honestly, no, that  
9 doesn't matter, or yes, it matters, but only between the  
10 top end and the bottom end of this range. People are  
11 very individual, and those individualities speak greatly  
12 to whether they will reoffend, to whether or not  
13 incarceration is really necessary to protect the public,  
14 whether or not treatment or some other, some other  
15 alternative would be more appropriate.

16           Now I find that I am able to go to court,  
17 and whether I win or I lose, whether the defendant gets  
18 a big sentence or a small sentence, I walk away from  
19 sentencing hearings now feeling as though I was heard,  
20 the defendant was heard, his side was heard, and that  
21 the court had the ability to make the sentencing  
22 decision based not solely on the conduct that resulted  
23 in the conviction, but also in all of the factors that  
24 speak to 3553(a), the purposes of sentencing.

25           We are all here because we want justice.

1 We want the system to work as best as it can. I think  
2 the best possible thing that the Commission can do now  
3 is to provide information, data to sentencing courts and  
4 practitioners. I would find that useful. I would find  
5 that relevant, and I know the courts that I practice in  
6 front of would, as well. Thank you.

7 CHAIR SESSIONS: Thank you,  
8 Ms. O'Connell.

9 So, are we up for questions?

10 COMMISSIONER FRIEDRICH: Ms. O'Connell,  
11 in your written testimony, you talked about § 994(e) the  
12 format.

13 MS. O'CONNELL: Uh-huh.

14 COMMISSIONER FRIEDRICH: And as you know,  
15 that provision directed the Commission to assure that  
16 the guidelines reflect the general inappropriateness of  
17 considering education, employment records, family ties  
18 and responsibilities and community ties, and  
19 recommending a term of imprisonment or length of a term  
20 of imprisonment. And if I'm understanding the  
21 defender's position correctly, you read that provision  
22 to direct the Commission not to consider these factors  
23 in deciding that a defendant should be sentenced to  
24 prison, as opposed to probation, but also direct the  
25 Commission to not consider those factors in determining

1     how long a defendant's sentence should be. Right? Am I  
2     reading you right?

3                     MS. O'CONNELL: Yes.

4                     COMMISSIONER FRIEDRICH: Okay. But as I  
5     read your testimony, you suggest that it is okay for the  
6     guidelines to consider these factors in order to  
7     recommend a lower sentence, but not a higher sentence.  
8     Am I right?

9                     MS. O'CONNELL: No, you're not.

10                    COMMISSIONER FRIEDRICH: Okay. What I,  
11     what I, and I'm on page five of your testimony.

12                    MS. O'CONNELL: Uh-huh.

13                    COMMISSIONER FRIEDRICH: You say, the  
14     list of factors should not be used to choose prison or  
15     probation, which I understand, or a lengthier prison  
16     term. Right? A longer prison term. But I read the  
17     testimony, maybe I've read it incorrectly, to say it's  
18     okay to consider these factors in reducing a defendant's  
19     sentence. Am I wrong.

20                    MS. O'CONNELL: I don't think that you're  
21     reading what I'm saying accurately.

22                    COMMISSIONER FRIEDRICH: Okay. So if  
23     defenders have repeatedly suggested to the Commission  
24     that we've misread Congress' directive to the Commission  
25     with regard to these factors -

1 MS. O'CONNELL: Yes.

2 COMMISSIONER FRIEDRICH: And that  
3 actually Chapter Five shouldn't discourage the courts  
4 from considering these factors.

5 MS. O'CONNELL: Right.

6 COMMISSIONER FRIEDRICH: Right? In  
7 imposing a shorter sentence. So the way I read your  
8 testimony, I interpret it as a one-way ratchet. It's  
9 okay to consider these factors in order to reduce a  
10 defendant's sentence, but not to increase the  
11 defendant's sentence. And I just, did I just  
12 misinterpret your testimony?

13 MS. O'CONNELL: I'm not talking about  
14 ratchetting sentences up in any direction. I'm not  
15 interested in ratchetting sentences up.

16 COMMISSIONER FRIEDRICH: No. I mean -

17 MS. O'CONNELL: My testimony is directed  
18 at the position that the Commission, in my view and in  
19 the defender's view, the Commission, when it comes to  
20 the departures provisions in 5H and in [5K2], that the  
21 Commission should, instead of assigning values and  
22 numbers, the Commission should -

23 COMMISSIONER FRIEDRICH: Well, I don't  
24 think we assigned values and numbers to these factors.  
25 I think what the Commission has said is that they're not

1 ordinarily relevant in determining. But I interpret the  
2 defender's testimony, your written testimony and  
3 testimony in the hearings as saying things like  
4 employment and things like education, that those sorts  
5 of factors could be considered and should be considered  
6 to reduce the defendant's sentence.

7 MS. O'CONNELL: True.

8 COMMISSIONER FRIEDRICH: All right. But  
9 yet they should not be considered to increase a  
10 defendant's sentence. Correct?

11 MS. O'CONNELL: Well, yeah. I think the  
12 legislative history would support the argument that as I  
13 think I said in my testimony, a symmetrical reading of  
14 the directive.

15 COMMISSIONER FRIEDRICH: Not just in  
16 terms of prison versus probation, but also in terms of  
17 length. It's okay to consider in terms of going down,  
18 but not to go up. Let's, for example, say you have a  
19 defendant and Mr. Hawkins has a co-defendant in a  
20 conspiracy. Your client has no high school diploma.  
21 Your client has no job. You agree that the Commission  
22 guideline suggests that it would be inappropriate for a  
23 judge to consider those factors to increase the sentence  
24 your client receives. Correct?

25 MS. O'CONNELL: Yes.

1                   COMMISSIONER FRIEDRICH: Okay. But  
2 Mr. Hawkins' client, who has a college education, who  
3 has a great job, he has lots of family and community  
4 ties and he's done a lot of work in the community, the  
5 [defenders'] submission [is] that the guidelines should  
6 permit a judge to consider those factors in reducing his  
7 time for the crime. Right?

8                   MS. O'CONNELL: No. I still don't think  
9 that you understand what it is that I'm saying. My view  
10 is that the purpose of 994 is to, to ask the Commission  
11 or direct the Commission to ensure that these factors  
12 are neutral.

13                   COMMISSIONER FRIEDRICH: But if they're  
14 neutral, and again, correct me if I'm wrong, but the  
15 impression I've had repeatedly is that the [defenders]  
16 believe that it's appropriate for the guidelines to  
17 consider them for purposes of lowering a defendant's  
18 sentence in a case where a defendant has extraordinary  
19 community ties, a good job, he has a college education,  
20 that those are things that a court should look at and  
21 say he's less likely to recidivate, et cetera, et  
22 cetera, therefore I'm going to give him a break in his  
23 sentence. Am I right? Have I misinterpreted what  
24 you've said?

25                   MS. O'CONNELL: The reason that a judge

1 would consider employment or community ties goes to  
2 recidivism, it goes to the purposes of sentencing, and  
3 what we're saying is that a judge should not solely send  
4 someone to prison because he doesn't have a job. That's  
5 what the purpose of the directives in 994 were. That's  
6 what our position is.

7 COMMISSIONER FRIEDRICH: I'm not talking  
8 about prison versus probation. I'm talking about the  
9 length of sentence.

10 MS. O'CONNELL: It's the same.

11 COMMISSIONER FRIEDRICH: Should the  
12 college educated, should the, you know, your client with  
13 the good job, who's less likely to recidivate,  
14 statistics would show, than someone who is unemployed  
15 and has no high school diploma, should that defendant  
16 good get a lesser sentence? Is it appropriate for the  
17 Commission to encourage courts to sentence that  
18 defendant more leniently than your client who has none  
19 of these?

20 MS. O'CONNELL: Well, it depends entirely  
21 on the person. It depends on a variety of factors.

22 COMMISSIONER FRIEDRICH: But you think  
23 it's appropriate for the Commission to encourage  
24 consideration of those factors downward, not upwards,  
25 but downwards.

1 MS. O'CONNELL: I think it's appropriate,  
2 yes.

3 COMMISSIONER FRIEDRICH: The problem I  
4 have, given the purpose of the Sentencing Reform Act, I  
5 find that interpretation extremely hard to square with  
6 the Sentencing Reform Act. Congress wasn't concerned  
7 about having a win. Congress was concerned about like  
8 defendants who committed similar crimes being treated  
9 similarly, and Congress was extremely concerned about  
10 socioeconomic factors and other things, socioeconomic  
11 status, to influence the judge's sentence. So I find it  
12 very hard to square the defenders' suggested  
13 interpretation of 994(e) with the statute. I just -

14 MS. O'CONNELL: Well, I don't know that  
15 it's just our view. I think that judges have said that  
16 they don't want, they don't want to be told what to do  
17 in regards to, to those 5H factors. It's, when you look  
18 at 3553(a), there is the nature of the offense, the  
19 history and characteristics of the defendant, and  
20 several things necessarily play into that. Those are  
21 factors that speak to the purposes of sentencing, and  
22 considering them for a permissible reason versus  
23 considering them for an impermissible reason -

24 COMMISSIONER FRIEDRICH: It's  
25 impermissible to consider them to increase a defendant's

1 sentence, because he or she may be more likely to  
2 recidivate. Right? I'm just, I'm asking.

3 MS. O'CONNELL: I don't know that that's  
4 necessarily true. As I said, it's the entire picture of  
5 the defendant. Judges don't sentence based on  
6 employment. That's not my experience. They don't, they  
7 just didn't do that. There are a number of factors that  
8 play into how they determine what is an appropriate  
9 sentence. The history and characteristics of the  
10 defendant include long-term stable employment, that has,  
11 that has valuing in, in determining what's the most  
12 effective sentence to effect the purposes of sentencing  
13 that are found in 3553(a).

14 CHAIR SESSIONS: Okay. I'll call a  
15 truce.

16 COMMISSIONER HINOJOSA: Just a quick  
17 comment. You have to admit that when you talk about  
18 history characteristics of the defendant, you certainly  
19 would exclude race, gender, socioeconomic status that  
20 have been forbidden by the statute itself. Those are  
21 forbidden factors by the statute.

22 MS. O'CONNELL: Yes, they're forbidden.

23 COMMISSIONER HINOJOSA: So you wouldn't  
24 consider socioeconomic status.

25 MS. O'CONNELL: Yes, if, if I know what

1 you mean.

2 COMMISSIONER HINOJOSA: Well, I'm just  
3 saying what the statute says.

4 MS. O'CONNELL: Well, socioeconomic  
5 status, you don't send someone - the way that I read  
6 994 is that you don't send someone to prison because  
7 he's poor. You don't deny someone probation because  
8 they're poor. You don't give someone probation -

9 COMMISSIONER HINOJOSA: Well, those factors  
10 are not listed in that list that talks about determining  
11 imprisonment or not. Those are just strictly listed as  
12 forbidden factors in another section.

13 MS. O'CONNELL: But they would be factors  
14 that would be considered.

15 COMMISSIONER HINOJOSA: They would be?

16 MS. O'CONNELL: No. What I'm saying -  
17 no. I'm sorry. Those factors are, are sentencing  
18 factors that - they're not sentencing factors. They're  
19 just impermissible because -

20 COMMISSIONER HINOJOSA: I think they're  
21 congressionally worded as forbidden. They wrote  
22 3553(a), and so I'm saying would you not have to read  
23 them together and say at least with regards to the  
24 history and categorization of the defendant, these are  
25 factors that cannot be considered?

1 MS. O'CONNELL: Well, I think that,  
2 that - I think that what we -

3 COMMISSIONER HINOJOSA: You certainly can  
4 agree on race and gender. Right?

5 MS. O'CONNELL: We agree on race and  
6 gender.

7 COMMISSIONER HINOJOSA: And they also  
8 listed socioeconomic status.

9 MS. O'CONNELL: They list socioeconomic  
10 status, but I don't think that precludes consideration  
11 of disadvantages [such as] youth. I don't think it does.

12 COMMISSIONER HINOJOSA: I guess my next  
13 question was [about what] you mentioned, I guess it was the  
14 Eastern District that you said had only one 5K1.1 case.

15 MS. O'CONNELL: Yes.

16 COMMISSIONER HINOJOSA: Of course, there  
17 were 89 cases, and 83 were within the guidelines and then  
18 there were five that were departure variances. Why didn't  
19 you think it was odd that there was only one 5K1.1? The  
20 total for the year is listed.

21 MS. O'CONNELL: In fiscal year 2008?

22 COMMISSIONER HINOJOSA: Right. And 83 were  
23 within the guidelines and there was one 5K1.1, and five  
24 departure variances.

25 MS. O'CONNELL: You mean in, under the

1 not otherwise identified?

2 COMMISSIONER HINOJOSA: Well -

3 MS. O'CONNELL: Is that what you're

4 telling me?

5 COMMISSIONER HINOJOSA: It talks, it was  
6 five below the guideline range. None above the guideline,  
7 [] 83 within the range. I'm just saying one doesn't  
8 appear to be that much out of place when you look at the  
9 total picture. And then for Mr. Hawkins.

10 MR. HAWKINS: Yes, sir.

11 COMMISSIONER HINOJOSA: You talked about  
12 the departure variance rates in the Northern District of  
13 Texas. What's interesting about that is I looked up, in  
14 fiscal year 2008, the upward departure/variance rate in  
15 the Northern District of Texas is 6.5 percent, which is  
16 four times the national average. The downward departure  
17 variance rate is 7.2 percent. This is a phenomenon that  
18 you don't see in just about any other district, at least  
19 we haven't seen it. The national average for upward  
20 departure/variance is 1.5 percent, and then fiscal  
21 year 2008 I believe the downward departure rate is about  
22 13 point something percent. What do you think causes  
23 this to be so different in that district? And are some  
24 of these factors that Commissioner Friedrich is asking  
25 about being used for the upward variance rates?

1                   MR. HAWKINS: It's very difficult, you  
2 know, to explain those statistics and why that's  
3 happening. But let me, let me say that I, I believe  
4 that in 2008, that we had some very high profile bank  
5 robbery cases. Defendants engaged in multiple bank  
6 robberies. And I, I think, if I recall correctly, I  
7 think the statistics show, at least during that time  
8 period, that bank robberies comprised five times more of  
9 the case load than they did nationally, and that the  
10 bank robbery upward variances comprised about 15.5  
11 percent, I believe, of the six percent of those things  
12 that you pointed out. The other places where these  
13 variance, variations take place a lot of times are in  
14 immigration cases. I -

15                   COMMISSIONER HINOJOSA: Because it does  
16 appear to be about 70 cases or a little bit more.

17                   MR. HAWKINS: Yes, and -

18                   COMMISSIONER HINOJOSA: 71 cases, I guess.

19                   MR. HAWKINS: And I think that I've  
20 got - by in large, the, those variances come from two  
21 to three judges.

22                   COMMISSIONER HINOJOSA: Two to three what?

23                   MR. HAWKINS: Two to three judges.

24                   COMMISSIONER HINOJOSA: Is that an  
25 indication of judicial disparity, I guess?

1                   MR. HAWKINS: I'm sorry, Your Honor. I  
2 want to make sure I understand your question.

3                   COMMISSIONER HINOJOSA: Well, I guess what  
4 you mean there is that it depends on who the judge is.

5                   MR. HAWKINS: In - yes. There are, we  
6 have judges that are, we have two to three judges that  
7 are much more prone to give variances than the other  
8 judges are, just like those same judges were more prone  
9 to give upward departures, back in the mandatory  
10 guideline days. For us, this system, at least in the  
11 Northern District of Texas, has been a net gain.  
12 Whereas before, any judge who was giving a downward  
13 departure, that sentence was going to be automatically,  
14 I'm not, pretty automatically saying it was going to be  
15 reversed by the Fifth Circuit, no matter what. Now  
16 those judges, those judges that are considering a  
17 3553(a) factors and are troubled by these guidelines,  
18 they know that they can vary downward, as long as they  
19 explain their reasons, just like the judges that think  
20 the guidelines don't punish some people enough can get  
21 those same exact reasons and be informed also.

22                   COMMISSIONER HINOJOSA: So in your district,  
23 it's probably about half and half, because you've  
24 indicated it's double what it was pre-*Booker*, and so I  
25 was going to assume then that half of it has gone up and

1 half down, in that doubling.

2 MR. HAWKINS: Yeah. I, I -

3 COMMISSIONER HINOJOSA: 65 percent upward  
4 departure is very high compared to what it's always been  
5 nationally. It used to be, pre-Booker, maybe one  
6 percent or less.

7 MR. HAWKINS: I, I couldn't, I could not  
8 disagree with that statistic, Your Honor. I think that  
9 that's right. I think we probably have, we do have, I  
10 think we have historically had a higher rate of  
11 departure and variance than, than most districts. But  
12 now with the, the advisory guidelines, I think the  
13 judges are more free to go vary where they disagree with  
14 those guidelines, and so it's worked out better for us  
15 in the Northern District.

16 VICE CHAIR CARR: Mr. Hawkins, do I  
17 understand you to say that in your district, prosecutors  
18 will withhold the motion for acceptance merely because  
19 the defendant fights detention?

20 MR. HAWKINS: Absolutely.

21 VICE CHAIR CARR: And they're explicit  
22 about that.

23 MR. HAWKINS: Yes. What happens is that  
24 they will come to you and say, well, if you're going to  
25 fight detention, then we're not going to offer a plea

1 agreement. And if they don't offer a plea agreement,  
2 they won't move forward for acceptance. We have had  
3 several cases where an assistant United States attorney  
4 has just told us that if you're going to fight us on  
5 detention, then no plea agreements, and you know what  
6 that means. That means no third point.

7 COMMISSIONER HINOJOSA: Have you taken that  
8 to the Fifth Circuit?

9 MR. HAWKINS: Yes, Your Honor. We've  
10 taken it in several circumstances. The case I think is  
11 *United States v. Duhon*, and what the Fifth Circuit  
12 has said, as long as it's not irrational,  
13 unconstitutional or arbitrary, then the government can  
14 do what they want. But there's no definition as to what  
15 that is. We've taken this challenge up when we've  
16 merely filed a motion to suppress and said if the judge  
17 denies our motion to suppress, then we're pleading  
18 guilty, and it's been upheld. They didn't have to do it

19 COMMISSIONER HINOJOSA: I thought the *Duhon*  
20 decision was the one in which the Fifth Circuit said,  
21 well, you can get the guideline application wrong, but  
22 if the judge says ultimately he'd give the same  
23 sentence -

24 MR. HAWKINS: I apologize. I may have  
25 given the wrong case, Your Honor, I'm sorry, with regard

1 to the -

2 CHAIR SESSIONS: Any other questions?

3 I just want to go back to the 5H factors,  
4 because you talk about that they should be replaced with  
5 a set of factors for departure, essentially, and I think  
6 that what you're basically talking about is factors  
7 for downward departure. And I'd ask that you think  
8 about this in a different kind of way. You're talking  
9 about, all of you were talking about the need for the  
10 Sentencing Commission to give more information for  
11 practitioners and judges to use, and as an alternative,  
12 as opposed to the various discouraged factors, not the  
13 forbidden factors, but the discouraged factors, one  
14 option, of course, would be to give a full exploration  
15 of both the positives and negatives of these various  
16 factors. Now, it's not all down. It could very well be  
17 up, because, after all, some of those factors were  
18 actually developed historically because people felt  
19 they were proxies for racial discrimination or  
20 socioeconomic discrimination, et cetera. And my  
21 question is: Assuming that there is a removal of these  
22 discouraged factors, and a replacing them with the most  
23 current extensive research on how these particular  
24 factors are relevant in the sentencing process, isn't  
25 that what you're asking for ultimately?

1 MS. O'CONNELL: Yes.

2 CHAIR SESSIONS: Isn't that something  
3 that you would agree with, even though you know there  
4 could be, let's just say as an example, age. Well, age  
5 impacts recidivism at different, in different ways based  
6 upon where you are, and that could very well help some  
7 and hurt others. Well, family circumstances, those  
8 could very well be factors for socioeconomic  
9 discrimination or they could be used in very positive  
10 ways for lowering a risk of recidivism. But what you're  
11 asking for, I thought, was a full explanation of what  
12 the research says in regard to all of those  
13 characteristics, and in that way, giving informational  
14 guidelines to judges and practitioners about those  
15 particular factors, no matter how they end up, whether  
16 they hurt clients or whether they benefit clients. And  
17 I guess I'm asking you, is that what the defenders are  
18 asking for?

19 MS. O'CONNELL: Yes.

20 CHAIR SESSIONS: Or are they asking for  
21 just something which is just, you know, as Commissioner  
22 Friedrich is saying, a downward ratchet, use these  
23 factors for the down, but not in any way consider them  
24 for the up?

25 MS. O'CONNELL: Yes, Your Honor. You've

1 got it right. That's what we're asking for.

2 CHAIR SESSIONS: Do you agree with that?

3 MR. HAWKINS: Yes, Your Honor, I do agree  
4 with that. I don't want - I'm concerned about the  
5 Commission assigning any particular value to what that  
6 would be, but we would like for the Commission to  
7 highlight those statistics which can -

8 CHAIR SESSIONS: Knowing that they could  
9 be up and down, positive and negative.

10 MR. HAWKINS: We already know, I think,  
11 pretty much where those are anyway, Your Honor.

12 CHAIR SESSIONS: Okay. Any other  
13 questions?

14 Well, thank you, folks, for a great  
15 discussion, and as usual with the defenders, you're very  
16 well prepared. I must say that I read both. This is  
17 the first time two written submissions were forwarded to  
18 the Commission, and I think I read them all, and I  
19 appreciate the work. Thank you very much for coming.

20 MR. GIBBENS: Thank you for having me.

21 CHAIR SESSIONS: And we'll be seeing you  
22 probably in New Orleans.

23 MR. GIBBENS: We're looking forward to  
24 it.

25 CHAIR SESSIONS: Coming up in the near

1 future. Okay. Thank you very much.

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I, Jane Demars, Certified Shorthand  
5 Reporter for the State of Texas, certify that the  
6 foregoing is a correct transcription of the proceedings  
7 in the above-entitled matter.

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1                   CHAIR SESSIONS: Good morning. I just  
2 went out and just to check and see if Judge Jones  
3 arrived, and she's not arrived yet. She's driving in  
4 from Houston, so who knows about the traffic. So Judge,  
5 if you don't mind, we'd like to go forward. I want to  
6 express my appreciation that you're here today.

7                   This is our sixth of seven regional  
8 hearings. We've been going around the country listening  
9 to all practitioners, all stakeholders in the process,  
10 and in particular, both district court judges and court  
11 of appeals judges. So it is a particular thrill that we  
12 have the two of you.

13                   And let me just introduce you to the  
14 Commission. Of course, we met with Judge Benavides last  
15 night, but this is the Honorable Fortunato Benavides.  
16 You have served on the U.S. Court of Appeals for the  
17 Fifth Circuit since 1994. Prior to joining the federal  
18 bench, Judge Benavides served as a visiting judge on the  
19 Supreme Court of Texas and as a judge on the Texas Court  
20 of Criminal Appeals, 13th Court of Appeals for Texas,  
21 and 92nd District Court of Hidalgo and Hidalgo County  
22 Courts-at-Law. Judge Benavides has also practiced  
23 privately. He holds a Bachelor of Arts from the  
24 University of Houston, and a law degree from the  
25 University of Houston Law Center.

1                   So Judge, it's an honor. I enjoyed  
2 talking with you last night, and it's an honor to have  
3 you here today.

4                   JUDGE BENAVIDES: Thank you. And I wish  
5 to welcome you and the members of the Commission to  
6 Austin, and I hope you enjoy our fair city while you're  
7 in town. I assume that it's, the weather is probably  
8 what has delayed Judge Jones. And in the event that she  
9 may not make it, I had talked to her two or three weeks  
10 ago about her testimony, and she did indicate to me, as  
11 I think she will indicate if she does show up, that she  
12 would hope, that she thinks the guidelines are working,  
13 that she would hope that the Commission would go slowly  
14 in terms of any major changes, and let the courts kind  
15 of sort out the changes that have been made, and I think  
16 I can speak for myself and her with reference to the  
17 changes that she'd make with respect to adding statutory  
18 rape and other kind of questions that we had.

19                   Here she is right now.

20                   CHAIR SESSIONS: I appreciate very much  
21 you speaking for her. But I think probably she can  
22 speak for herself.

23                   JUDGE BENAVIDES: And if I can speak now  
24 for myself, that I do agree with that assessment, and  
25 that the Commission go slow in making changes, and give

1 the courts a chance to interpret some of the changes, I  
2 think they have been welcome changes, and let us sort  
3 those kind of things out. I would agree with that.

4           With respect to some of the items that  
5 were mentioned as potential topics, one, the mandatory  
6 minimum, I would not spend too much time with that. I  
7 view that as kind of the will of the Congress, and it's  
8 a political decision. I would hope that Congress would  
9 go slow in that area, because once you categorize things  
10 by offenses and punishments by offense, without looking  
11 to recidivism and without looking to the particular  
12 offense that's involved, you get more and more away from  
13 the idea of individualized assessment, which I think is  
14 necessary to a system of justice. Nonetheless, I do  
15 respect the political aspect of that, and that that is a  
16 role that Congress can play and does play, and probably  
17 that the public appreciates that they do play that role  
18 from time to time.

19           I think that the guidelines, as a  
20 practical matter, after *Booker*, are working well. As I  
21 indicated last night, I'm puzzled by the reasoning and  
22 the ultimate result that came with *Booker*. Nonetheless,  
23 as a practical matter, I believe that it's a good  
24 working, it's created a good working model. Most of the  
25 judges are sentencing under the guidelines, and it

1 provides, I think, for some uniformity, at the same time  
2 allowing discretion to our district judges, and so I  
3 think while I'm still, it's hard to understand how we  
4 got there, I think that in effect, it has been a useful  
5 tool.

6           As far as our work on the appeals court,  
7 I think we're, we are sorting those things out. Our  
8 biggest problem probably is in plain error analysis,  
9 things are not raised before the district courts, and  
10 that are raised for the first time. The district judges  
11 throughout the circuit were a little perplexed at how  
12 they were having to get people out of the penitentiary  
13 and do resentencing on questions that were never brought  
14 to their attention in the first place. I think the  
15 circuit as of recently has gotten a little bit more, has  
16 done a little more analysis as to whether errors are not  
17 just errors, but whether they're plain, and also under  
18 the, whether it caused some sort of substantial injury  
19 to the complainant. And so we're probably having less  
20 of those cases being sent back for resentencing.

21           Getting back to my main theme, I do think  
22 that we have now a working solution, as a result of  
23 *Booker*, and I think it's a proper blend. And once  
24 again, I understand and I sympathize with the mandate  
25 that you have with respect to trying to get uniform

1 sentences, but we kind of have a problem with that. And  
2 the way that I view what has happened now is, given the  
3 fact that the Supreme Court did find that certain facts  
4 had to be found in order to have some of these enhanced  
5 sentences, that the solution, the practical solution  
6 that has occurred has allowed both a concern for  
7 uniformity and a concern for discretion, and having  
8 had – and they forced the system, where the prosecutors  
9 would have been determining whether they were going to  
10 plead and prove these facts, then all you would have  
11 been, all we would have been doing is substituting the  
12 discretion of the district judges that we now have to  
13 the discretion of the prosecuting attorneys as to  
14 whether they were going to allege the fact and try to  
15 prove it, and I'm not too sure that in the long run that  
16 that would have created more uniformity than we  
17 presently have.

18 So I've probably exhausted my five  
19 minutes. If you have any questions, I'm open to your  
20 questions, any of your questions that you might have,  
21 and it's a great pleasure to appear before you, and  
22 thank you for the opportunity to do so.

23 CHAIR SESSIONS: Good morning, Judge  
24 Jones.

25 JUDGE JONES: Good morning. I have to

1 apologize. I was told we were starting at 9:00.

2 CHAIR SESSIONS: Well, that's fine. You  
3 had someone who was about ready to testify to exactly  
4 what you're going to testify to, but I think it's best  
5 that you're here, that you're here in person.

6 Let me just introduce you to the  
7 Commission. Judge Edith Jones was confirmed to the U.S.  
8 Court of Appeals for the Fifth Circuit in 1985, has  
9 served as the circuit's chief judge since 2006. Prior  
10 to her nomination, Chief Judge Jones practiced privately  
11 in Houston, Texas. She earned her bachelor's degree at  
12 Cornell and her law degree at the University of Texas,  
13 right here in the University of Texas School of Law.  
14 She also serves the Judicial Conference of the United  
15 States. And welcome. Thank you very much for coming.

16 JUDGE JONES: Thank you. You're giving  
17 me five minutes, initially?

18 CHAIR SESSIONS: I think we'll give you  
19 as much time as you'd like to take.

20 JUDGE JONES: All right. Thank you.  
21 I'll try to be reasonable here. I filed my comments,  
22 which are fairly brief, and Judge Benavides,  
23 fortunately, had gone over testimony of some other  
24 appellate judges, so I might have a couple of remarks  
25 about those, but I think I have several brief themes to

1 address.

2 First of all, that the Fifth Circuit  
3 judges, for good or ill, appear to handle almost 20  
4 percent of the entire federal criminal docket. Now, a  
5 lot of that is concentrated along the border with  
6 Mexico. Nevertheless, because of the breadth and  
7 diversity of our circuit, we have a wide variety of  
8 federal crimes, and we see those on appeal. Our judges  
9 see them every day in the trial courts. We have fraud,  
10 we have Medicaid abuse, we have securities, we have  
11 bankruptcy fraud, immigration crimes. You name it, the  
12 Fifth Circuit has seen it, and in a very large volume.

13 For that reason, my first point would be  
14 a request that you take into consideration the views of  
15 our court. A lot of our judges are not among the most  
16 outspoken, because we're normally very busy. We are,  
17 our courts are very, very busy, especially those that  
18 are heavily affected by crime. We do not have time to  
19 write papers and speak at seminars in the way that some  
20 judges around the country do, who frankly have a lot  
21 less experience than we do. So I would urge you to call  
22 on our people when you need some advice, just to get  
23 that viewpoint of a court that is sentencing, courts  
24 that are sentencing routinely and in large numbers, and  
25 therefore can see the product of the guidelines and in

1 many respects, not sucking up too much, the wisdom of  
2 the calculus that has been created.

3           The second is that I testified to the  
4 Commission several years ago, hoping that you would take  
5 some action on how to categorize sex offenses for  
6 recidivism purposes, and our court had completely  
7 botched it up. Our court plucked the categorical rule,  
8 and the Commission has helpfully clarified that issue.

9           Another issue I mentioned at the time was  
10 my concern about assaults on law enforcement officers,  
11 as a recidivism element, and recent survey of our last  
12 two years worth of appeals shows that that doesn't seem  
13 to be such a problem. So I would not highlight that at  
14 the present time.

15           Let us look, moving now to the appellate  
16 area, in 2008 to '09, again, we had well over a thousand  
17 direct criminal appeals, and of those, 73 percent or 659  
18 were decided on the merits on challenges only to the  
19 sentence. So I would suggest that our appellate, as  
20 well as trial judges, are experts in guidelines appeals.  
21 The remaining 27 percent either challenged the  
22 conviction only or the conviction and the sentence. If  
23 you do a rough calculation, I'd say just about every  
24 judge on our court is responsible for over 100  
25 sentencing appeals per year, a very, very large volume.

1                   Does that mean that we have a better  
2 basis from which to fulfill our responsibilities under  
3 *Gall* and *Kimbrough*? Sadly, it does not. I read, I read  
4 the comments of a number of the other appellate judges  
5 who have testified before you, and I guess we're all  
6 just wringing our hands about what reasonableness review  
7 constitutes, not something that you or we can remedy on  
8 our own. It remains to nine Supreme Court Justices to  
9 try to help us out.

10                   But just to give you an example, we are  
11 seeing a few outlier cases, although Judge, Chief Judge  
12 Hinojosa assures us, tells us that the Fifth Circuit is  
13 generally sentencing more within the guidelines than  
14 other circuits are. But I sat on an appellate panel  
15 just very recently, where we had two sentences in two  
16 completely different areas, I'd rather not talk about  
17 the facts in public, but both of those sentences were  
18 four times the guidelines, and in each case, the judge  
19 articulated some explanation, but one might have had the  
20 feeling that the judge hadn't been particularly familiar  
21 with this type of crime, because you could tell that had  
22 the judge been in another part of the circuit, likely at  
23 least one of those sentences probably would have been  
24 half what it was. Well, what could we do about that?  
25 You know, I'm not going to tell you the outcome of the

1 appeals, they haven't come out yet, but it is very  
2 difficult to find a principle basis, after *Gall* and  
3 *Kimbrough*, for saying that a sentence is unreasonable.  
4 Justice Alito has written a little bit about this. I  
5 heard a very interesting colloquy between one of our  
6 judges and Justice Breyer I think several years ago,  
7 before *Gall* and *Kimbrough* had come out, and our judge  
8 kept saying, "Well, Justice Breyer, how can we on the  
9 appellate court determine what's reasonable?" And  
10 Justice Breyer said, "Well, you just look at the sentence  
11 and you look at the guidelines, and then you understand  
12 how it all works." And of course, Justice Breyer is the  
13 epitome of sweet reason when he's speaking. But he  
14 finally got a little frustrated after this came at him  
15 three times, and he said, "Well, I'm sure over the course  
16 of time you will develop a database from which you can  
17 determine whether a sentence is reasonable." And you  
18 know, with due respect, I think that's an unrealistic  
19 way to look at it. Our mission on the appellate court,  
20 after *Gall* and *Kimbrough*, is to say, "Did the district  
21 judge follow the guidelines procedurally, yes or no? If  
22 he did or she did, did he or she state a reason for the  
23 final sentence that was issued?" And it doesn't take  
24 much of a reason to fall within the parameters of 3553.  
25 So it is not likely that even our judges, with 100 cases

1 per year on appeal, coming from all over the circuit,  
2 can develop our own internal, quote, database, to say  
3 that this is unequivocally an outlier sentence. Maybe  
4 there's some way the Commission would be able to address  
5 that, apart from maybe going into deeper analysis when  
6 variances occur as to, you know, obviously, even  
7 geography may have one thing to do with it, but if there  
8 is something in the underlying factors that cause an  
9 enhancement or a downward departure or variance that can  
10 be somehow categorized and explained.

11 We had a famous case in our court, well,  
12 famous because it was subject to some internal debate,  
13 where a fellow was a hopeless drunk. He was an illegal  
14 reentrant, and he had been in New York. One of his, one  
15 of his prior crimes was when he was in a flophouse in  
16 New York, and he fought over a, over a mattress on the  
17 floor with another drunk, and picked up a brick and  
18 conked the guy over the head and killed him. So it was  
19 rated a manslaughter in New York, and he got a minimal  
20 sentence of some sort, but nevertheless, he killed a  
21 man. This came back to, on his record of illegal  
22 reentry as a, as an assault crime, and then the judge  
23 departed way upward and gave him ten or 15 years. Well,  
24 why? Well, because he killed a man, and we do not have  
25 many illegal reentrants who have been guilty of that

1 kind of offense. So sometimes the underlying facts  
2 speak very loudly. As Dean Keaton used to say, the  
3 things speaks for itself. That's the point of *res ipsa*  
4 *loquitur*. But maybe there's a research ground that you  
5 can go into where, so you can articulate, for the  
6 benefit of the district and the appellate judges, some  
7 of the things that create legitimate outlier sentences.

8           The only other point I would make here is  
9 that in my experience, the guidelines are most difficult  
10 to rescue - wrestle with in regard to child pornography  
11 and the offenses that turn on proof of loss. I agree  
12 with the, our colleague on the appellate circuit who  
13 said proof of loss gets into very arcane and almost  
14 meaningless distinctions, sometimes, as to dollar  
15 amounts and the calculus that relies solely on dollar  
16 amounts is often a very unsatisfactory way to go about  
17 measuring the culpability and the problems with the  
18 victims and that sort of thing. And then in the child  
19 pornography, likewise, it's not clear to me that we have  
20 enough background in those prosecutions, at this point  
21 in time, to really identify culpability in terms of,  
22 especially with these sophisticated cyber crimes in  
23 terms of the number of images and the events that the,  
24 that the Commission has said we have to consider. And  
25 indeed, in those cases, I have seen a marked propensity

1 of our district judges to deliver sentences not within  
2 the guidelines. Whether that's good or ill, I don't  
3 comment, but it's more, I think it's something like a 40  
4 percent variance rate, and that suggests that there's  
5 something wrong with the guideline, something seriously  
6 wrong.

7 I noticed that several judges alluded to  
8 the impact of the *Taylor* case and the categorical  
9 approach, and that's been stymieing us for a long time.  
10 When you're looking at recidivism, and then you have to  
11 fall back on recidivism in terms of what a statute, a  
12 state statute defines as a crime, irrespective of what  
13 the crime may have been, it's very unsatisfactory. You  
14 may not be able to do much about that, but I'll just  
15 point out it creates unevenness in application.

16 We had one case where, we've had more  
17 than one case, where we would have a person with a prior  
18 crime committed out of state, let's say under the law of  
19 Colorado, and something was an assault under the law of  
20 Colorado, and the Tenth Circuit said, under the  
21 categorical approach, this is a violent crime and, or  
22 under whatever its approach was, and our circuit said  
23 that very same offense for, under our circuit, is not a  
24 violent crime, and therefore, the offense level was  
25 several degrees lower. So relying on this supposedly

1 objective framework of categorical approach and the  
2 elements of the state crimes offers many opportunities  
3 for unevenness, some of which Justice Alito referred to  
4 in his, one of his concurrences.

5 But I really thank you for the  
6 opportunity to testify, and would solicit your  
7 questions.

8 CHAIR SESSIONS: Let me turn then to the  
9 commissioners. Any questions?

10 COMMISSIONER FRIEDRICH: Judge Jones, you  
11 referred to Judge Alito's opinion in the case today, and  
12 I was just wondering, do you agree with his view that  
13 the only way to right the Armed Career Criminal Act  
14 ship, as he put it, is to have Congress enumerate more  
15 crimes in the statute? Do you think that's the right  
16 result to help the courts deal with the issue.

17 JUDGE JONES: To be honest with you, I,  
18 since I'm a lower court judge, I don't presume to say  
19 whether the Supreme Court is doing things right or not,  
20 and whether that's - and if it's in Congress'  
21 bailiwick, I'm not going to tell Congress what to do. I  
22 think that would probably help, but it all goes back to  
23 *Taylor*, which, to me, articulated the definition of a  
24 crime in a direct appeal of substantive criminal  
25 liability, and it's never been clear to me that using

1 that is the right approach to sentencing, once  
2 culpability is established. In other words, *Taylor* was  
3 guided by the requirement of due process and notice to  
4 an offender, theoretically. Now, obviously, after  
5 *Apprendi*, there's some element of that with certain  
6 kinds of enhancements, but at the same time, you know, I  
7 guess what Justice Alito was saying is that they have an  
8 internal problem that they can't resolve. So if the  
9 Court can't do it, I guess they're throwing it back at  
10 Congress as a last resort. They certainly can't count  
11 on us. I think the Court could rethink it, but short of  
12 that, they would have to go back to Congress. If  
13 Congress broadened the terminology, or let's say  
14 referred specifically to generic crimes or allowed a  
15 PSR. It's never been clear to me why a PSR can't offer  
16 hearsay about the underlying crime in the way that it  
17 offers hearsay about other drug deals. I've never quite  
18 understood that calculation either. So I'm sorry not to  
19 be more succinct.

20 COMMISSIONER HINOJOSA: I've heard from  
21 both of you the sort of frustration we've heard from other  
22 circuit judges across the country so far about the  
23 reasonableness standard, where that leaves the appellate  
24 courts. And I know, Judge Jones, you mentioned that it  
25 might be up to the Supreme Court. Let's say Congress

1       decided to do something about this, and I know you just  
2       said that you wouldn't attempt to give them any advice,  
3       but how do you think this can be fixed if there's -  
4       Since one of the things we're considering doing is  
5       putting out a report with regards to what we regard as  
6       possibly some suggestions. So knowing that the Supreme  
7       Court has taken a piece of the statute and just  
8       rewritten it, what would you do with regards to trying  
9       to alleviate the frustration we hear from the appellate  
10      courts as to what exactly our role is here. Would you  
11      have any suggestions as to what recommendations should  
12      be made?

13                   JUDGE BENAVIDES: Well, we're talking  
14      about recommendation in terms of dealing with subjective  
15      reasonableness?

16                   COMMISSIONER HINOJOSA: Well, any  
17      recommendation that might make it clear to anyone what if  
18      any appellate standard there was.

19                   JUDGE BENAVIDES: I think the main thing  
20      is to educate our district judges who are being educated  
21      with respect to the type of findings that they make and  
22      what their sentences are based on. I'm satisfied if  
23      they consider the three 3553(c) factors, I guess, I get  
24      the numbers mixed up, that we can deal with the cases on  
25      the appellate level.

1                   I think the idea of subjective  
2    reasonableness, it creates a problem. I'm not too sure  
3    there are any remedies, whether provided by the Supreme  
4    Court or provided by Congress. It's not going to  
5    present - you're not going to have a perfect solution.  
6    We're still going to have the problem of subjective  
7    reasonableness. It's going to be the next problem we  
8    have with the next piece of legislation or the next  
9    decision from, from the Supreme Court. And while it's a  
10   daunting task, I guess, to try to just find out what is  
11   subjectively reasonable and what is, what is not, I  
12   think over time we're going to have the case law  
13   developed, and there will be a body of law, and  
14   different types of sentences and different types of  
15   histories that will give guidance both to the appellate  
16   court and to the district judges. I just don't see a  
17   silver bullet out there. I mean as long as the  
18   sentences can't be mandatory, the guidelines can't be  
19   mandatory, you're going to have some variances, and so  
20   your charge is going to be, in a way, frustrating. On  
21   the other hand, I think it's a healthy thing to give  
22   discretion to the district courts because they are  
23   judges, and I think that it's very hard to sit up there  
24   and think of all the different circumstances that you  
25   create uniformity and all, and I think it's an

1 impossible task, if you look at the size of the  
2 guidelines, it's an impossible task to make a niche and  
3 have some kind of categorization where you're going to  
4 get perfect uniformity, and I don't think that that  
5 would be a good thing. I think you get uniformity as an  
6 ideal, but there's got to be room for discretion. And  
7 I'm not, while the task is difficult, I'm not unhappy  
8 with the system. I think you-all have made some recent  
9 changes that have helped us out. Judge Jones mentioned  
10 them. I mentioned them earlier. And I think that  
11 that's been most helpful. But I don't think we're going  
12 to get to this Utopian situation where you have uniform  
13 sentencing, the charge that you have, because I think  
14 that itself, I think that straightjacket itself is, can  
15 be very unjust.

16                   And we can talk about mandatory minimums,  
17 but I don't know why the Sentencing Commission is not  
18 going to have similar problems, in setting up its  
19 guidelines and its policies, that we would have if  
20 Congress addressed the problem. We're still going to  
21 have some problems. I think we're dealing with them,  
22 and from time to time, like these hearings, we've  
23 reviewed the comments of other judges before you, some  
24 of those changes or things for your consideration, and  
25 I, frankly, am very supportive of your work and the work

1 that you've done so far. These recent amendments have  
2 really helped quite a bit.

3 JUDGE JONES: Just thinking about it a  
4 little bit here, it seems to me that there might be some  
5 thought given to requiring, I hate to say it, more  
6 documentation by district courts if they are going to  
7 vary off of a national standard, and you have loads of  
8 statistics about what national standards seem to be or  
9 circuit standards, depending on what level of generality  
10 you want to get to. But the, I'm thinking of these  
11 recent cases where you had four times the guidelines,  
12 and there are others, but the government doesn't  
13 normally appeal in our circuit if the sentences are  
14 under the guidelines, although we, our judges do that  
15 less than some other circuits, but we don't even see  
16 those. But if there's some duty of articulation of the  
17 district courts based on the heartland, so to speak, of  
18 those sentences for those kinds of offenses, that might  
19 be helpful. I suppose the courts could require that, at  
20 some point. Congress might be able to articulate that.

21 With regard to the categorical approach,  
22 and one way to go at that would be to, of course, we,  
23 you know, we've had - every time you define something  
24 in, you define other things out. So when you go to  
25 burglary has had a long history, attempted burglary, you

1 know, burglary of a habitation, burglary of a playhouse,  
2 you know, all sorts of - you could, you could add an  
3 additional framework based on the number of prior  
4 events. I think criminal history tries to incorporate  
5 that to some extent. If there is some way to allow the  
6 courts to look at the facts through the lens of the PSR  
7 in the same way that they look at prior drug dealings,  
8 that's what I, that's what I don't understand. Because  
9 if you've got some bum up on the stand who says this  
10 fellow did cocaine deals with me ten times, and he's  
11 only charged with two or three, and you're allowed to  
12 enhance the sentence on that basis, what is so much, so  
13 unreliable about using a PSR that says we called the  
14 prosecutor out in this other jurisdiction, and he said  
15 that this, what looks like a, an assault offense is  
16 really a child rape offense, which is literally what we  
17 encounter sometimes. So maybe loosening the *Shepard*  
18 idea about what is valid underlying documents or what is  
19 satisfactory. Now, I realize that brings into play this  
20 idea that the government and the defendant both want to  
21 move, move the ball, in criminal adjudication, from the  
22 guilty plea phase to the sentencing phase, and I  
23 personally think that's nonsense. I was a judge for two  
24 years before we ever got to decide any sentence appeals  
25 at all. Those were a halcyon period in my career. And

1 the judges looked at all sorts of things with no – and  
2 the defendant had no right to see them in advance, and  
3 you know, basically assess the punishment. So it's not  
4 clear to me that, when you're trying to achieve more  
5 uniformity, that putting this in the adversary system is  
6 going to help out with that goal particularly.

7           The other thing I'd say is that although  
8 I'm frustrated about having to perform these duties on  
9 appeal, I still think that the basic responsibility in  
10 sentencing is with the district judge because the judge  
11 sees the defendant, he see the family, if the family is  
12 there. He can tell the lawyer, you know, body language,  
13 all sorts of background events about the defendant that  
14 people on an appellate court simply can't. So there's  
15 no question in my mind that the sentencing judge is the  
16 ultimate repository of power here.

17           VICE CHAIR CARR: From the cases that come  
18 before you, do you perceive inconsistent charging or  
19 plea bargaining practices among the nine districts in  
20 your circuit.

21           JUDGE BENAVIDES: I can't see it, because  
22 I don't know what charge would have been filed if the  
23 attorney hadn't got there first and worked out the, the  
24 K1 or K1, I call it the K1 agreement. So I don't  
25 know whether we really get to see that. We're only

1 struck with what we have in the record before us, and we  
2 don't know what's happened before. I think that's  
3 always going to exist. You're going to have good  
4 lawyers. You're going to have some, someone represented  
5 by someone that knows the system better, and as a  
6 result, and I don't use gaming the system in a  
7 pejorative way, but that happens, and it's going to  
8 happen regardless. Sometimes we do wonder, especially  
9 if everybody comes up at the same time on the sentencing  
10 appeal, how someone who obviously had a much bigger  
11 role, was more involved, winds up with, with a better, a  
12 more lenient sentence than someone who was clearly not  
13 as involved, but did get the benefit of striking some  
14 kind of bargain, and in those cases, we get to see it  
15 because they come up at the same time. Absent that, I  
16 don't think we have a way of knowing, you know, how the  
17 deal came to be.

18 JUDGE JONES: I agree with Judge  
19 Benavides on the plea agreements. On the charging  
20 agreements, I do see some variations, and, but it seems  
21 to depend. I don't know what factors it depends on. I  
22 don't know if it's consistent or what, but I, in some of  
23 the smaller jurisdictions, the U.S. Attorneys perhaps  
24 don't have as much to do, and so they charge some people  
25 to the max on crimes that where you'd think this is just

1 very, very unfortunate.

2 JUDGE BENAVIDES: I'm sorry.

3 CHAIR SESSIONS: Go ahead.

4 JUDGE BENAVIDES: I would realize that  
5 from my conversations with certain judges in the Western  
6 District, where the docket is unbelievable, that there  
7 are, maybe practicality has something to do with some of  
8 the findings that aren't made, in order to move the  
9 dockets, and there are instances where it seems fairly  
10 clear to me that the fact that the appeal is coming from  
11 that jurisdiction, from that division, for instance, has  
12 some bearing, if you compare it to something coming out  
13 of maybe the Eastern District of Texas or someplace in  
14 Mississippi where they don't have that docket, where the  
15 judges aren't under that pressure, and where the  
16 prosecutors aren't under that pressure. At the same  
17 time that I'm commenting on it, I don't want to, I'm not  
18 trying to comment disfavorably on it, because that's a  
19 reality that those district judges and those prosecutors  
20 are having to deal with. So if you look at the overall  
21 frame of justice, I cannot say that their consideration  
22 doesn't help move the docket and provide a system of  
23 justice that might - that it's okay, and it might be  
24 worse but for the fact that those people on the ground  
25 have those considerations in mind. I would like to

1 suggest that that might be so.

2 VICE CHAIR CASTILLO: I want to get back  
3 to this issue of the upward variances, but before I do,  
4 I do want to thank both of you for your testimony. I  
5 think, Judge Jones, you make a very good point in terms  
6 of the Fifth Circuit really being the laboring ground  
7 for our federal criminal justice system. I'm very  
8 mindful of that, and every time I come to the Fifth  
9 Circuit, I come to the place that dominates our criminal  
10 docket, and in a very real way has not only been well  
11 represented on our Commission through the presence of  
12 Judge Hinojosa, who I've had the privilege of serving  
13 with, but who basically is helping our national  
14 statistics in terms of what they look like for guideline  
15 sentencing. But at the same time, I think while we keep  
16 these national statistics, my concern is most defense  
17 attorneys right now see this as sort of a heyday of  
18 advocacy. There are more below the guidelines sentences  
19 than ever before, but people are losing track of these  
20 two cases that you talked about, Judge Jones, these  
21 upward variances, where the Supreme Court now has I  
22 think laid out a track for defendants, because if you  
23 use an upward variance, you don't, you're not even  
24 required to have notice that this might be coming. So  
25 you'd have a situation where, under the *Irizarry* case,

1 you could receive a sentence up to the statutory  
2 maximum, and there's no problem as long as it's an  
3 upward variance versus an upward departure, and while  
4 people might see the one point something percent going  
5 up to three percent as not being that big of a deal, it  
6 is a big deal if you're one of those particular  
7 defendants who receives one of these sentences. And as  
8 all members of the Commission, I try and keep track of  
9 every single sentencing opinion that comes out  
10 nationally, and where I'm seeing the biggest disparity  
11 is in child pornography, where I've seen sentences go  
12 from anywhere from 80 years to maybe as low as 18  
13 months, and white collar offenses, where sentences are  
14 now ranging anywhere from six months to 30 years, or we  
15 could even take the Madoff sentence, which is off the  
16 charts. Would it be helpful, and this is my question,  
17 if instead of always nationalizing our statistics, if we  
18 broke it down circuit wide so that you would have what  
19 the average sentence looks like for white collar  
20 offenses in the Fifth Circuit, what the average child  
21 pornography sentence looks like in the Fifth Circuit?  
22 Would that give you, then, some kind of base to make  
23 these difficult reasonableness determinations?

24 JUDGE JONES: Absolutely.

25 JUDGE BENAVIDES: I agree. I'm a

1     proponent of the idea of local justice, and that what,  
2     what is acceptable to a community in one area of the  
3     country may not be as acceptable to another area of the  
4     community. I think that that would be a good idea. You  
5     would have many detractors from that idea, and they  
6     would be, have, be on solid ground in terms of you're  
7     charged to try to get some kind of uniformity, and so  
8     that uniformity, you know, winds up clashing -

9                     VICE CHAIR CASTILLO: Right.

10                    JUDGE BENAVIDES: - with this idea of a  
11     more localized justice system, which doesn't offend me  
12     at all.

13                    VICE CHAIR CASTILLO: The down side would  
14     be that certain circuits might look unusual, when you  
15     start comparing them, you know, and I won't even mention  
16     what circuits, but -

17                    JUDGE BENAVIDES: You mean like posting  
18     their names on the bulletin board, who didn't show up?

19                    JUDGE JONES: Well, that's pretty clear  
20     to anyone who reads your statistics right now, so I  
21     think that would just be - but to provide some kind of  
22     database for us in our circuit to work from, I think  
23     that would be helpful. I mean there's no way of keeping  
24     it out of the press, but that's what the press is for.

25                    JUDGE BENAVIDES: The other, there's a

1 secondary effect, because once you have that  
2 established, and a circuit knows that you're looking at  
3 the contours of a sentence within a circuit, that might  
4 promote more an idea of not being national and the idea  
5 of well, we're more local, so it's okay in this circuit  
6 to not give a guideline sentence more often, and so that  
7 might be at cross purposes. So it's a delicate  
8 question.

9 CHAIR SESSIONS: I'll offer that  
10 question. One of the general questions that we've asked  
11 during these hearings relates to how to make the  
12 guidelines relevant again, how to get respect for the  
13 guidelines among judges throughout the country. And I  
14 raised this in light of two opinions that I'm thinking  
15 of from the courts of appeals. The first is a Second  
16 Circuit opinion in which the court indicated, Well,  
17 you've gone through the guidelines, but they seem to be  
18 confusing and you can't arrive at a result without doing  
19 substantial research, then just go write the 3553(a), and  
20 you don't necessarily have to go through the guidelines.  
21 And the second opinion, actually I think is from this  
22 circuit, and it's a little bit less direct than that  
23 opinion, but essentially, if the judge gets the  
24 guidelines calculation wrong, but then the judge says  
25 but anyway I was going to give this sentence pursuant to

1 3553(a), and so therefore no prejudice, provided that the  
2 judge gives a reason, basically that suggests that any  
3 mistakes that were made in regard to the guideline  
4 calculation become less significant, and I think the  
5 Fifth Circuit has said, you know, that that does not  
6 warrant a remand or a reversal. So my question is do  
7 you see cases like that, the impact of cases like that,  
8 and that, you know, logically, what follows is that  
9 judges in the Fifth Circuit will just say, "Well, okay,  
10 even if I got the guideline calculation wrong, that's  
11 the sentence I would have given anyway, for whatever  
12 reason." And I wonder if just, if you, if you take our  
13 position here, we're trying to make a guideline system  
14 that has the respect of judges throughout the country.  
15 You know, in light of those kinds of movements in the  
16 law, in the country, do you have any advice for us as  
17 to, you know, how to -

18 JUDGE JONES: I think you've got to  
19 promote respect for the guidelines in those areas of the  
20 country where there are a lot more downward departures  
21 than variances. Because the Fifth Circuit has one of  
22 the highest compliance rates. Of course, I was on the  
23 panel in a couple of those cases that talked about  
24 harmless error, and it was no part of what we said or  
25 what we wrote, nor do I believe it was interpreted to

1 say that toss away the guidelines and just, you know,  
2 dignify your sentence at the end with I would have done  
3 it anyway, because we've, our routine statement in  
4 sentencing appeals is you look first at the guidelines  
5 calculations, and then we also go into the is it a  
6 variance or is it a departure framework before the judge  
7 can say, "Well, this particular issue is very unclear to  
8 me, so if I am wrong, then I would have given the  
9 sentence anyway." It seems to me that it is a very  
10 useful harmless error device that does not relieve the  
11 judge from looking at the guidelines to begin with, but  
12 offers less opportunity - less possibility of all the  
13 costs and delay attendant on resentencing. And as you  
14 are probably aware, if you're dealing with illegal  
15 reentry sentences, occasionally one faces the problem of  
16 having a case on appeal when the defendant's within a  
17 few months of release. So we try [to] work on those quickly,  
18 but obviously, if there's a mistake and we have to  
19 resentence, the whole purpose is gone. So I think  
20 it's - I do not think it is our version of sticking a  
21 thumb in the eye of the guidelines.

22 CHAIR SESSIONS: No, I didn't mean to  
23 suggest that. I just was interested in any advice that  
24 you may have to essentially make the guidelines more  
25 relevant with judges and more respected by judges, so

1       that, you know, they essentially choose to accept the  
2       guidelines.

3                       JUDGE JONES: I think you're getting into  
4       the Article III psychology to some extent.

5                       CHAIR SESSIONS: Absolutely, right.

6                       JUDGE JONES: I do, I have thought for  
7       quite sometime that of course, there was great hue and  
8       cry when they came in originally, you know, these are  
9       unconstitutional, blah, blah, blah blah blah, and I had  
10      thought that that was probably a generational impact,  
11      and that as you -- that we are 25 years in, but the  
12      Supreme, and the Supreme Court has officially declared  
13      these to be discretionary, but it has not said they  
14      should not be taken into consideration, and I think that  
15      generationally, as judges come on to the bench, some of  
16      that problem will solve itself.

17                      JUDGE BENAVIDES: I would, I guess I'd  
18      try to figure out what you mean by having the district  
19      judges respect them. If you're talking about respect  
20      them from the standpoint of make sentences consistent  
21      with the guidelines, that's one thing. If you're  
22      talking about just the respect that judges have for the  
23      guidelines system, that's completely different. As to  
24      the ladder, if all the sentences were affirmed, that  
25      would cause great respect, under the ladder view, for

1 district judges of the sentencing guidelines. They  
2 really do not like, and I agree with Judge Jones that  
3 this is kind of a harmless error analysis, the district  
4 judges, the thing, from my conversations with them, that  
5 they abhor more than anything is having to resentence  
6 when they know that they're ultimately going to be  
7 resentenced to the same amount of time, and the costs  
8 that are attendant with those, especially in parts of  
9 Texas where they're driving prisoners a lot of miles and  
10 it's costing a tremendous amount of money.

11 Now, if you're talking about respect from  
12 the standpoint of them following them, and what the  
13 Commission can do to make the guidelines followed more,  
14 if that's the question, there's a limit to how far you  
15 go without making it some kind of a *de facto* mandatory  
16 system.

17 I personally am happy with the way it  
18 works. I think you've got the best of both worlds. A  
19 lot of that is colored by the fact that I do believe in  
20 judges' discretion and local discretion, but I think  
21 that you're doing things, and I know our circuit is  
22 doing things to respect the proper calculation, and I  
23 think that for the most part, our judges are giving  
24 guideline sentences.

25 JUDGE JONES: May I add that I do think

1 that as is the case with any regime, the flaws are  
2 dominant in the public's mind over the things that work  
3 right, and for the most part, the calculus of factors  
4 that the, that the guidelines represent work reasonably  
5 well, I think. But when you have problems like child  
6 pornography and the white collar offenses, and I'm  
7 trying to think if there's some others, but those in  
8 particular, where the articles can come out, well, you  
9 know, one person gets 13 months, another one gets 13  
10 years, then that creates a mindset. So getting your  
11 hands around those huge problems, it seems to me, would  
12 relieve a lot of the judges' concerns.

13 COMMISSIONER WROBLEWSKI: Can I follow up  
14 on what you just said, actually what both of you said?  
15 We've heard, in going around, this has been actually a  
16 fascinating experience, this is our sixth hearing, we've  
17 heard a number of criticisms, and many of them are  
18 things that you've described. For example, a lot of  
19 judges, and a lot of defense attorneys are thrilled that  
20 offenders' characteristics are now part of the  
21 consideration in ways that they weren't before *Booker*.  
22 On the other hand, we've heard criticisms from  
23 prosecutors that sometimes offenders' characteristics  
24 can drive the sentence down sometimes to probation. On  
25 the other hand, we've heard criticisms from defense

1 attorneys about relevant conduct, and the case example  
2 that you've described of someone who's charged with one  
3 crime, the guideline says X and the judge says, "Well, I  
4 have all this other information about you, and now it's  
5 four X." We've also heard criticisms about the use of  
6 substantial departures and cooperation. It seems to me  
7 that a lot of that can be addressed in what you're  
8 talking about, which is putting some limits on, on  
9 movement away from the guidelines up on relevant  
10 conduct, down on offender characteristics, in essence to  
11 create a greater range of sentence that would have a  
12 very deferential standard of review, but then if you  
13 went beyond those limits, the review would be a little  
14 bit more stringent. Do you think that necessarily gets  
15 us too close to the mandatory system that you're talking  
16 about, that, and therefore we have our constitutional  
17 problems, or is there some way you can have something to  
18 address these outliers.

19 JUDGE JONES: You'd have to talk to nine  
20 other, nine other people before you could give the  
21 answer to that, I fear, but someone else suggested  
22 creating wide, wider ranges of variation, but you're  
23 talking about a slightly different thing.

24 COMMISSIONER WROBLEWSKI: Even assuming  
25 you have -

1                   JUDGE JONES: The way we reviewed  
2 departures was, you know, the judge would have to sort  
3 of tie a departure to [inaudible] in criminal history  
4 and sort of explain, "I went up three levels rather than  
5 one because of the, you know, these were assaultive  
6 offenses or whatever," and I think you're talking about  
7 that kind of ladder, and I think until you, until you  
8 try it, you don't know whether it would be approved or  
9 not. Not bad.

10                   JUDGE BENAVIDES: I think also, I mean a  
11 number of people that are being prosecuted in the United  
12 States, I mean it's an absolutely daunting task to think  
13 that you're, that with all those people in jail and all  
14 the different circumstances that you have, that you're  
15 going to have enough policy statements and have enough  
16 definitions -

17                   JUDGE JONES: Right.

18                   JUDGE BENAVIDES: - of different types  
19 of crimes that are aggravated by use of force, or things  
20 like that, that you're going to, that you're going to  
21 make people happy. You're going to have prosecutors  
22 complaining and you're going to have defense attorneys  
23 complaining. I think the larger question is in general,  
24 how do people feel, in the legal community and outside  
25 the legal community, about the sentencings that exist in

1 the United States today, and I think by in large, that  
2 there is a greater feeling that there's consistency, I  
3 think there's a greater feeling that justice is being  
4 meted out in the federal system as a result of the  
5 sentencing guidelines. Even though I came up under, and  
6 practiced law when it wasn't sentencing guidelines, I  
7 think there is respect for the, for the judges at that  
8 time and their sentences, but there was a growing, large  
9 communities in this country that felt that it was very  
10 unfair, and they were exactly correct, and I don't think  
11 you're going to get to a perfect system, but I would  
12 caution you not to feel that you have to address an  
13 issue because, every time that the prosecutors or  
14 defense attorneys are concerned about the case, because  
15 they're always going to be concerned about the case,  
16 they are always going to be dissatisfied, because  
17 they're advocates, and I respect their role as  
18 advocates, but by in large, I think you've done a very  
19 good job. I think the system is working, and when you  
20 make the small adjustments from time to time because  
21 there's a need for it, I think that process is working,  
22 and so I thank you for the work that you've done.

23 CHAIR SESSIONS: Judge Jones.

24 JUDGE JONES: And may I, may I make -  
25 This isn't really relevant to the questions, but someone

1 mentioned the *Irizarry* case and about notice before the  
2 judge sentences. I have a lot of trouble with that. It  
3 seems to me that the judge would come into a – and I've  
4 never sentenced a defendant, but it seems to me that our  
5 judges read the presentence reports and they know what  
6 they're thinking about before the defendant comes into  
7 the courtroom for sentencing, but goodness knows things  
8 can happen in the sentencing process that cause the  
9 judge reasonably to change his or her mind. I mean the  
10 defendant may, you know, flick an obscene gesture to the  
11 prosecutor, or the family may give an indication that  
12 you know, they're disgusted with this person, which  
13 would seem to mean that there's something going on that  
14 maybe he's irretrievably bad, and anyway, things can  
15 happen, and the judge does have the right to sentence up  
16 to the statutory max. And of course, a guilty plea  
17 advises a person that they are subject to that, and that  
18 only the judge can make the final decision. So I think  
19 giving notice would add another layer of complexity and  
20 delay that would not help out the process.

21 JUDGE BENAVIDES: I support that.

22 CHAIR SESSIONS: That's one of the things  
23 that you, that you mentioned, that perhaps we should  
24 require judges to provide greater and greater notice  
25 about why they are making the decisions that they're

1 making, and I'm particularly sensitive to the judges in  
2 the Western District of Texas, who are just overwhelmed,  
3 frankly.

4 JUDGE JONES: Don't forget the Southern.

5 JUDGE BENAVIDES: Southern District, on  
6 the border.

7 CHAIR SESSIONS: But the judges in the  
8 Southern are so incredibly capable.

9 JUDGE BENAVIDES: That is true.

10 CHAIR SESSIONS: They're able to handle  
11 it. I just wonder if there has to be some balance  
12 there. The more you require people to explain the  
13 decisions that they make, in a high case load  
14 environment, you know, the more it slows down the  
15 process.

16 JUDGE JONES: Well, but the good judges  
17 articulate their reasons on the, on the record in a  
18 paragraph, couple of paragraphs, so.

19 JUDGE BENAVIDES: It is strange that for  
20 a departure you don't have to give notice, but for a  
21 variance you do, and so there, that's an anomaly,  
22 obviously. You could argue, on the other hand, that  
23 since it's not required in one, and that's more drastic,  
24 that it shouldn't be required in the other, which is  
25 less. So I guess that's just something that you grapple

1 with. I'm sure that our district judges are in, are  
2 smart enough that they could come up with some  
3 statements that, you know, it is possible that there may  
4 be a departure based on these things, and then just have  
5 some kind of a form out there in all these cases so that  
6 there would be some sort of a notice, and that's what, I  
7 think if you formalize it, what's going to happen is  
8 you're going to create some method to get around it  
9 generically, you know, generally so that, so that in a  
10 specific case he's not going to know any more than that  
11 general notice that he or she might get, and I join  
12 Judge Jones in the idea that it would be quite  
13 cumbersome, I think.

14 COMMISSIONER HINOJOSA: One of the things  
15 I've been surprised about at the appellate level is, you  
16 know, when you read *Rita* and the cases that followed,  
17 there is language that the court has given, that  
18 certainly at an appellate level, you can presume that  
19 any guideline sentence is reasonable, and that if it's  
20 within the guidelines, the reasoning can be less than it  
21 would be if it's outside the guidelines, and there's  
22 even language in one of the opinions, I believe, that  
23 says that the farther away you go from the guidelines,  
24 obviously there would be the necessity for further  
25 explanation, without setting the standard that the

1       appellate court can have a different standard because  
2       they're further away from the guidelines, and it seems  
3       to me that there has been a concentration at the  
4       appellate level, perhaps on other portions of the same  
5       opinions, and I wonder if that's because of the feeling  
6       that the district judge knows best or the feeling that  
7       this is not our jurisdictional situation from the  
8       standpoint that the sentence should be at the district  
9       court level, because it does seem to me that there are  
10      parts of those opinions that indicate that  
11      reasonableness, appellate review standards should mean  
12      something, as opposed to just if there was some  
13      explanation then it should be okay. I think part of the  
14      reason the Justice Department doesn't field these cases  
15      is because they feel that there is no such thing as  
16      reasonable or unreasonable. And of course, the defense  
17      attorney has the responsibility that the defendant has,  
18      to go ahead and file the appeal, which is different than  
19      the Department of Justice would be. And I just wondered  
20      if you all had any thoughts on any of that.

21                   JUDGE BENAVIDES: Well, I think the  
22      system has been changed with the discretion reinforced  
23      after *Booker*. And I don't, I think, I don't think that  
24      we view ourselves as, as keepers of a mandatory regime.  
25      In other words, we're, we don't have this outlying thing

1 with reference to mandatory guidelines. And we're  
2 keenly aware now that they're not mandatory. The fact  
3 that they're not mandatory provides an extra layer, I  
4 think, for being aware of the discretion [that] the district  
5 judges have. I don't think you can get to discretion  
6 from mandatory and still have the type of review that  
7 existed before *Booker*.

8 JUDGE JONES: I agree with that. I think  
9 that we are probably somewhat reluctant to use that  
10 scale of reasonable articulation as a device to vacate  
11 and remand, because in so many cases we know that the  
12 sentence will be the same again, so I suppose that it's  
13 just the sense of futility that if you – the judge will  
14 be unhappy at having to go through the same routine  
15 again, particularly if the judge has properly calculated  
16 the guidelines, and it's just a question of our saying  
17 you didn't explain why you went up so much. But a judge  
18 might view – you are correct that we have not vacated  
19 many sentences on that basis.

20 JUDGE BENAVIDES: It's like, kind of like  
21 ordering a hamburger, but you don't get it because you  
22 didn't say whether it had mayonnaise on it or not. Add  
23 the mayonnaise and you're going to get the same  
24 hamburger.

25 COMMISSIONER HINOJOSA: You're talking

1       about What-A-Burger.

2                   CHAIR SESSIONS: Any other questions.

3                   COMMISSIONER FRIEDRICH: Judge Jones, you  
4       made a comment about the fraud guideline and the  
5       emphasis on the amount of loss. I'm just wondering  
6       would you recommend that we simplify the loss table,  
7       emphasize other factors rather than loss? What sort of  
8       suggestions do you have, if anything?

9                   JUDGE JONES: Well, of course, as you  
10      know I wrote the *Olis* case, and that was one where the  
11      sort of lower-level fellow in one of the, in *Dynegy*,  
12      which was a company that was involved in, you know, sort  
13      of daisy chain inflation of its revenues. Lower-level  
14      fellow got sentenced originally to 25 years, when the  
15      higher up executives who actually called the shots plead  
16      guilty and got one or two years. And in that case, that  
17      was a securities fraud, and the government wanted to  
18      predicate the sentence on proof of loss, where it would  
19      be something in the stock market, or I forget exactly  
20      what it was, but anyway, it was a hundred million  
21      dollars or something. And I said that this loss had to  
22      be tailored to the securities fraud standards for  
23      damages. And he ended up, I forget what the sentence  
24      ended up with, maybe eight years or something. But I  
25      think that, you know, making the ranges broader would

1 help, but there also - it's really hard to say, because  
2 each fraud crime has a different character of victims.  
3 And when you steal people's credit cards and may or may  
4 not take advantage of them, you may have a large  
5 technical loss, but not a large physical loss to the  
6 victims of crime, whereas in another one, I can remember  
7 one where some people were trying to sell something to  
8 elderly people, and just ruined them, ruined them, and  
9 under, but under the proof of loss guidelines, the loss  
10 might have been a few hundred thousand dollars, and the  
11 sentence, according to guidelines, would have been, you  
12 know, five, three or four, five years, but these people  
13 had taken total advantage of a very vulnerable  
14 population, and you know, so.

15 COMMISSIONER FRIEDRICH: Do you feel like  
16 the district courts aren't using the departure that's  
17 built into the guideline that enables the district  
18 court, in its opinion, in which it overrepresents a  
19 defense or underrepresents it departs, so you just don't  
20 think we're using that enough.

21 JUDGE JONES: No, and the other situation  
22 is I've seen some Medicare-type-fraud guideline loss  
23 cases where you say, "Well, do you calculate for  
24 defrauding the government for something. Well, what's  
25 your basis for loss?" In other words, they were

1 exploiting the guideline, and is the guideline the  
2 amount that they might legitimately have collected, or  
3 is the guideline, or based on an increment from that, or  
4 is it based on all of what they got? It's - I'm sorry,  
5 I should have prepared better for this subject, but  
6 sometimes the - you have to really invent the basis for  
7 the loss, and I could find some cases for you like that,  
8 and in those cases, it seems to me like the whole  
9 enterprise is probably not worth the candle. So you  
10 have a -

11 JUDGE BENAVIDES: Yeah. I agree, and I  
12 think the question is interesting because it reflects  
13 the other side of the coin, and that is that you don't  
14 want sentences to be uniform, that you want judges, from  
15 time to time, to make a departure, and so it's kind of  
16 at odds with the idea of mandatory guidelines, uniform  
17 type sentencing. Our concepts of justice vary, from  
18 time to time, based upon unique circumstances or a kind  
19 of a generalized feeling of the idea that all, that  
20 everybody ought to be treated the same, and they're at  
21 cross currents. So I think your question itself  
22 reflects that kind of dilemma that exists.

23 CHAIR SESSIONS: Well, we feel honored,  
24 by the way, to have both of you testifying today, and we  
25 appreciate it very much, and I guess we'll call it a day

1 for this moment.

2 JUDGE BENAVIDES: Thank you.

3 JUDGE JONES: Thank you.

4 (Recess taken from 10:01 to 10:20.)

5 CHAIR SESSIONS: I'll call the meeting to  
6 order. Good morning. Thank you very much for coming  
7 today. This is the sixth out of seven regional  
8 hearings. In each regional hearing, we've heard from  
9 judges on the courts of appeals and judges from the  
10 district courts of those particular regions, and I must  
11 say, they have, the discussions that we've engaged in  
12 with judges has been incredibly instructive and,  
13 frankly, helpful. So I really appreciate your  
14 willingness to participate today because I know of your  
15 busy schedules.

16 So let me introduce you to the  
17 Commission. First, J. Leon Holmes has served as a  
18 district judge in the Eastern District of Arkansas, and  
19 has served as chief judge of that district since 2005.  
20 Prior to his judicial appointment, he practiced law in a  
21 private firm in Little Rock. Judge Jones has also  
22 served as an adjunct professor of law at the Arkansas  
23 School of Law and a professor at Thomas Aquinas College.  
24 Chief Judge Holmes has also, holds a bachelor's degree  
25 from Arkansas State University, a master's from Northern

1 Illinois University, a doctorate from Duke, and a law  
2 degree from the University of Arkansas. And I saw,  
3 according to my notes, that I have changed you with the  
4 chief judge of the Fifth Circuit of the United States,  
5 and referred to you as Judge Jones on one occasion.

6 JUDGE HOLMES: I'm flattered. I hope  
7 she's not insulted, but I'm flattered. Thank you.  
8 That's all right.

9 CHAIR SESSIONS: Well, fortunately,  
10 you're in different circuits, so. Welcome.

11 Next, the Honorable Micaela Alvarez has  
12 been a district court judge in the Southern District of  
13 Texas since 2004, having previously served as a  
14 presiding judge at the Texas 139th Judicial District  
15 Court. Before joining the bench, Judge Alvarez  
16 practiced privately in McAllen, Texas. Judge Alvarez  
17 received both her Bachelor of Science and her law  
18 degree right here from the University of Texas. You  
19 just flashed the Texas sign. That is the Texas sign.

20 JUDGE ALVAREZ: That's the Texas sign.

21 CHAIR SESSIONS: For those of us who are  
22 not from Texas, we don't exactly know what that is, but  
23 I imagine -

24 COMMISSIONER HINOJOSA: If they had it,  
25 they could have the sign.

1                   CHAIR SESSIONS: The Honorable Kathleen  
2                   Cardone has been a district court judge in the Western  
3                   District of Texas since 2003. She previously served in  
4                   the Texas Judiciary as a visiting judge, as a judge with  
5                   the 388th and 383rd judicial district courts, as an  
6                   associate judge of the Family Law Court of Texas, and as  
7                   a judge of the Municipal Court for the City of El Paso.  
8                   Judge Cardone has also served as a mediator, and in  
9                   private practice. She got her Bachelor of Arts degree  
10                  at the State University of New York at Binghamton,  
11                  getting closer to my home, and also her law degree at  
12                  Saint Mary's School of Law. Welcome to all, all three  
13                  of you.

14                   Is there any preference as to who wishes  
15                  to go first, or should we go in order of introduction?

16                  JUDGE ALVAREZ: Order of introduction,  
17                  for my money.

18                  CHAIR SESSIONS: All right. It's just  
19                  that I can't order a judge around, so.

20                  JUDGE HOLMES: Let me begin by saying  
21                  thank you for the opportunity to testify here today, and  
22                  thank you for the excellent work that you do with  
23                  reference to the guidelines.

24                   I assumed the duties of a judge of the  
25                  United States District Court for the Eastern District of

1 Arkansas on July 19, 2004, less than a month after  
2 *Blakely* was decided, and less than five months before  
3 *Booker* was decided. My first sentencing was on January  
4 12, 2005, the day *Booker* was decided, and since that day  
5 I have imposed sentence on 341 offenders. I know that  
6 some of the districts, over that number of five years,  
7 would be much greater than that.

8           But I believe that the current system  
9 strikes a reasonable balance between judicial  
10 discretion, on the one hand, and uniformity and  
11 certainty of sentencing on the other. It is helpful for  
12 me to have the guidelines to inform me of the sentences  
13 typically imposed for offenders committing the crime for  
14 which the particular offender to be sentenced has been  
15 convicted so that there can be uniformity in sentencing.  
16 I am interested in knowing what has been the judgment of  
17 my peers with respect to the application of the § 3553(a)  
18 factors in similar cases. At the same time, however, I  
19 believe it is important that judges have the discretion  
20 to impose a sentence outside the guideline range because  
21 in imposing sentence, we are not imposing sentence on  
22 categories or types, we're imposing sentence on human  
23 persons with their own individual characteristics and  
24 history.

25           The current system has the advantage of

1 providing the judge with some indication of what other  
2 judges have found to be a reasonable sentencing range in  
3 similar cases, while at the same time allowing the judge  
4 to tailor the sentence to the human person before the  
5 court for sentencing.

6           While I believe that the current system  
7 is generally a good one, I am concerned that it rests on  
8 unsteady foundation. As we all know, the advisory  
9 guideline system has never been adopted by Congress. It  
10 was the result of a decision in *Booker* in which by a  
11 vote of five to four the court held that the mandatory  
12 guideline system was unconstitutional inasmuch as it  
13 permitted judges to find facts that could result in  
14 sentencing enhancements, and therefore violated the  
15 defendant's right to trial by jury. We all know that  
16 the four Justices from the opinion of the Court on that  
17 issue then joined one of the Justices in the majority to  
18 create a new majority in holding that the remedy for the  
19 constitutional violation was to render the guidelines  
20 advisory. One Justice who joined the opinion of the  
21 Court on the constitutional issue joined four Justices  
22 who dissented on that issue to form a majority voting to  
23 excise § 3553(b)(1) and § 3742[e]. The result of excising  
24 those subsections is that the guidelines are now advisory  
25 in many cases in which either no enhancements would apply  
26 or the facts that would give rise to enhancements

1 are not in dispute.

2                   It has been nearly five years since  
3 *Booker* was decided. We continue to operate under the  
4 same statutory scheme, substantially the same rules of  
5 criminal procedure, and substantially the same  
6 guidelines manual, which is to say that even though the  
7 guidelines have been advisory for five years, we still  
8 operate under statutes, rules and guidelines designed  
9 for a system of sentencing in which the guidelines were  
10 mandatory. I hope that the Sentencing Commission will  
11 recommend changes in the statutes and rules to make them  
12 fit the advisory system under which we operate, and also  
13 adopt changes to the guidelines to remove vestiges of  
14 the mandatory guideline system.

15                   I suggest that the Sentencing Commission  
16 recommend that Congress repeal 28 U.S.C. § 3553(b)(1)  
17 and 18 U.S.C. § 3742(e)(3), I think I just miscited that,  
18 which were excised by the Supreme Court, but which remain  
19 in the statutes.

20                   I also call the attention of the  
21 Sentencing Commission to the attention of § 3553(f).  
22 That's the safety valve section, as you already know.  
23 It allows the court to impose a sentence below the  
24 otherwise applicable statutory minimum when

1 certain facts are present. This provision appears to  
2 say that the mandatory minimum for a defendant who is  
3 eligible for the safety valve is the low end of the  
4 guideline realm. The Supreme Court did not hold that  
5 § 3553(f) is unconstitutional, nor did the Court  
6 excise any portion of that section in the remedy portion  
7 of the *Booker* decision. The courts have consistently  
8 held that the guidelines are advisory, even under  
9 § 3553(f), but the reasoning that leads to that  
10 conclusion is not particularly persuasive.

11 I also suggest that the Sentencing  
12 Commission recommend to Congress that the second  
13 sentence of 3553(e) be repealed. That sentence provides  
14 that when the government moves for a departure below the  
15 statutory minimum because of the defendant's substantial  
16 assistance, the sentence shall be imposed in accordance  
17 with the guidelines.

18 The notion of departures in the  
19 sentencing guidelines and in the Federal Rules of  
20 Criminal Procedure appears to me to be out of place in  
21 the context of an advisory guideline system. In the  
22 current system, the duty of the court is to impose a  
23 sentence that is sufficient but not greater than  
24 necessary to comply with the purposes in  
25 § 3553(a)(2). In arriving at a sentence that is

1 sufficient but not greater than necessary to comply with  
2 those purposes, the court will consider the sentencing  
3 guidelines range as advisory. When the court imposes a  
4 sentence outside the guidelines range, however, the  
5 court is not departing from anything, but is simply  
6 performing the function required by the statute of the  
7 Supreme Court. The term departure suggests a  
8 presumption that the appropriate sentence was within the  
9 guidelines range and that a sentence outside the  
10 guideline range therefore must be supported by some  
11 important justification. It suggests that somehow the  
12 parties are entitled to expect a sentence within the  
13 guidelines range. The term variance has the same  
14 infirmity. As we all know, the Supreme Court has  
15 rejected the notion that district courts may impose a  
16 presumption that a guidelines-range sentence is  
17 reasonable. It may be important for statistical  
18 purposes to make a record of the number of sentences  
19 that are within the guidelines range and the number of  
20 sentences outside the guidelines range, and it may be  
21 important to distinguish between the sentences that are  
22 outside the guidelines range that are based upon those  
23 motions by the government for leniency because of the  
24 defendant's substantial assistance and those that were  
25 not, but otherwise the provisions in the sentencing

1 guidelines manual pertaining to departures appear to me  
2 to be of no particular significance. It appears to me  
3 that when the provisions, that the provision in the  
4 manual relating to departures are vestiges of the  
5 mandatory guidelines system, and my suggestion is that  
6 the Sentencing Commission should consider deleting them.  
7 If there are portions of the guidelines relating to  
8 departures that need to be considered in determining the  
9 sentencing guidelines range, those portions should be  
10 moved to the section of the manual relating to  
11 adjustments to the advisory sentence range.

12 Rule 32(h) of the Federal Rules of  
13 Criminal Procedure requires the sentencing judge to give  
14 notice of a possible departure from the sentencing  
15 guidelines. The Supreme Court held in *Irizarry* that  
16 Rule 32(h) does not apply to variances. Rule 32(h)  
17 should be repealed. After the Supreme Court's decision  
18 in *Irizarry*, Rule 32(h) has no practical effect. A  
19 sentencing judge can impose a sentence outside the  
20 guidelines range without notice by basing the sentence  
21 on the § 3553(a) factors, which are the factors  
22 that ultimately must justify the sentence.

23 Let me conclude by saying, again, that I  
24 am in favor of the advisory guidelines system. The  
25 theme of my suggestions to the Commission is that our

1 statutory scheme, procedural rules and guidelines  
2 manual, which are designed for a mandatory guidelines  
3 system, should be redesigned for an advisory guidelines  
4 system.

5 CHAIR SESSIONS: Thank you, Judge Holmes.  
6 Judge Alvarez.

7 JUDGE ALVAREZ: Thank you. Good morning.

8 CHAIR SESSIONS: Good morning.

9 JUDGE ALVAREZ: Thank you for inviting me  
10 to present my view from a district court bench. I began  
11 sentencing immediately after *Booker*. I can recall  
12 calling Judge Hinojosa, in fact, to see if he could  
13 provide me with any guidance about how I should proceed,  
14 now that *Booker* had been, that the decision had rendered  
15 the guidelines advisory.

16 During my short tenure on the bench, I  
17 have sentenced, by my latest calculations, over 5,500  
18 defendants, so although in numbers I may be one of the  
19 newer judges on the bench, in number of years I may be  
20 one of the newer judges on the bench, in numbers of  
21 sentencings, I think I have sufficient experience to be  
22 able to speak to the application of the guidelines.

23 Now, having listened yesterday afternoon  
24 and this morning, one of the things that has come up, of  
25 course, is that all the judges agree that it's very

1 difficult to sentence defendants. We have various  
2 people involved in the sentencing, but when it comes  
3 down to it, it is the district court judges that are, in  
4 fact, applying the guidelines and determining what a  
5 sentence will be.

6           In performing my duties, I hear often  
7 from defense counsel and defendants that the guideline  
8 that applies to that particular individual is too high.  
9 I have yet to hear anybody say that it is too low, and  
10 the complaint is always that it is too high. One of the  
11 things I think that they forget is that we are looking  
12 at a defendant, yes, as an individual before the court,  
13 but also considering a sentence that should be imposed  
14 in consideration of a lot of other factors, not just  
15 what the defendant himself thinks is appropriate for him  
16 and not just what I individually think is appropriate  
17 for me. In that respect, I do believe that we should  
18 consider a national standard for sentencing, because we  
19 are federal courts, we're not state courts, and I have  
20 sentenced at the state court, but as a federal court, I  
21 believe that it is, in fact, necessary to consider what  
22 is going on across the country.

23           The statute specifically provides that we  
24 should impose a sentence that avoids unwarranted  
25 disparities, and that is part of what we as judges have

1 to consider. In this respect, I do believe that the  
2 guidelines are an essential tool for sentencing. There  
3 are many who say that the guidelines, because they look  
4 at a cold record, based on the offense, the particular  
5 factors that apply to that offense, and the criminal  
6 history, that they are, you know, in fact not promoting  
7 uniformity and justice, but rather, in one way or  
8 another, bringing about some sort of unfairness. I do  
9 not necessarily agree that uniformity equates to  
10 unfairness. In fact, it can, in some instances, promote  
11 it. But I do believe that there is a distinction  
12 between uniformity and fairness. Now, in our system of  
13 justice, we believe in equality and fairness for all,  
14 and what that means, in my opinion, is that we have to  
15 consider what a similarly situated defendant with a  
16 similar history would receive, not just in my particular  
17 court, but again, because we're in federal court, across  
18 the nation.

19 I don't believe, however, that, that  
20 said, that any system of justice can be fair if it does  
21 not take into account the individual, and so for that,  
22 you know, factor I do believe that it is important that  
23 we have discretion. I believe that the guidelines as  
24 they are now provide the court with the discretion that  
25 we need to impose the sentence that is fair and just to

1 all, not one that considers in isolation the particular  
2 offense, the particular defendant, but that considers  
3 all the factors that we have to consider.

4 Judge Benavides touched upon the fact  
5 that, you know, that we should look at it on the  
6 community level. I do believe we should look at it on  
7 the community level, but I believe in our instance,  
8 because we are federal judges, the communities that we  
9 are looking at is the United States of America, not the  
10 particular county in which we live, not the particular  
11 district that we serve or the particular division where  
12 we sit.

13 Having said that, as I said, I do believe  
14 that discretion is necessary in order to serve justice,  
15 and to bring about fairness. I have, on many occasions,  
16 heard from a defendant about their particular case and  
17 their particular situation. In conducting my  
18 sentencing, as you have heard, you know, I review the  
19 presentence investigation report. I do not come to a  
20 conclusion about what sentence will be imposed based  
21 upon a review of the report, but I obviously reach some  
22 conclusions. But I listen to the defendant. I listen  
23 to the attorney. I listen to the government. After I  
24 have heard from all, then I consider, you know, the  
25 sentence based upon all that I have to consider, which,

1 of course, includes the information in the presentence  
2 investigation report, includes the 3553(a) factors, and  
3 includes anything else that may be presented to me by  
4 that particular defendant, his counsel and the  
5 government, and anybody else that would speak to the  
6 court, because I do, despite the numbers that I have, I  
7 do provide each and every opportunity to a defendant to  
8 present whatever he may wish, and that includes calling  
9 witnesses. I often have a defense counsel calling  
10 family members or other people who they believe need to  
11 present something to the court, and I listen to all of  
12 those. After I have heard all of that, then I determine  
13 what the appropriate sentence will be for that  
14 particular individual. However, I cannot just ignore,  
15 in my opinion, at least, what the guidelines provide for  
16 initially, because I believe that if we ignore the  
17 guidelines altogether, then we are, you know, going back  
18 to a system that comes down to my personal opinion about  
19 this, you know, personal defendant.

20 As a state court judge I sentenced in a  
21 system that did not have guidelines, and I have seen the  
22 disparity that results from that system, and although  
23 some may argue that that, in fact, reflects the  
24 community opinion about what is appropriate for that  
25 particular case, I'm not sure that that is always so,

1 because I have seen, within the same community,  
2 different defendants who appear to be very similarly  
3 situated who have received very, excuse me, committed  
4 very similar offenses, receive very different sentences.  
5 As a state court judge, although I consider it to be  
6 inappropriate, I also believe that sometimes there are  
7 influences on that state court judge that are reflected  
8 in sentences that should not be considered for  
9 sentencing purposes, and part of that, of course, has to  
10 do with the fact that in Texas, at least, our judges are  
11 elected judges.

12 I believe that *Booker, Gall* and *Kimbrough*  
13 have provided us with the appropriate balance between  
14 the abstract nature of the guidelines, because I do  
15 believe they are to some degree abstract, with the very  
16 human aspects of each particular case that comes before  
17 the court, and I believe that consideration of the  
18 guidelines provides for both uniformity and because they  
19 are now advisory, with the discretion that is necessary  
20 to ensure fairness.

21 Now, having said that and having praised  
22 the guidelines, I do have some concerns about particular  
23 guidelines. One area of particular concern to me is the  
24 application of §2L1.2, which is one that I use  
25 quite often that is a section that pertains to the

1 immigration cases, that is, you know, either the illegal  
2 reentries or the reentries after deportation. And it  
3 concerns me as to one particular, one particular type of  
4 defendant. That is, I often have in front of me a young  
5 defendant, generally a male, I cannot recall a single  
6 female in this category, but generally a male who is  
7 often in the range of say 18 to 22 who was brought here  
8 as a child by his parents, who has been raised in the  
9 United States, who has spent his entire life as what he  
10 believes is a citizen of the United States, who  
11 sometimes in that age range commits some offense or in  
12 one way or another comes before an immigration court and  
13 ends up being deported. Most of the times the ones that  
14 I see have committed a felony. Otherwise I don't know  
15 that they generally get deported. Most of the time they  
16 have committed a felony. The felony can be a four level  
17 enhancement felony or it can be a 16 level enhancement  
18 felony. So we have a young person who has been, for all  
19 practical purposes, a citizen of the United States, who  
20 knows nothing but living in the United States, who quite  
21 often does not speak any [Spanish], quite often does not  
22 have any family in Mexico, who has, quite often, has not  
23 even been to Mexico, who gets deported. They come  
24 before the court, and again, depending on the particular  
25 offense that resulted in their deportation, they may be

1 looking at the low end of the guideline range, maybe six  
2 months in custody, at the high end of the guideline  
3 range, depending on those variables, at three to four  
4 years in custody. In that particular case, I believe  
5 that the guidelines, when they, you know, are up in the  
6 three to four year range, quite often are greater than  
7 necessary, because this is an individual who, despite  
8 whatever felony he has committed, is looking, for the  
9 first time, at an immigration offense, having to come to  
10 the realization that he cannot live in the United  
11 States. And this age range, 18 to 22, I think as  
12 anybody who has dealt with those people, anybody who as  
13 a parents knows, they are most often not capable of  
14 living on their own, especially in a foreign country.  
15 Most often they are facing not just the consequences of  
16 the felony, the consequences of the immigration offense,  
17 but the emotional turmoil of coming to grips with the  
18 fact that they will be having to make a living on their  
19 own in a foreign country, removed from their family. I  
20 do believe that in those cases that there should be some  
21 mechanism in the guidelines for consideration of that  
22 type of defendant. Cultural assimilation, of course, is  
23 one of the considerations in that respect, but I don't  
24 think that cultural assimilation always covers this  
25 particular kind of defendant. And so I would urge the

1 Commission in that respect to consider whether this is  
2 an area that perhaps some adjustment could be made in  
3 the guidelines. Now, over time, when these young  
4 defendants have gone through immigration court several  
5 times, I don't know that it's necessary anymore because  
6 as they get older and I see them, occasionally when they  
7 continue to come back, as they get older, I feel that  
8 well, you know, time should have given them the ability  
9 to make the adjustment, but I believe that at least for  
10 the first-time offender, in our court system, that there  
11 ought to be some adjustment there.

12 Now, let me make a few other comments [that]  
13 pertain to the guidelines that I didn't intend  
14 originally, that are not part of my written statement,  
15 because it's a result of some of what I've heard over  
16 the last day and a half.

17 Let me speak to child pornography. I've  
18 heard from members of the Commission and from some of  
19 the people who have testified that there are many judges  
20 and others who feel that the guidelines are too high. I  
21 have not had a lot of cases dealing with child  
22 pornography, but I have had a couple. One of those was  
23 earlier on, when the guidelines had not yet been  
24 adjusted. In my opinion, in that case, the guidelines  
25 were not high enough. I sentenced the defendant to

1 something above the guidelines.

2 I think it is important to remember that  
3 child pornography is not a victimless crime. There are  
4 many who look at it as a victimless crime. You cannot  
5 engage in even the simple possession of child  
6 pornography without some child having been somewhere  
7 abused by some adult, you know, individual, male or  
8 female, and I say adult, I suppose it can happen with  
9 somebody who is not an adult. But the bottom line is  
10 that a child somewhere was abused. And you know, we use  
11 some very nice terms sometimes. Abused speaks to a wide  
12 variety of conduct. What we are talking about is we are  
13 talking about children forced into performing some sort  
14 of sexual act. Whether it is displaying their body in a  
15 sexual manner or whether it is actually engaging in  
16 sexual conduct, that is what we are dealing with when we  
17 deal with child pornography. And I do not believe that  
18 the viewing of child pornography is in any way a  
19 victimless crime, because regardless of when that video  
20 image was captured, that child has to live with that for  
21 the rest of their life. And I will put it to you on a  
22 personal level. If, under some circumstance, you have  
23 been photographed naked, would you want that on the  
24 internet for everybody to see? There's nothing wrong.  
25 There's nothing illegal about being naked, and everybody

1 has done it at some point or another, but not a single  
2 person in this room would want that out there. Well,  
3 what we are talking about is children who have been  
4 forced to perform sexual conduct, and those children  
5 grow up, and they have to deal with that for the rest of  
6 their life. They have families. They have children.  
7 They are school teachers, policemen, they are people  
8 that wait on us in the restaurants. And for those  
9 children to know that there is somewhere out there this  
10 image of them in that manner is something that affects  
11 them.

12                   And the one, the first case that I had,  
13 one of the children was identified. I had from her  
14 mother a letter addressing, you know, the effect that  
15 this has had on her daughter. And the mother addressed  
16 the letter because of the fact that she said that her  
17 daughter could not, in fact, make herself sit down and  
18 write about this because it was something that affected  
19 her every single day, you know, in dealing with anybody  
20 and everybody. You know, she wondered whether this was  
21 a person who had seen her in that video.

22                   So I believe that the guidelines reflect  
23 some of that concern, and I would urge anybody who is  
24 dealing with an issue of child pornography to go back  
25 and read some of the reports that reflect these

1 concerns.

2 I am always terrible with names, but  
3 there is, you know, the Supreme Court case that touches  
4 on these issues in connection with a statute, not  
5 necessarily with sentencing. But one of the things that  
6 sticks to me from that case is the fact that one, were  
7 there not a market for child pornography, we would not  
8 have, you know, these images being produced. So I urge  
9 the Commission to take that into account. And maybe  
10 what we need is not necessarily a better understanding  
11 of the guidelines, because I think one of the  
12 indications is there may be something wrong with the  
13 guidelines, but I think maybe we need a better  
14 understanding of the crime itself. And I don't know  
15 that that is necessarily a job for the Commission, but  
16 perhaps in formulating the guidelines, the Commission  
17 could better lay out the rationale for the guidelines and  
18 what drove the guidelines in particular.

19 Very quickly, I will touch on one other  
20 matter that was raised, as well, and that is pertaining  
21 to the drug quantities and the statutory minimums in  
22 some cases. You know, I do believe it is appropriate to  
23 consider drug quantity, and I believe that the role  
24 enhancement or the role adjustments provide for the  
25 proper adjustments in consideration of what the quantity

1 is, because I do believe that part of this pertains to  
2 culpability. A defendant who agrees to engage in the  
3 offense of, you know, drug trafficking, this is, you  
4 know, in addition to immigration, what I deal with on a  
5 very, very regular basis. And it is appalling to me, as  
6 a court, how people so easily agree to engage in drug  
7 trafficking. I do believe it is appropriate to consider  
8 quantity because of the fact that there is a vast  
9 difference between somebody who may be, you know,  
10 selling on a street level to somebody who is helping  
11 these drug cartels get their product into mainstream  
12 America. So I think that the tables as they are now  
13 provide for that consideration.

14                   With that, I will conclude my statements  
15 by saying this: I am an individual with my own personal  
16 values and beliefs. You know, the defendant in front of  
17 me is an individual with his own particular concerns.  
18 But I do believe that it is important for us to remember  
19 that it is not me individually and it is not the, just  
20 the defendant individually that is affected by  
21 sentencing. But as a nation, we have to take into  
22 account how this impacts the community that we serve. I  
23 believe that the guidelines provide for the proper  
24 balance between all of the factors, both those that are  
25 already reflected in the guidelines, those set out by

1 3553(a), as well as the individual before the court and  
2 and their particular characteristics and history. Thank  
3 you very much.

4 CHAIR SESSIONS: Thank you very much,  
5 Judge Alvarez.

6 Judge Cardone.

7 JUDGE CARDONE: First of all, let me  
8 begin by thanking you for the opportunity to appear here  
9 today to give testimony. I'm honored to be able to  
10 share with you some of my thoughts regarding the  
11 sentencing guidelines. And before - I prepared a  
12 written statement and I'm going to go over that with  
13 you, but before I do, I want to say two things, because  
14 I was just listening to my colleague Judge Alvarez. On  
15 page two of my written, prepared statement, I'm going to  
16 talk about exactly the same things she just talked about  
17 and I find it interesting that she was talking about it  
18 because I haven't seen her in probably a year, but it  
19 brings home to me how very real that situation is for  
20 those of us who are dealing with it on a regular basis,  
21 and I'm talking about the, the children that we find  
22 here in the United States that are, that come back  
23 illegally, and are facing the enhancements under [2L1.2(b)].  
24 And I'll talk about that in just a minute.

25 But I wanted to emphasize to you, I

1 prepared this statement with no input from Judge  
2 Alvarez, and we both have the same information. The  
3 other thing is she mentioned about pornography. And I  
4 want to reiterate what she said. I actually see quite a  
5 few, not as many as other cases, but I see a lot of  
6 pornography cases, and you know, we're not just talking  
7 about depicting children by pictures. Some of the  
8 graphic, some of the things they've done to children,  
9 you know, tied up, hung upside down, I mean you know, if  
10 you've ever dealt with some of those images, they are  
11 not just nice little images of pretty little girls  
12 painted up. Some of them are horrific, horrific images.  
13 So I just wanted to say that, because I think some  
14 people think we're just talking about pretty painted  
15 little girls, and oftentimes we're not.

16 My tenure on the United States district  
17 court began in July 2003. Before joining the El Paso  
18 Division of the Western District of Texas, I spent over  
19 25 years as a state judge. In my early career, I  
20 practiced before the federal courts, but as the year  
21 progressed, I became more involved in the state court  
22 system. Thus, when I was elevated to the position of a  
23 United States district court judge, I had only a very  
24 passing knowledge of the sentencing guidelines.

25 As I began working with the guidelines, I

1 found them to be extremely useful in setting a framework  
2 for sentencing. I appreciated their thoroughness in  
3 addressing each separate offense and in incorporating  
4 the surrounding circumstances of that offense. However,  
5 by January of 2005, sentencing was thrown into a turmoil  
6 with the U.S. Supreme Court decision in *Booker*, and it  
7 seemed no sooner had I figured out what I was doing,  
8 everything was, might be for naught, it was all changed.

9           What I believe to be the result of *Booker*  
10 and its progeny is essentially a system of sentencing  
11 where the U.S. Sentencing Commission offers its  
12 expertise by compiling data which will provide ranges  
13 within which a particular sentence should fall.  
14 However, the ultimate decision of tailoring that  
15 sentence to fit the individual rests in my hands, the  
16 hands of the district court judge. Though I'm required  
17 to follow the three-step process as set forth in *Gall* in  
18 imposing a sentence, in the end I must give a sentence  
19 which flows from the correct calculation of those  
20 guidelines in keeping with the factors of 3553(a).

21           Though I find this process to be a much  
22 improved system of determining a fair sentence for any  
23 given defendant who might appear in my court, I've also  
24 found that this method is not without its hurdles. Any  
25 structure that's built to accommodate every situation is

1 inevitably going to find someone who just doesn't fit  
2 that structure. It's some of those more problematic  
3 structures that I want to address here today.

4           First, I want to review with you some  
5 statistics, so that you get a sense of the breadth of my  
6 experience in working with these guidelines. For your  
7 information, I've brought with me, and I think each of  
8 you have a copy of the 2009 fiscal year statistics for  
9 the Western District of Texas. In there you will see  
10 that the total criminal case filings for 2009, in my  
11 division alone, in El Paso, was 3,424 cases. That's  
12 approximately 38 percent of all of the criminal cases  
13 filed in our district. There are only four district  
14 judges in El Paso. In 2003, when I took the bench, the  
15 total number of criminal cases filed in El Paso was  
16 2,140. So the number has actually increased by 1,284  
17 over the past six years, just in my division. And for  
18 fiscal year 2009, in my court alone, there were 898  
19 criminal defendant cases that were filed and 963  
20 criminal defendant cases closed. Thus I meted out  
21 approximately 1,000 criminal sentences in the past  
22 fiscal year.

23           The majority of the cases that I see in  
24 my court are immigration cases and drug cases. The drug  
25 cases involve large quantity of drugs, including

1 marijuana, cocaine, heroin, ecstasy and  
2 methamphetamines. The recent publicity that the City of  
3 Juarez, Mexico has received, and the indictments by  
4 Attorney General Holder of the Mexican drug cartels,  
5 indicates that the El Paso-Juarez corridor is one of  
6 three major drug smuggling corridors into the United  
7 States. In fact, in the indictment filed by Attorney  
8 General Holder in August of 2009 against Vicente  
9 Carrillo Fuentes, Attorney General Holder stated that  
10 approximately 70 percent of the cocaine which entered  
11 the United States annually was transported through the  
12 Juarez El Paso corridor.

13 So today I'd like to address my remarks  
14 to the two areas of the sentencing guidelines that I  
15 deal with the most and that I know the best, immigration  
16 and drug cases.

17 First, and this is the part that pertains  
18 to Judge Alvarez, I'd like to address the issue of the  
19 enhancement under [USSG] §2L1.2(b)(1), and that's the  
20 enhancement which applies when an alien unlawfully  
21 enters the United States and has a prior conviction  
22 or convictions. In many of the cases that I see,  
23 this enhancement applied, I have before me a  
24 young person in his twenties, and it's almost  
25 tracking what she said, who was brought into this

1 country as an infant by undocumented parents seeking a  
2 better life. This child grew up going to school in the  
3 United States, speaking only English, working, and most  
4 of the time never questioning where he was born or his  
5 nationality. He believes himself to be an American.  
6 Then, at some point in his twenties, the person has a  
7 run-in with the law. He's convicted of a felony  
8 offense, and as a result of that conviction, he's  
9 deported from the only country he knows. Though he's  
10 deported back to Mexico, he speaks no Spanish, is  
11 unfamiliar with that culture, has no family members  
12 there to assist him. All of his family is back here in  
13 the United States. This person oftentimes will panic,  
14 return back into the United States, not realizing that  
15 if he's caught he faces sentences of 37 to 46 months for  
16 a plus 16 enhancement, 24 to 30 months for a plus 12  
17 enhancement, and or 12 to 18 months for a plus eight  
18 enhancement.

19 Now, contrast that with somebody who has  
20 come into the United States repeatedly for the past 20  
21 years. That person has been voluntarily removed to  
22 Mexico 11 times, has been returned to Mexico two times.  
23 This person is found at the El Paso County Detention  
24 Facility because he's been arrested and convicted of a  
25 DWI. He has numerous prior run-ins with the law for

1 public intoxication, misdemeanor theft, assault, all  
2 with the labels or disposition of the case unknown.  
3 This person would probably be a total offense level of  
4 six, criminal history category two, and his sentencing  
5 guideline range would be one to seven months.

6 I'd like to propose to you the following:

7 I believe that the sentencing guidelines should  
8 recognize circumstances where a defendant has been in  
9 this country for many years, only to find that now the  
10 only country he knows is no longer an option for him.  
11 These individuals are often in this country through no  
12 fault of their own. Shouldn't there be some recognition  
13 of that in mitigation of their guideline range? Perhaps  
14 there could be an adjustment provision, much like a  
15 minus three adjustment for acceptance. It could allow  
16 for a downward adjustment by factoring in that there are  
17 numerous, factoring in their numerous prior years of law  
18 abiding residence in this country.

19 Currently, to address this issue, counsel  
20 for the defendant often files what we call a motion for  
21 downward departure, citing cultural assimilation.  
22 Though recognized in the Fifth Circuit, it is a highly  
23 discouraged and infrequently granted departure. It  
24 essentially requires the sentencing court to make a  
25 finding that the defendant's circumstance are so

1 atypical or extraordinary that it warrants a downward  
2 departure on the basis of cultural assimilation, and as  
3 I've indicated, these are cases that I see quite often,  
4 as evidenced by Judge Alvarez referring to the same  
5 thing, thus making a finding by me that they are  
6 extraordinary or atypical is just not warranted. That's  
7 why I would propose to you that these defendants should  
8 be entitled to some sort of formulaic downward  
9 adjustment. I believe that this would avoid many of the  
10 variances that the judges must resort to in order to  
11 recognize those special circumstances.

12                   A second issue in immigration that I'd  
13 like to touch upon is the criminal history  
14 documentation. Though over the years I have seen many  
15 different types of immigration cases, the vast majority  
16 of those cases that pass through my court are illegal  
17 reentry, 18 U.S.C. § 1326 cases. Many of these  
18 defendants are charged with enhanced felonies understand  
19 1326(b)(1) or 1326(b)(2), and it is these enhanced illegal  
20 reentry cases which cause the most consternation. It is  
21 the rare enhanced 1326 case that doesn't require an  
22 extensive check into the defendant's criminal history.  
23 Most of these criminal histories expand over decades,  
24 entail searching into court documents from New York to  
25 California to Denver to Florida, in any one given case.

1 Often cases must be postponed to allow the United States  
2 probation offices, officers to obtain copies of  
3 documents from small counties which keep very poor  
4 records. And with the advent of computer filing and  
5 docketing, many courts have destroyed paper copies  
6 altogether and can only provide the court with some sort  
7 of computer generated entries. This, in most cases,  
8 doesn't satisfy the needs or the requirements of  
9 documenting a defendant's criminal history for purposes  
10 of accurately determining that correct enhancement  
11 calculation and their criminal history category.

12           Though I am unsure of the exact solution  
13 to this problem, I would like to point out that it is  
14 truly a problem that I see on almost a daily basis. One  
15 solution might be to limit the criminal history in those  
16 cases to a certain number of years, perhaps ten. I  
17 don't know the exact fix to this dilemma, but I would  
18 point out to you that it is a very time consuming and  
19 difficult task to comply with the requirement of this  
20 section of the guidelines.

21           Now, turning to drug cases. The  
22 situation under the guidelines that I'd like to address  
23 is a common one along the U.S. Mexican border, a  
24 multi-defendant drug smuggling conspiracy case. This  
25 issue involves my giving what I consider to be disparate

1 sentences to co-defendants in the same case.

2 I'll use as my example a case involving  
3 seven defendants charged in a seven count indictment for  
4 conspiracy drug offenses including possession with  
5 intent to distribute large quantities of  
6 methamphetamine, marijuana and MDMA, which is ecstasy.  
7 Obviously, since it's a conspiracy case, each of these  
8 defendants have different roles to play. The main  
9 defendants are the ones who directed the transporting  
10 and loading of the controlled substances between Mexico  
11 and the United States to stash houses in El Paso, and  
12 then subsequently directed those transfer of those drugs  
13 to far away states such as Georgia and Tennessee. Then,  
14 as co-defendants, there are the truck drivers who  
15 transported illegal narcotics from El Paso, Texas, into  
16 the interior of the United States, often using what we  
17 call a cover load. In this case, one of the leaders of  
18 the drug conspiracy received a sentence as low as 90  
19 months, while the truck driver received a 120-month  
20 sentence, which is the mandatory minimum.

21 What I would like to address regarding  
22 the way these cases are handled under the guidelines  
23 calculations pertains to the availability of safety  
24 valve, which would allow for a guideline range below the  
25 mandatory minimum of 120 months for the leader

1 organizer. Compare this to the inability of the  
2 co-conspirator with a prior criminal record to be  
3 sentenced below that mandatory minimum. This low level  
4 co-conspirator is now eligible - is not eligible for  
5 safety valve because of a prior conviction. Even if he  
6 fully cooperates with the government by providing a  
7 safety valve statement, and even if he played only a  
8 minimal role, a minor role or even a minimal role in  
9 that offense, if this low-level co-conspirator is a  
10 truck driver with a prior misdemeanor record that  
11 somehow amounts to more than one criminal history point,  
12 any possibility of getting below that mandatory minimum  
13 is foreclosed. Meanwhile, safety valve for the leader  
14 organizer is automatic. Certainly, the low-level  
15 co-conspirator can seek some sort of 5K.1 motion for  
16 downward departure from the government, but it is not  
17 automatic, and frankly, because the government's  
18 obtained everything they wanted from the conspiracy  
19 leader, who obviously would have much more knowledge  
20 about what was going on, the minor co-conspirator is  
21 facing a mandatory minimum. And I, as the judge, seeing  
22 the potential injustice of this, am powerless due to the  
23 mandatory minimum.

24 Now, I recognize, and I brought it with  
25 me, that in your March, 2009 publication, *Impact of*

1     *Prior Minor Offenses on Eligibility for Safety Valve,*  
2     you discuss my concern in part with regards to that,  
3     those prior minor offenses. In the conclusion of that  
4     publication, you state that only 260 defendants, 1.1  
5     percent of all drug trafficking offenders, were  
6     disqualified from eligibility for safety valve due to  
7     minor offenses in their criminal history. Thus you  
8     conclude prior convictions for minor offenses have a  
9     minimal impact on safety valve eligibility. First, in  
10    my court, this is not such a rare occurrence, and as a  
11    judge, I strive to give fair and reasonable sentences to  
12    100 percent of the defendants appearing before me, not  
13    some calculated subset, and I believe that fairness and  
14    reasonableness demands consistency. This is what I  
15    believe justice requires. To mete out an injustice to a  
16    defendant should not be disregarded because it is a  
17    statistical minority. Furthermore, I would argue to you  
18    the opposite statistic, and that is if this provision is  
19    allowing 99 percent of leader organizers to get that  
20    less significant sentence than a minor player, where is  
21    the justice or fairness in that?

22                   I have attempted to limit my comments  
23    today to the few areas where I believe the guidelines  
24    and statutes have resulted in disparate sentences.  
25    These comments, however, should not belie the fact that

1 I believe the sentencing guidelines generally work very  
2 well.

3 Thank you for the opportunity to speak,  
4 and I'd be glad to answer any questions.

5 CHAIR SESSIONS: Thank you, Judge  
6 Cardone.

7 So we open it up for questions. Mr.  
8 Wroblewski.

9 COMMISSIONER WROBLEWSKI: Yeah. I'd like  
10 to just ask you, Judge Cardone, just something about the last  
11 sentence you spoke about.

12 JUDGE CARDONE: Sure.

13 COMMISSIONER WROBLEWSKI: The guidelines  
14 and the safety valve provision in the guidelines, in the  
15 statute, are supposed to preclude organizers and leaders  
16 from getting reductions under the safety valve. So I'm  
17 a little curious about that. And one of the things you  
18 talked about in one of the other panels is that if a  
19 leader or organizer involved in these truck loads, their  
20 offense levels should be in the high thirties, if not  
21 the forties, and they may be getting reductions because  
22 of substantial assistance because they're cooperating.

23 JUDGE CARDONE: Right.

24 COMMISSIONER WROBLEWSKI: But isn't part of  
25 that that those reductions are taking them down to as low

1 as a 90-month sentence?

2 JUDGE CARDONE: No, no question, and  
3 again I will say to you that this is a conspiracy case.  
4 So in a conspiracy case, the amount, if you've got a  
5 bunch of people working in conspiracy, the amounts are  
6 attributable to everybody in that conspiracy. So even  
7 the one truck driver who's taking only a part of that  
8 huge amount of drugs is going to be in the conspiracy  
9 and is going to be sentenced with everybody else, and so  
10 they're in the high 40 range too. And yet they're not  
11 going to get the benefits that that leader organizer can  
12 get. And let me, let me qualify. When I say leader or  
13 organizer, I use that term to differentiate from - I  
14 know under the guidelines it's a very specific term, but  
15 I meant even if it's not the actual top of the line  
16 leader organizer, to be so much more culpable and be  
17 eligible for those reduced sentences because, because  
18 you're - some of these people are Mexican nationals, so  
19 they don't have a record in the United States. God  
20 knows what they have in Mexico, but they don't have a  
21 record in the United States, so they're not going to  
22 have to worry about that, that minus one that won't  
23 allow them to get a safety valve, whereas you've got  
24 some truck driver who picked up a DWI, you know,  
25 sometime in Tennessee, and he's not going to be eligible

1 for that because he, he scores higher. So that's really  
2 what I'm trying to refer to more.

3 COMMISSIONER WROBLEWSKI: And I take it  
4 that the steps that the Commission has taken over the  
5 years, for example, if you're a minor player, you don't  
6 have the leading role, you have levels - more levels off of  
7 the leading role, you have two to three levels taken off  
8 for accepting responsibility, and the person who's more  
9 culpable is supposed to be going up because of being an  
10 organizer or leader or manager or something, I take it  
11 you don't think any of that is sufficient, that those  
12 things are not sufficient to take into account.

13 JUDGE CARDONE: I think it helps, but if  
14 you're looking at a mandatory minimum, there's nothing  
15 that I can do.

16 CHAIR SESSIONS: Commissioner Howell.

17 COMMISSIONER HOWELL: I just want to  
18 start off with one comment about the child pornography  
19 case that both of you judges made, and that is that  
20 across the country, both at our hearings and it's  
21 revealed in other areas, so many judges think that our  
22 child pornography guidelines are producing too severe  
23 sentences for some of the offenders that they see in  
24 front of them. I think because across the country  
25 consistently in each circuit, the highest variance rate

1 among all the different offense types is in the child  
2 pornography area, this is something that is a priority  
3 for the Commission, and that we're looking at.

4 We're in the process, I think Judge  
5 Alvarez, you said having the Commission, you know,  
6 having the Commission do some sort of, you wonder  
7 whether we would be able to do a report or study of this  
8 type of offense and the type of offenses that are coming  
9 out to help explain some of the variances, and we are  
10 undertaking such, such a study right now, looking at the  
11 literature regarding recidivism, how many child  
12 pornography possessors actually have contact with,  
13 contact of a sexual nature with children, and so we are,  
14 we are undertaking that study now, and re-examining that  
15 child pornography guideline to see if there are  
16 refinements that can be made that make it more useful to  
17 judges around the country, because the variance rate is  
18 such that this is something that many of us feel we just  
19 can't ignore.

20 JUDGE ALVAREZ: May I make one comment?

21 COMMISSIONER HOWELL: Yes.

22 JUDGE ALVAREZ: You said one of the  
23 things that you're looking at is to see how many of  
24 those offenders have actual contact with children -

25 COMMISSIONER HOWELL: Yes.

1                   JUDGE ALVAREZ:  And I see that in very  
2     different settings, and I would urge the Commission to  
3     consider that that is not necessarily the most important  
4     criteria.  And I'll give, by way of example, you know,  
5     there was an incident, I don't remember it was six  
6     months ago, a year ago, where a news reporter was  
7     videotaped in her room by some stalker, and that was put  
8     out to the public.  I don't know that it was, you know,  
9     more or less embarrassing to that news reporter, the  
10    fact that that stalker had not personally touched her.  
11    Okay?  So it is not just a question of is there physical  
12    contact.  I go back to, you know, the statement that I  
13    made, it's a matter of is there a market for this,  
14    because there are those who will view it?

15                   COMMISSIONER HOWELL:  I didn't mean to  
16    say that that was the only harm we were looking at.  I  
17    think there are a variety of harms, and that one is the  
18    embarrassment, continuing, almost permanent  
19    embarrassment.

20                   JUDGE ALVAREZ:  More than embarrassment.

21                   COMMISSIONER HOWELL:  But one of the, you  
22    know, significant harms that, that we are looking at  
23    gauging or trying to evaluate is people who possess  
24    child pornography and whether they do have actual  
25    contact with children.  So I agree with you that there

1 are a number of other harms that Congress decided to get  
2 it again, the Supreme Court decided, and these are  
3 overriding things that we're looking at in this report.

4 I started with comment. I actually  
5 wanted to turn to, for this question, to a comment Judge  
6 Holmes made.

7 JUDGE CARDONE: Can I?

8 COMMISSIONER HOWELL: Yes.

9 JUDGE CARDONE: Because I just wanted to  
10 say something about your job on the child pornography,  
11 and I didn't mean to cut you off, but my concern is this  
12 sort of leaves the topic, and that is I would only say,  
13 on your looking at it, and some of the comments that you  
14 get that it's either too harsh or too easy, I know as a  
15 judge that when I get these child pornography cases,  
16 what happens is that we get these presentence  
17 investigation reports, and they cite numerically, and  
18 when somebody downloads this stuff, it can be volumes of  
19 stuff or it can be just a few things, normally it's  
20 volumes, because once you get it on, it just keeps  
21 coming.

22 But we get sort of this very sort of  
23 analytical analysis of like what is on the computer and  
24 how many images and all of those kinds of things. And  
25 I, I see it quite often, not, I can't say, you know, but

1 I see it quite often, and when you see it and you read  
2 it like that, it's not the same thing.

3 And I will give you only an example that  
4 I had. And that was that I was reading this report, and  
5 it was making reference to the fact that he had, this  
6 person had clicked on some website. It had a very sort  
7 of innocuous name, as some of them do, and then all of a  
8 sudden found himself in all of this child porn. And the  
9 attorney tried to use that as a way to say, Judge, you  
10 know, this is not a bad guy, he has no prior record, et  
11 cetera.

12 At the sentencing hearing, I actually  
13 got, got testimony, and they brought the website in, and  
14 you know, if you have to see those images, if the judges  
15 or the people that are commenting about this saw what  
16 they're talking about, not just looked at it sort of  
17 analytically, it is a lot different. And I would only,  
18 I'm only saying that to you because it's one thing to  
19 read about it, but it's another thing to see some of  
20 those images, and when you see those images, when we're  
21 talking about child pornography, it is not something  
22 that - it's like Judge Alvarez says, and again, it's  
23 not something that you can go, "Oh, this is just  
24 harmless." These are oftentimes very young children, in  
25 all kinds of acts and circumstances, and I, I don't know

1 if the guidelines can somehow - I mean, you know, you  
2 hate to force anybody to look at these pictures, but  
3 I'll tell you what, when you look at these pictures, you  
4 have a very different opinion than if you're just doing  
5 some sort of analytical, well, it's 1,550 images versus  
6 two images. I would only point that out.

7 COMMISSIONER HOWELL: This question is  
8 for Judge Holmes. One of the things that you  
9 recommended to us is to update the manual to make it,  
10 you know, to make it more workable, this advisory, and  
11 one of the things that you've suggested with regard to  
12 the departures, Chapter Five, is perhaps they should be  
13 deleted, and you're not the first person to appear in  
14 front of us to make that suggestion. And I have to say  
15 one of the things that I puzzle over with respect to  
16 that suggestion is our statutory mandate, which tells us  
17 that we, as a Commission, shall, and it says shall,  
18 consider how much relevance certain factors should play  
19 in sentencing, and those factors include age, family  
20 ties, community ties, education, and I think that the  
21 first Commission looking at that statutory mandate, what  
22 their job was, created Chapter Five in part to address  
23 those factors and make a number of them discouraged  
24 factors. So if we are looking to update the manual, and  
25 looking at the ones, the suggestion on one side to just

1 delete all references to those discouraged factors, and  
2 from the other side, our statutory mandate to give  
3 guidance to judges about how they should consider those  
4 factors, what relevance they should play in sentencing,  
5 I puzzle whether the elimination option is really an  
6 option that which comports with what we're supposed to  
7 be doing. I just wanted to know if you could help me or  
8 give me your thoughts on that.

9 JUDGE HOLMES: It may not be the best  
10 suggestion for how to go about it. My real thought is  
11 that we are five years into an advisory guideline system  
12 and we're still dealing with a manual, rules and  
13 statutes designed for a mandatory system. That's  
14 really, in thinking about that, and in thinking about  
15 what I do as a judge, what is helpful to me, and it is  
16 helpful, it is helpful to have the sentencing guideline  
17 range, to calculate that and look at it and think about  
18 it in light of the 3553(a) factors. And, and but once,  
19 once I have the sentencing guideline range and I have  
20 the defendant in front of me, and I have the 3553(a)  
21 factor to the consider, by in large, the departure  
22 provisions in the manual don't play much effect on -  
23 don't really affect what I do.

24 COMMISSIONER HOWELL: So if those  
25 departure provisions were revised to actually explain

1 more fully what, how those offender characteristics  
2 should be considered as part of sentencing, would, would  
3 that be more helpful, a rewrite of that chapter?

4 JUDGE HOLMES: You know, a rewrite of the  
5 35, you know, some commentary on the 3553(a) factors  
6 probably would be helpful, and how you apply them.  
7 Certainly we all struggle with that. We know there is  
8 no magic formula, and we all know that, on how to apply  
9 those factors. It's a difficult process, and it  
10 involves judgment. But once you, under the sentencing  
11 guidelines manual, you calculate the guidelines range  
12 and then you look at determining whether there are any  
13 departures that apply, if there are departures that  
14 apply, and you don't change the guideline range, then  
15 you're outside the guideline range. But once you're  
16 outside the guideline range, you're already into the  
17 3553(a) factors, and they're going to control in every  
18 instance. That's what you have to justify your ultimate  
19 sentence on anyway. And because of the, the other  
20 things that I mentioned, and everybody is aware of it,  
21 the *Irizarry* case, when you get in, when you go into  
22 sentencing and you hear the arguments and you, you hear  
23 the presentations, and you make a decision, and some of  
24 the judges, I think Judge Jones mentioned in the earlier  
25 panel, you don't necessarily know where you're going to

1       come out.  If you did, there would be no point in having  
2       the arguments and the allocution and all those things.  
3       You're going to listen to all that, and then make a  
4       judgment.  And if you're going to impose a sentence that  
5       is either above or below the guideline range, and you  
6       hadn't anticipated doing that in time to give notice,  
7       then, then you're going to base it on the 3553(a)  
8       factors and not on the, and not on the manual.

9                   I will say, unless you try a case - I  
10       don't know how the other judges do this, but if we have  
11       a, if you you know the statistics of the percentage of  
12       them that plead guilty, we have to see them at the  
13       change of plea hearing and at the sentencing.  And I  
14       will read the presentence report either the day before  
15       or the day of sentencing, and then go over it with the  
16       probation officer before the hearing.  But I don't read  
17       it two weeks in advance.  You know, I wouldn't remember  
18       it if I did.

19                   If we have a trial, and then we have  
20       sentencing, I can give notice, and I've done that.  I'm  
21       thinking about departing upward.  I have done that where  
22       I've heard a trial, and I know the case, and I can give  
23       them advance notice.  But if all we have is a change of  
24       plea, I may not know I'm going to consider a departure  
25       until I read the presentence report, because I don't

1 have enough information about the case.

2 So the departure provision, in terms of  
3 what I do with *Booker* and with *Gall* and *Rita* and all  
4 those cases, is not, it's just not a significant part  
5 of, of what - we may look at it in terms of how we fill  
6 out the sheet that goes to the Sentencing Commission,  
7 but in terms of the actual decision making, it's not a  
8 significant part.

9 CHAIR SESSIONS: Judge Hinojosa.

10 COMMISSIONER HINOJOSA: This is just, I  
11 guess a follow-up. *Booker* and the cases since then have  
12 said the procedure is termination of the guideline range,  
13 consideration of departures, and then going to  
14 variances. The one thing, when you talk about 3553(a)  
15 factors, when you look at those factors, two of them,  
16 two of the seven of the guidelines, one is the  
17 guideline, the other one is the policy statement, which  
18 is the departures, and I, as a judge -

19 JUDGE HOLMES: And it's all written for a  
20 mandatory guideline system. And I do look at those  
21 things, and I say it, and again, to the extent that  
22 someone argues for a departure under the guidelines, I  
23 will look at those guidelines and I will make a  
24 determination is it applicable. It's part of my duty.  
25 And if one side or the other argues for a departure

1 under one of the provisions of the guidelines manual, I  
2 will make a decision, either it fits or it doesn't fit,  
3 because it's part of what I'm required to do, and it  
4 makes a complete record for appeal. But at the end, the  
5 decision on the sentencing is going to be based on the  
6 3553(a) factors, and that does include considering the  
7 guidelines, but there are a lot of things in the  
8 departures that - I mean I, in my, in my experience,  
9 it's just not a very practical aspect of the manual  
10 that's helpful to us at this point.

11 COMMISSIONER HINOJOSA: You are required to  
12 look at it, and you know, really, one of the things that I  
13 don't think the Commission has done a good enough job is  
14 to really explain [§]5K2.0 with regards to the  
15 possibilities for the cases that have been brought up by  
16 the two federal border judges, and the opportunity not  
17 just to look at 5H1, but point six, but then also go to  
18 5K2.0 with all the possibilities there.

19 But it appears to me that the statute  
20 does require the steps that you just described, and then  
21 to say well, it was written when the guidelines, that  
22 statute was written when the guidelines were mandatory.  
23 Nevertheless, the Supreme Court has left it there. They  
24 decided which parts of the statutes would be written  
25 off, but the statute is still there.

1                   JUDGE HOLMES: And that's true. And I  
2 do, in every instance, I tell them we're going to go  
3 through the steps, including the departure steps under  
4 the guidelines. If someone argues for a departure or  
5 asks for a departure under the guidelines, we consider  
6 it, listen to the arguments, reads the cases if they're  
7 applicable cases, and make a determination.

8                   But you know, and my point was not that  
9 we should not be doing that as judges today. I mean  
10 that is our duty to do that today. But at the end, we  
11 have to make the decision based upon – we have to  
12 impose a sentence that is sufficient but not greater  
13 than necessary to comply with the purposes of [18 U.S.C. §  
14 3553(a)(2)], and that's, in the final analysis, what we're  
15 supposed to do. Consideration of the guidelines is one  
16 of those, one of those points. When we do that, when we  
17 do that, we have done our duty under the law as it  
18 stands today, and if it's not a sentence within the  
19 guideline range, I don't think that we're departing from  
20 anything or varying from anything. We're simply doing  
21 our duty under the statutes. And I would like to see us  
22 move toward a, a system that is actually designed for an  
23 advisory guideline system.

24                   And I don't disagree with you about what  
25 I'm supposed to be doing today. It may be that, in my

1 experience, the, the 35 - the departures don't play a  
2 big part in our sentencing, other than substantial  
3 assistance. Substantial assistance still plays a really  
4 big part in sentencing. The others don't play a big  
5 part. I very rarely get arguments based on the  
6 guidelines. We do occasionally. But we don't, we don't  
7 very often get arguments based on departures under the  
8 guidelines.

9           But I do think we should be rethinking if  
10 this is a good system, and I think it is. I think the  
11 advisory guideline system is a good system. I think  
12 it's superior to the mandatory guidelines system. I  
13 think it's superior to having sentencing without any  
14 guidelines at all. If we're going to do that, I think  
15 we ought to rethink the whole scheme, including the  
16 statutes, about what we're required to do and how we're  
17 required to do it.

18           And it's very helpful to me to know here  
19 is a sentencing range that, over time, has been the, a  
20 common range for sentences like this. That's helpful to  
21 me. But a lot of the rest, some of the other things are  
22 not. That's the meat of the guidelines, and I think  
23 that is helpful. The rest of it I think is probably not  
24 so helpful.

25           CHAIR SESSIONS: Commissioner Friedrich,

1 do you have anything?

2 COMMISSIONER FRIEDRICH: Yes. Judge  
3 Cardone, thank you for providing the statistics. This  
4 is published material to be used by the court?

5 JUDGE CARDONE: It's, I don't know who  
6 it's published to. It's certainly published to us, and  
7 it is prepared by our district clerk, and provided to  
8 all of us, and so we receive it. I received it just  
9 last week, and so I was able to bring it with me.

10 COMMISSIONER FRIEDRICH: Well, it's  
11 interesting, it's very interesting to me how it's broken  
12 down, different reports by judge in terms of your case  
13 load, criminal and civil, and bench hours and how long  
14 it takes to resolve a case and all these factors. It's  
15 very interesting to me.

16 I'm wondering, and I pose this question  
17 to all of you, what your reaction would be to having  
18 information published about the sentences you impose.  
19 You know, in the advisory system, the litigants are much  
20 more - much less certain about what sentence they might  
21 expect before a certain judge. It seems to me it would  
22 be especially helpful for them, appearing before certain  
23 judges, to have a better sense of what judges have done  
24 in particular types of cases. And I'm just interested  
25 in what your reaction would be to having more

1 information providing, provided about individual judges'  
2 sentencings.

3 JUDGE CARDONE: Well, I would say to you  
4 that I think that's probably not the case, because the  
5 attorneys that appear in front of us on a regular basis  
6 know us very well, and know the, know sort of what gets  
7 us going and what doesn't. I mean I, I don't know how  
8 else to put it. But I would say to you that each of  
9 these, these defendants are represented by counsel who  
10 are in our court every single day, who know us, who know  
11 sort of the things that we look at and, and you know, I  
12 can tell because the attorneys argue them to me, and  
13 sort of know, and have said to me, and I've told my  
14 client, judge, that, you know, you don't like blah,  
15 blah, blah blah. And I don't mean to say that it's our  
16 personal opinions, but it's sort of the way we look at  
17 different issues, the factors, some of the factors, et  
18 cetera, et cetera. So I don't know that statistically  
19 that would make a big difference, because I think  
20 nationally maybe, but in our communities, the lawyers  
21 that practice in front of us, I think, and I'm a big  
22 believer in consistency, I think because of your  
23 reputation and the way you consistently hand out  
24 sentences, that those lawyers then counsel their clients  
25 of that. So I think oftentimes they already have that

1 information.

2 COMMISSIONER FRIEDRICH: Judge Alvarez.

3 JUDGE ALVAREZ: I would agree with that.

4 I don't have any problem with, you know, my statistics  
5 being published. They are quite open records so that is  
6 not an issue. But I believe that the attorneys that  
7 practice regularly are familiar with what we tend to do  
8 in similar cases, and I don't know that it would make  
9 any difference to the particular defendant, because  
10 obviously he's already before us. So that as a  
11 defender -

12 COMMISSIONER FRIEDRICH: In terms of  
13 deciding whether to plead, that sort of thing.

14 JUDGE ALVAREZ: I suppose in that respect  
15 it might help to a certain degree, but I think that for  
16 the most part they'd get that information from their  
17 counsel, because they do know our work already.

18 COMMISSIONER FRIEDRICH: Judge Holmes.

19 JUDGE HOLMES: I have no objection to  
20 that information being compiled and published. I agree  
21 with what the other judges said, that most of the  
22 lawyers are going to be aware, and so for that purpose,  
23 it's, it has some value, but not great. But the public  
24 has an interest, a legitimate interest in knowing what  
25 we do, and, and being able to form their own opinions on

1       whether we're doing our job properly, and I don't have a  
2       problem with that information being published.

3                   CHAIR SESSIONS: Well, thank you all very  
4       much for coming here today. This is a very interesting  
5       discussion. We'll take your thoughts, and clearly, I  
6       think the expression is under advisement. Thank you.

7                   (Recess taken from 11:30 to 11:47.)

8                   CHAIR SESSIONS: Well, welcome. This is  
9       exciting for us.

10                   Mr. Lappin, we've been together at  
11       meetings all across the country, in the Criminal Law  
12       Committee for, in your case, for ten years, and to have  
13       you testify before the Commission is an honor for all of  
14       us. And Ms. Vance, I really sincerely appreciate your  
15       coming here today. So this is our last panel  
16       discussion, and we're really looking forward to it.

17                   So let me introduce each of you to the  
18       Commission.

19                   Harley Lappin was sworn in as director of  
20       the Federal Bureau of Prisons in April of 2003. He has  
21       a long and distinguished career as a public  
22       administrator with the Bureau of Prisons. He began his  
23       career in November of 1985 as a case manager at FCI in  
24       Texarkana, Texas. He was promoted throughout the ranks  
25       through the Bureau. Mr. Lappin received a Bachelor of

1 Arts degree in Forensic Studies from Indiana University  
2 in Bloomington, Indiana, in 1978, and a Master of Arts  
3 degree in Criminal Justice and Correctional  
4 Administration from Kent State University in Kent, Ohio  
5 in 1985.

6 Today is special for me. One of my  
7 favorite experiences of my professional life, really my  
8 first experience, was as a teacher and warden, which, of  
9 course, was not under your jurisdiction at that point.  
10 And then I worked my way through law school in the  
11 General Counsel's Office, Office of the Bureau of  
12 Prisons in Washington, D.C. So that's sort of a, I  
13 don't know, is that a circle of history or something  
14 that I'm, many years later, I'm -

15 DIRECTOR LAPPIN: We were lucky to have  
16 you.

17 CHAIR SESSIONS: I'm not so sure about  
18 that.

19 And Joyce Vance was confirmed as United  
20 States Attorney for the Northern District of Alabama in  
21 August of 2009. Prior to serving that post, she was  
22 chief of the Appellate Division in the U.S. Attorney's  
23 Office in the Northern District of Alabama, where she  
24 has worked since 1981. Before entering government  
25 service, she was an associate at the Birmingham law firm

1 of Bradley, Arant, Rose and White from 1988 to 1991.  
2 She earned her Bachelor of Arts degree from Bates  
3 College in 1982, and her law degree from the University  
4 of Virginia Law School in 1985.

5 For those of you who don't know, Bates  
6 College is in Lewiston, Maine, which happens to be the  
7 school where my eldest daughter went.

8 With those personal introductions,  
9 Mr. Lappin.

10 DIRECTOR LAPPIN: Thank you, Judge. It's  
11 really a pleasure for me to be back before you for the  
12 hearing. I certainly appreciate the opportunity to  
13 appear before you today and discuss the Bureau of  
14 Prisons inmate reentry programs, as well as the  
15 challenges we are facing, including continued increases  
16 in the size of the inmate population, unfortunately  
17 without corresponding increases in capacity or staffing  
18 for the agency.

19 Over the past 20 years, the federal  
20 inmate population has increased by more than 200 percent  
21 to more than 209,000 inmates. Over the past few years,  
22 we haven't been able to build enough facilities to keep  
23 up with the increase in the federal inmate population,  
24 and we have not been able to increase staffing, as well.  
25 Today our inmate to staff ratio is 50 percent higher

1 than that reported by the five largest state departments  
2 of corrections. We are forced to double bunk nearly all  
3 of our high security institutions, many of whom are  
4 aggressive and violent offenders, and have various  
5 antisocial tendencies, and we are triple bunking nearly  
6 half of the remaining inmate population housed in our  
7 lows and mediums. Over the past 25 years, the number of  
8 inmates in federal prisons who have a history of  
9 violence has increased more than six-fold, and that is  
10 affiliated with gangs have increased by four-fold.

11           Rigorous research demonstrates that  
12 increases in crowding and reductions in staffing lead to  
13 increased serious assaults by inmates, both on staff and  
14 inmates. Additionally, crowding and reduced staffing  
15 levels affects inmates' access to important services,  
16 and limits our ability to prepare inmates for reentry  
17 into the community. Inmates are being released,  
18 unfortunately, without the benefit of some programs that  
19 enable them to gain the skills and training necessary to  
20 reintegrate successfully. In fiscal year 2007-2008, for  
21 the first time, the Bureau of Prisons was not able to  
22 meet the statutory mandate for treating 100 percent of  
23 eligible offenders in need of residential substance  
24 abuse treatment. The waiting list for such treatment  
25 currently exceeds 7,000 inmates, and waiting lists for

1 education programs currently exceed 15,000 inmates.

2 Our most important reentry program, or  
3 one of them, Federal Prison Industries, is dwindling,  
4 rather than expanding. We operate factories, primarily  
5 at medium security and high security institutions, where  
6 we confine the most violent and criminally sophisticated  
7 offenders. More than three-quarters of the inmates who  
8 work in Federal Prison Industries have been convicted of  
9 serious offenses, including drug trafficking, weapons,  
10 robbery or other violent offenses. Work in Federal  
11 Prison Industries keeps inmates productively occupied,  
12 thereby reducing the opportunity for violent and other  
13 disruptive behavior. Work in Federal Prison Industries  
14 also teaches inmates job skills and work ethics, and it  
15 does so without the use of appropriated funds. Rigorous  
16 research has confirmed that inmates who participate in  
17 the program gain valuable skills and training, resulting  
18 in substantial reductions in the rate of recidivism.  
19 Federal Prison Industries participants are 24 percent  
20 less likely to recidivate, when compared to similar  
21 nonparticipating inmates, and inmates who participate in  
22 vocational or occupational training programs are 33  
23 percent less likely to recidivate than similar inmates.  
24 Additionally, Federal Prison Industries participants  
25 were 14 percent more likely to be employed one year

1 after release from prison than their nonparticipating  
2 peers. Finally, inmates in Federal Prison Industries  
3 are less likely to be involved in misconduct while  
4 incarcerated, as compared to other inmates.

5 Last year Federal Prison Industries  
6 closed or downsized 20 factories, resulting in the loss  
7 of approximately 1,700 inmate jobs. That's nearly ten  
8 percent of the federal prison inmate workforce in Prison  
9 Industries. These actions, while necessary, can be  
10 expected to result in more idleness, higher recidivism,  
11 and increased staffing required on the part of the  
12 Bureau of Prisons to supervise more idle inmates.

13 There are many factors that significantly  
14 affect recidivism, including prison programs. Research  
15 by the Washington State Institute of Public Policy  
16 confirms that programs such as those operated by the  
17 Federal Bureau of Prisons, which include residential  
18 drug treatment, Federal Prison Industries, education and  
19 vocational training, yield savings as high as \$6.23 for  
20 every dollar spent, as a result of lowering costs for  
21 arrests, conviction, incarceration, supervision and  
22 avoiding further crime victimization.

23 The longstanding philosophy of the Bureau  
24 is that preparation for reentry begins on the first day  
25 of imprisonment. The broad array of programs available

1 at every federal prison is designed to facilitate  
2 prisoner reentry. All medically-able sentenced inmates  
3 are required to work. Most inmates are assigned to do  
4 institution jobs such as food service worker, orderly,  
5 plumber, painter, warehouse worker, groundskeeper. They  
6 earn between 12 and 40 cents per hour in these  
7 institution jobs. Inmates who participate in Federal  
8 Prison Industries earn up to \$1.15 per hour.

9           The Bureau of Prisons' educational  
10 programs are effective in reducing recidivism. Inmates  
11 who participate in these programs are 16 percent less  
12 likely to recidivate, as compared to their  
13 nonparticipating peers. Inmates who do not have a high  
14 school diploma or a General Educational Development  
15 certificate must participate in the literacy program for  
16 a minimum of 240 hours or until they obtain a GED.  
17 Non-English-speaking inmates are required to participate  
18 in an English as a second language program until they  
19 are proficient in oral and written English. Post-  
20 secondary occupational-oriented programs are available  
21 in many institutions, and inmates with their own  
22 resources are permitted to enroll in post-secondary  
23 education programs.

24           The Bureau operates 62 residential  
25 substance abuse treatment programs for the 35 percent of

1 the inmate population who have moderate to serious  
2 substance abuse problems. Inmates in these programs are  
3 housed together in a separate unit of the prison that's  
4 reserved for drug treatment, which consists of intensive  
5 half-day programming five days a week. The remainder of  
6 the day is spent in education, work skills training or  
7 other inmate programming. Upon completion of this  
8 portion of the treatment, aftercare services are  
9 provided to the inmate while he or she is in the general  
10 population, and also later at the residential treatment  
11 center. A rigorous evaluation of the residential drug  
12 abuse treatment program demonstrated convincingly that  
13 offenders who participated in residential drug abuse  
14 treatment were less – and were released to the  
15 community for at least three years, were 16 percent less  
16 likely to be re-arrested and to have their supervision  
17 revoked and returned to prison than inmates who did not  
18 receive such treatment. This reduction in recidivism is  
19 coupled with a 15 percent reduction in drug use for  
20 treatment subjects.

21           The agency is often challenged on its use  
22 of residential reentry centers, an important part of the  
23 reentry program. Most inmates who are released to  
24 United States communities are transferred to a  
25 residential reentry center to serve the last few months

1 of their sentence in a structured setting in the  
2 community prior to completing their federal sentence.  
3 Some inmates are transferred to home detention during  
4 the last portion of their residential reentry center  
5 stay, while others are sent directly to home confinement  
6 for the last few months of their sentence. Inmates who  
7 are released through RRCs are more likely to be  
8 gainfully employed, and therefore less likely to  
9 recidivate, as compared to inmates who are released from  
10 prison directly to the community. We have recently  
11 begun to place inmates at low risk for recidivism, based  
12 on their age, criminal history and other criminogenic  
13 factors, and with few reentry needs, such as a need for  
14 housing or employment or family ties, directly into home  
15 confinement whenever possible, allowing us to allocate  
16 the residential reentry center beds to those with the  
17 need for the services and the structure provided in that  
18 environment. The Second Chance Act expands the Bureau's  
19 authority to place inmates in RRCs for an extended  
20 period of time from which to - I'm sorry, for an  
21 extended, extending the time limit from the ten percent  
22 not to exceed six months, to 12 months, and authorizing  
23 the agency to place inmates with shorter sentences, 12  
24 months or less, directly into RRCs for service of their  
25 entire term of imprisonment. Based on the mission of

1 the agency to confine offenders in institutions that are  
2 secure and most cost efficient and provide opportunities  
3 to prepare for reentry, the Bureau of Prisons is rarely  
4 using the RRCs for direct court commitments, and rarely  
5 uses transfers, or rarely transfers inmates to RRCs for  
6 prerelease services for more than six months. Most  
7 inmates with short sentences are appropriately placed in  
8 prison camps, which are minimum security, much less  
9 costly than RRCs and offer a wide variety of inmate  
10 programs, and most releasing offenders receive the  
11 necessary transitional assistance in the three or four  
12 months at an RRC. While it is certainly desirable for  
13 offenders to remain with their families and in the  
14 community for extended periods of time, such placements  
15 cannot be justified with the agency mission as cost  
16 efficient and necessary to address reentry needs.

17 Again, I appreciate joining you today. I  
18 look forward to answering questions that you may have.

19 CHAIR SESSIONS: Thank you, Mr. Lappin.

20 Ms. Vance.

21 MS. VANCE: Mr. Chairman and members of  
22 the committee, it's an honor to speak to you this  
23 morning about criminal sentencing in the federal system,  
24 and especially the impact of *United States v. Booker*  
25 on all of us. I have the unusual position of having

1       been a career federal prosecutor, and now being a  
2       relatively new United States attorney, and I know you've  
3       heard from a number of my colleagues. I'm here to offer  
4       you a view from the Deep South. It's a little bit  
5       strange being an appellate lawyer in recovery to be in a  
6       room with this many federal judges, and to have gotten  
7       that far without drawing a question. I'm not sure if I  
8       can make the shift, but I'll try my best.

9                       I'm a U.S. attorney in the Northern  
10       District of Alabama. I have about three-fifths of the  
11       state's population, the northern 31 counties in Alabama.  
12       My main office is in Birmingham. My office has  
13       prosecuted, for an office so situated, a rather  
14       extraordinary amount of both public corruption and of  
15       white collar crime. Most recently, a couple of weeks  
16       ago, we convicted our mayor on an indictment involving  
17       in excess of 60 counts of fraud and other related  
18       crimes. Ex-Mayor Langford's conviction makes him the  
19       fifth member of the Jefferson County Commission to go to  
20       federal prison in the State of Alabama, he having  
21       previously been a county commissioner. My office also  
22       prosecuted a systemic accounting fraud at HealthSouth  
23       Corporation, once one of Alabama's largest corporate  
24       entities. Virtually every high ranking corporate  
25       officer was convicted, with the exception of the CEO and

1 Chairman of the Board Richard Scrushy, who was  
2 acquitted, but subsequently convicted in the Middle  
3 District of Alabama on unrelated charges.

4           So because we do a large number of both  
5 significant and smaller prosecutions in this area, this  
6 community context gives us plenty of reason to consider  
7 the impact of *Booker* on sentencing, and particularly in  
8 the area of white collar crime. My belief is that  
9 *Booker* has made sentencing less uniform, and thus  
10 less predictable for prosecutors and defendants alike,  
11 particularly in the white collar context. Whatever  
12 deficiencies some of its detractors believe the  
13 guidelines have, the guidelines have promoted  
14 consistency by treating like cases alike, without regard  
15 to the particular jurisdiction or the randomly selected  
16 sentencing judge. The individual consideration that  
17 judicial discretion promotes I think appeals to all of  
18 our innate senses of fairness in the sentencing process  
19 of individuals.

20           Consistency, on the other hand, provides  
21 a systemic sense of certainty in sentences handed down  
22 to defendants convicted of similar conduct. And I  
23 believe that that comes with the additional benefit of  
24 promoting and contributing to the public's trust and  
25 belief that the system has integrity, a very important

1 factor from where I sit.

2 My sense is that the challenge that the  
3 system and certainly the Commission faces going forward  
4 is to balance, in the post-*Booker* era, those competing  
5 concerns of judicial discretion and the individuality  
6 benefits it brings, with concerns about consistency, so  
7 that the system as a whole imposes fair, certain and  
8 consistent punishment.

9 The guidelines were obviously predicated  
10 on the belief that it was important for defendants who  
11 committed similar crimes and had similar characteristics  
12 to receive similar sentences. By in large, the  
13 experience in my district, the guidelines were very  
14 successful in achieving that goal of consistency.

15 Appellate review is important to us in  
16 making these guidelines effective, because a court of  
17 appeals could provide a single interpretation of the  
18 guidelines for cases brought in multiple district  
19 courts, and thus promote consistency within a circuit.

20 After *Booker* and *Gall*, the role of the  
21 courts of appeal has been significantly diminished so  
22 that sentencing is once again a matter almost  
23 exclusively for the district court. Like other courts  
24 of appeals, in my circuit, the Eleventh has applied a  
25 highly differential standard of review in evaluating

1 sentences since *Booker* was handed down. The court  
2 reviews the sentence for procedural and or substantive  
3 reasonableness, applying an abuse of discretion standard  
4 of review. Since very few cases at this stage involve  
5 any significant procedural question about the  
6 calculation of the guidelines, the focus is generally on  
7 substantive reasonableness. And the Eleventh Circuit  
8 has held it will not vacate a sentence for substantive  
9 unreasonableness unless it is left with the definite and  
10 firm conviction that the district court committed a  
11 clear error of judgment in weighing the § 3553(a)  
12 factors by arriving at a sentence that lies outside the  
13 reasonable range dictated by the facts in that case.

14           The Eleventh Circuit has not completely  
15 forsaken reasonableness review, and I worry sometimes  
16 that I'm the poster child for anger by the district  
17 court in my district, because we have appealed a number  
18 of cases and had reversals, but quite frankly, even  
19 though the Eleventh Circuit has noted that the district  
20 courts' choice of sentence is not unfettered, it is very  
21 rare to have appellate review of a sentence that  
22 reverses a case.

23           Recently we have had that happen. This  
24 past week the Eleventh Circuit issued a published  
25 opinion in *United States v. Livesay*. That is one of

1 the HealthSouth related cases, a 2.7 billion dollar  
2 accounting fraud that essentially eviscerated one of the  
3 largest health service providers in the company, and the  
4 district court has sentenced this particular gentleman,  
5 the company chief financial officer, and he held other  
6 positions, to a sentence of probation. The court of  
7 appeals held, on appeal, that that sentence was not  
8 reasonable for a key player in the massive 2.7 billion  
9 dollar fraud, and took the unusual step in our circuit  
10 of instructing the district judge to impose a custodial  
11 sentence. But a case like *Livesay* is by far the rarity.  
12 The bottom line is that a procedurally sound sentence  
13 will almost certainly be affirmed on appeal.

14           So given the limited role of appellate  
15 review after *Booker*, a district court has significant  
16 authority to impose a sentence outside the guideline  
17 range.

18           The data suggests that district courts  
19 nationwide still impose guideline sentences more often  
20 than not, although they have imposed more non-guideline  
21 sentences since *Booker*, and those statistics hold up  
22 pretty well in my district. I think we actually have  
23 higher than the national average of guidelines-based  
24 sentences.

25           In fiscal 2008, the judges in our

1 district imposed above-guideline sentences in 2.7  
2 percent of cases, below-guideline sentences in 10.9  
3 percent of cases, and then we had another 19.9 percent  
4 of our cases that involved §5K.1.1 departures.  
5 So primarily we had a heartland of guideline sentences.

6 As a practical matter, in my district,  
7 federal prosecutors continue to treat the advisory  
8 guideline range as the appropriate benchmark for  
9 beginning the sentencing conversation. Defense lawyers  
10 treat the guidelines as a ceiling for sentencing,  
11 without regard to the existence of statutory maximums,  
12 and quite frankly, each judge has his or her own view of  
13 the wisdom of the applicable guideline range. So while  
14 it's difficult to generalize about the reasons for the  
15 variances we see, it's clear to us that a downward  
16 variance is far more likely than an unward variance at  
17 this point in the progression.

18 Although we generally believe that the  
19 judges in our district carefully exercise their  
20 sentencing discretion, and I have to say, you know, we  
21 are the Deep South, we both like and respect our bench  
22 and enjoy excellent relationships, but we have noticed  
23 an increasing number of below-guideline sentences in  
24 white collar cases. We take very few affirmative  
25 sentencing appeals in our office, and of those taken

1 since *Booker*, the majority have been appealed from below-  
2 guideline sentences in either white collar or public  
3 corruption settings.

4           So I want to be very clear that in the  
5 overwhelming majority of our cases, we believe that our  
6 judges sentence reasonably. Even when they don't select  
7 the sentence that we advocate for, we believe that they  
8 are well within the reasonable range.

9           Having said that, though, I do want to  
10 touch briefly on our concerns in white collar  
11 sentencings, and I'd like to do that by offering to you  
12 an example of a case. This is a post-*Booker* case.

13           We prosecuted a man named Michael Crisp.  
14 Crisp was the comptroller for a small construction  
15 company based in Birmingham. He prepared false  
16 financial statements, overstating the company's accounts  
17 receivable, and provided them to a bank which  
18 predictably extended a line of credit. The bank relied  
19 on the false reports and continued to extend credit well  
20 beyond the company's means, and when the company was  
21 ultimately unable to repay the line of credit, the bank  
22 lost over \$480,000. Crisp's victim was a small family-  
23 owned bank. He plead guilty. His guideline range was  
24 24 to 30 months. He cooperated against the owner of the  
25 company. We filed a, perhaps an overly generous 5K1.1

1 motion offering him a 50 percent downward departure, the  
2 low end of a range of 12 to 15 months, and the district  
3 court sentenced Crisp to five hours of custody in the  
4 United States Marshals' custody to be served at Crisp's  
5 convenience. We appealed, it was my case, and the  
6 Eleventh Circuit vacated the sentence. The Eleventh  
7 Circuit held that the below-guidelines sentence was  
8 substantively unreasonable, in light of the § 3553(a)  
9 factors, and noted that the court gave Crisp,  
10 and I'm quoting, "five hours for a crime that caused  
11 \$484,137.38 in harm." That equates to \$96,827.48 per  
12 hour, or \$1,613.79 per minute served in custody. I  
13 think that that was Judge Carnes's opinion.

14 On resentencing, the district court  
15 resentedenced Crisp to 100 days in custody, still  
16 significantly below the guidelines range, and quite  
17 frankly, the *Crisp* case, which was not unique in our  
18 district, gave us great pause.

19 Below-guideline sentences are extremely  
20 troubling to us in the white collar context, because we  
21 think deterrence there is important, and is a more  
22 reachable goal, perhaps, than it is in some more  
23 opportunistic crimes.

24 In vacating another below-guideline  
25 sentence in a white collar case in our district, I think

1 the Eleventh Circuit really got it dead on. They said  
2 because economic and fraud based crimes are more  
3 rational, cruel and calculated than sudden crimes of  
4 passion or opportunity, these crimes are prime  
5 candidates for general deterrence. The defendants in  
6 white collar crimes often calculate the financial gain  
7 and risk of loss, and white collar crime, therefore, can  
8 be affected and reduced with serious punishment.  
9 Sentences like Crisp's could reasonably lead a potential  
10 white collar thief to conclude that fraudulent conduct  
11 in the Northern District of Alabama is worth the risk.  
12 And I think some of our crime statistics bear that out.  
13 You might be willing to go to jail for seven days to  
14 make \$7,000,000,000. We've seen little deterrent effect  
15 from this type of sentence.

16           Although the Eleventh Circuit did correct  
17 the sentence in Crisp, and has corrected sentences in  
18 other egregious cases, there remains a real risk that  
19 below-guidelines sentences in white collar cases will  
20 undermine the effectiveness of white collar sentencing  
21 and statutes.

22           Post-Booker, I think the result will  
23 likely be less consistency, as we get further into it,  
24 and it may actually migrate from white collar into other  
25 areas with similarly detrimental effect.

1                   One of the things I like to think that  
2 I've learned in my years as a prosecutor is that we do  
3 have more in common in the system than we have that  
4 separates us, and I mean prosecutors, defenders, judges  
5 and the probation department. My experience, in talking  
6 with colleagues, is that we all seek the same thing in  
7 sentencing. We all seek fair, certain sentences that  
8 impose appropriate punishment for a particular  
9 defendant, while providing meaningful deterrence for  
10 would-be criminals.

11                   It is sometimes very difficult, and I  
12 don't think we acknowledge enough that as stakeholders  
13 in the system, it can be very difficult for us to engage  
14 in honest conversation because, quite frankly, if my job  
15 is to be a defender, it's difficult for me to come into  
16 a hearing and explore a position that's against my  
17 client's interest. Similarly, you don't hear  
18 prosecutors willing to give ground very often. But this  
19 issue is so serious and so systemic that I think it  
20 requires us, in an exercise of responsibility, to be  
21 willing to step away from our advocacy positions and to  
22 explore meaningfully and very openly what works best for  
23 us as a system.

24                   My instinct is that the best results that  
25 we achieve happen when we come and work together. We

1 did that in my district under the leadership of our  
2 chief judge when we explored resentencing after the  
3 crack guidelines were amended, and it was very effective  
4 and interesting experience, because we found that we all  
5 walked away from our initially held opinions and worked  
6 together to get those cases through the system quickly.  
7 So that's my belief. And my experience leads me to  
8 believe that the best way in the system that we can  
9 balance the often competing goals of individualized  
10 sentencing, on the one hand, and consistency on the  
11 other, is for the Commission to encourage communication  
12 by all of the stakeholders in the justice system, much  
13 as we did with the nationwide conferences that followed  
14 regarding the crack guidelines.

15 I think prosecutors want to ensure that  
16 the guidelines continue to have a valid advisory role.  
17 I do believe that we are willing to be open and to  
18 consider other points of view, although they may need to  
19 be brought to us aggressively, but we are open and we do  
20 like to consider propositions that promote the fairness  
21 of the system. My belief is that it will work best if  
22 we do all work explicitly and deliberately together.

23 So on that note, I'd like to thank you  
24 you all for the work you've done. You've certainly  
25 provided appellate lawyers like myself with a full

1 employment plan over the years, and we're grateful, but  
2 we are more grateful for the guidance and the  
3 leadership, and for the Commission's willingness, I  
4 think, to re-examine and to update the guidelines to  
5 work in the legal framework that we now find ourselves  
6 in. And I look forward to answering any questions  
7 you all have.

8 CHAIR SESSIONS: Thank you, Ms. Vance.

9 VICE CHAIR CARR: Director Lappin, you  
10 mentioned in your written submission that the Federal  
11 Prison Industries program has diminished significantly,  
12 in part because of the authorization and appropriations  
13 bills, but also administrative changes by the Federal  
14 Prison Industries Board of Directors. What were they?

15 DIRECTOR LAPPIN: Excuse me. There are,  
16 the Federal Prison Industries organization is overseen  
17 by a board appointed by the President, and there has  
18 been pressure over the years, similar to that which  
19 we're seeing in litigation, to have less impact on law  
20 abiding citizens' businesses in this country, a notion  
21 we agree with, and as a consequence of that, they have  
22 put caps on certain types of products and services not  
23 to exceed a certain level of production, in an effort to  
24 protect the businesses in, that are operating in the  
25 United States. Given that, we're kind of going in a

1 different direction. We are looking for more products  
2 and services to perform offshore, and seeking  
3 authorities to be able to pursue that on a larger scale  
4 so that at the end of the day, we'll have even less of  
5 an impact on people's businesses in this country, but  
6 they put some established caps to protect certain  
7 products and services areas.

8 CHAIR SESSIONS: Commissioner Friedrich.

9 COMMISSIONER FRIEDRICH: Director Lappin,  
10 I have two questions. You mentioned in your testimony  
11 that the Second Chance Act gave the Bureau of Prisons  
12 the ability to sentence inmates to halfway houses for  
13 the last 12 months of their sentence, and you mentioned  
14 that it's the rare case that you send an inmate to a  
15 halfway house for more than six months, and your typical  
16 average is three to four months. And I would ask you if  
17 you could elaborate on why you typically don't send an  
18 inmate to a halfway house for more than six months. Is  
19 that solely for cost? And secondly, the Second Chance  
20 Act also gives the Bureau of Prisons the ability to  
21 sentence inmates to home confinement at the end of their  
22 prison term. Is that also for twelve-month periods, and  
23 if so, are you sending some low-level offenders who  
24 typically you might send to halfway houses, that are low  
25 security, are you sentencing them to home confinement or

1 are you sending them to home confinement for 12 months,  
2 the full - are you exercising your authority to the  
3 full extent.

4 DIRECTOR LAPPIN: Yeah. First of all, on  
5 the second question, it allows up to ten percent of the  
6 sentence to be served on home confinement, so it's how  
7 much time, and home confinement is driven by the length  
8 of sentence, and again, up to ten percent.

9 We are currently evaluating every inmate  
10 for up to 12 months. We have found in the past that  
11 oftentimes, for many inmates, beyond six months can  
12 actually result in less success because many of the  
13 inmates have family ties, and as a consequence, have  
14 opportunities for employment and a place to live long  
15 before the six-month period occurs. Our sense is they  
16 tend to get a little frustrated, and sometimes act out  
17 because of their desire to move on after they've  
18 established themselves back in the community.

19 So secondly, there's a limited number of  
20 halfway house beds available, and it varies  
21 geographically. We have some communities that are, bend  
22 over backwards to offer halfway house opportunities in  
23 their communities. The other extreme is that some  
24 completely resist, and as if their citizens are not  
25 going to return home. And as a consequence, there's not

1 an abundance of beds. So our objective, always, is to  
2 send every offender, if we could, in the United States  
3 to a halfway house for at least some period of time, and  
4 we do it on the basis of how long have they been  
5 incarcerated, what are their community ties, do they  
6 have some, do they have skills that might lead for them  
7 to be employable moreso than others, do they have a  
8 place to live or is that something that they're going to  
9 have to accomplish during that period of incarceration,  
10 and based on that, we are currently averaging about 120  
11 days in a halfway house, when you, when you average all  
12 of the inmates.

13                   Eighty-five percent. So last year, for  
14 example, the Bureau of Prisons released just slightly more  
15 than 60,000 inmates. About 18, 19,000 were deported.  
16 Slightly more than 40,000 were released into the United  
17 States. Eighty-five percent of those transitioned out  
18 through a halfway house, on average for 120, some more  
19 than six, but not a lot, and, and the majority of those  
20 transitioning out through a halfway house today are  
21 getting home confinement towards the end of that  
22 sentence.

23                   The most difficult inmates to place are  
24 three groups: sex offenders, inmates with mental  
25 illnesses, and those that have very violent records and

1 continue to be, act out during a period of  
2 incarceration. Those are the more troublesome ones to  
3 place. So that's kind of an overview of the halfway  
4 house situation. We are now, for lower risk inmates who  
5 have family ties and job opportunities, we're moving  
6 more of them typically coming out of camps, minimums and  
7 lows, directly into home confinement, in lieu of halfway  
8 houses, so that we can reserve those halfway house beds  
9 for those inmates that have the greatest needs, and  
10 typically those are the inmates that fall into the  
11 medium and high security institutions, who have been  
12 incarcerated for longer periods of time, may not have as  
13 very good family ties, are going to be more troublesome  
14 to find jobs given their records, some with lack of  
15 skills, and so what we're trying to reserve those beds  
16 that we do have for those inmates that have the greatest  
17 need, in anticipation that towards the end of the  
18 sentence, if the stay goes well, we'll also put them out  
19 on home confinement for a portion of that sentence.

20           The other issue is funding. When the  
21 Second Chance Act passed, even though we may have other  
22 cases that we would like to put in for a longer period  
23 of time, it costs us more money. And so when we went  
24 from about a 92-bed average, a year and a half ago, to  
25 120-bed average, it cost us an additional \$30 to

1       \$40,000,000 a year to do that. We were able to do that  
2       without reducing staff in the Bureau of Prisons. But  
3       today, for us to be able to put more money into  
4       community corrections, I'd have to, we would have to  
5       lower staffing in our institutions, reprogram that money  
6       from institution operations to community corrections,  
7       and we're unwilling to do that, given the low level of  
8       staffing that currently exists. So it's a combination  
9       of things that are driving that.

10                    COMMISSIONER FRIEDRICH: But those low  
11       risk offenders who you're sending directly to home  
12       confinement, are you maximizing the ten percent -

13                    DIRECTOR LAPPIN: Yes.

14                    COMMISSIONER FRIEDRICH: - relatively  
15       speaking?

16                    DIRECTOR LAPPIN: Yes. We're trying to  
17       put them up for as long as we can. Now, there's a cost  
18       to that. It's not as expensive, nearly as expensive to  
19       be in a halfway house, but we still have to pay for  
20       people to supervise and to monitor. So most places we  
21       have halfway houses who, as part of their contract,  
22       provide that supervision. Do they show up for work?  
23       Phone calls, home visits, things of that nature, while  
24       they're on home confinement.

25                    And I'll say, you know, the cost of

1 halfway houses has increased, and it's, it was, we  
2 expected that, because we want more services in those  
3 halfway houses. We want drug transition services. We  
4 want more mental health services. We want more medical  
5 services. We want more job placement services. And  
6 when you build those into the contracts, obviously, it  
7 has a greater expense. We think it's worth it. It's  
8 worth the investment, given the critically important  
9 period of time it is transitioning from prison to the  
10 community. So we're all in favor of it, but it does  
11 cost \$72, \$73 per day per inmate, which is slightly  
12 higher than what it costs us to keep them incarcerated  
13 in a minimum or low security institution.

14 COMMISSIONER FRIEDRICH: In halfway house  
15 or home detention?

16 DIRECTOR LAPPIN: Halfway house.

17 VICE CHAIR CARR: When you talk about the  
18 counterproductive results of more than six months, is  
19 that home confinement, halfway house or both?

20 DIRECTOR LAPPIN: Both.

21 VICE CHAIR CARR: And is that annual  
22 or -

23 DIRECTOR LAPPIN: It is. We're currently  
24 doing some research on this very issue. Typically, I  
25 don't, I don't think the problem is the home

1 confinement. I think the problem is more so a person who  
2 has really done well in that halfway house, established  
3 themselves, has a job, and gets anxious over the  
4 continued increased supervision, even though, you know,  
5 they're well established, they're doing, they're ready  
6 to move on, and there's indication not to do that.

7 CHAIR SESSIONS: Mr. Wroblewski.

8 COMMISSIONER WROBLEWSKI: Thank you, Judge.

9 First, I 'd like to say thank both of you  
10 so much for coming. I know how much time you've taken  
11 out of your schedules to be here. It's very important  
12 to us. A couple of questions.

13 Joyce, you mentioned, in your case list,  
14 the white collar defendant had a 50 percent reduction  
15 for substantial assistance. Is that typical of  
16 reductions for 5K in your district?

17 MS. VANCE: You know, being new to the  
18 process, I've taken a look at our 5Ks, and we do have, I  
19 think, a pattern of 5Ks that approach the 50 percent  
20 mark. There are even some that exceed that, and  
21 obviously, that's something that we look at fresh at  
22 this point, but yes, I'd say that's pretty typical.

23 COMMISSIONER WROBLEWSKI: All right. Mr.  
24 Lappin, the programs that you talked about, you mentioned  
25 some statistics about reductions in recidivism. How often

1 does your staff evaluate or re-evaluate those programs  
2 that you have? Is that done every decade? Every two  
3 years? Is there some role that you think that this  
4 Commission could play in either part of those  
5 evaluations, promoting Prison Industries or other  
6 programs like that?

7 DIRECTOR LAPPIN: We update those. We,  
8 there's an ongoing research assessment for drug  
9 treatment and all of the other programs. I don't recall  
10 exactly how often it's done. It's not as difficult to  
11 do today, given the automated nature of the information  
12 that we have. But I can follow up and find out how  
13 often we're doing that. I don't know exactly.

14 COMMISSIONER WROBLEWSKI: Can you do a case  
15 study on the statistics? It doesn't go back up to you, but -

16 DIRECTOR LAPPIN: Yeah. And that's the  
17 thing. The trigger is rearrests. It's not  
18 reincarcerations. We oftentimes - It's too difficult  
19 to determine that. So in some cases, even though our  
20 recidivism rate, our return rate is about 40 percent in  
21 the Federal Bureau of Prisons, which is slightly lower  
22 than the average of the states, which is, you know, I  
23 think 65 percent range, so - and the trigger is  
24 rearrests, and there may be some that we're counting as  
25 recidivating who get arrested but don't get convicted

1 and sent to prison, so the number could be actually a  
2 little lower than that.

3 COMMISSIONER WROBLEWSKI: Do you have that  
4 data now, for example? Because we've been struggling on the  
5 Commission with getting recidivism data on people in the  
6 system.

7 DIRECTOR LAPPIN: I will check and follow  
8 up for you with our research folks.

9 COMMISSIONER WROBLEWSKI: Thank you.

10 DIRECTOR LAPPIN: I think just your  
11 interest in reentry is noteworthy. In my opinion, it's,  
12 there's a resistant public to the ex-offender who, not  
13 unlike other social issues, out of sight out of mind,  
14 and even in those supportive communities, they still  
15 bear the brunt of discrimination in employment and in  
16 finding a place to live. Some communities go so far as  
17 to passing restrictions on them returning to their home  
18 districts. It's a shame. I believe it makes the  
19 communities less safe because, and this is especially  
20 true of sex offenders, when we're forced to release them  
21 and we actually have to release them into districts and  
22 into locations that they have absolutely no ties. And  
23 so again, I think the more this is discussed, the more  
24 sympathetic – and I understand the social, society's  
25 concerns over folks coming back from, after spending a

1 period of time incarcerated, and what they've done in  
2 the past, but at the end of the day, the vast, vast  
3 majority of these people coming home, very few stay for  
4 the rest of their life, and I think the more we talk  
5 about it, the more involved – you know, a few years  
6 ago, to be honest with you, not to get political on  
7 this, but when President Bush mentioned reentry in the  
8 State of the Union address, that was a real turning  
9 point for a more open discussion on these things, and I  
10 encourage us to continue that dialogue, because these  
11 are still our citizens, many of whom can be productive,  
12 and I think we've got to figure out ways to bring people  
13 along.

14 We just, we just finished four years of  
15 litigation to get a halfway house in one community, and  
16 until this halfway house, their inmates were basically  
17 released directly into the street, again, which I think  
18 is far less safe than having structured supervision in  
19 that transition.

20 CHAIR SESSIONS: Let me just follow up  
21 with the reentry programs, because obviously, we have an  
22 interest in the reentry programs, as well, and in  
23 particular, incentivizing inmates to participate in  
24 treatment options and ultimately a reentry. You know  
25 the 500-hour drug and alcohol rehabilitation program is

1       incredibly positive. The responses, in terms of  
2       recidivism rates, have been terrific. You obviously  
3       have so many people wanting to go in it that you can't,  
4       you can't service everyone, and violating your statutory  
5       obligation in that respect. Of course, the reason that  
6       many people are participating, you know, let's be  
7       realistic, is because they're going to get a reduction  
8       in sentence. Despite that fact, you have a program with  
9       that level of subtle coercion, which is extraordinarily  
10      positive. And then you describe the other programs that  
11      you've had, vocational training, educational training,  
12      the requirement of getting GEDs, all can be reflected in  
13      the risks of recidivism. So my question is have you  
14      thought or what's your - I'm not too sure I'm allowed  
15      to ask you what your personal view is, but perhaps I can  
16      ask on behalf of the Bureau, what the Bureau's  
17      perspective is on creating incentives to participate in  
18      reentry programs before they actually are released into  
19      the community, and then, once they go through a reentry  
20      program, perhaps provide the incentive of a slight  
21      reduction in sentence to get them into the program, and  
22      then move them through halfway house or alternatives,  
23      you know, like home confinement, ultimately into the  
24      community in coordination with the probation officers  
25      who are receiving them at the other end, I mean that

1 seems to me like a no-brainer. So that's the first area  
2 of incentivizing.

3           And the second is, you know, essentially  
4 good time, where 85 percent, and this is a good point,  
5 your good time has essentially been taken away as an  
6 incentive for managing behavior within facilities. I  
7 mean based upon my very limited and ancient experience.  
8 I don't mean to suggest that I have any expertise in  
9 this regard. But it would seem if people have to earn  
10 good time, or can have it realistically taken away for  
11 bad behavior, that you are improving people's behavior.  
12 And so I guess my question is: Are there any  
13 discussions about perhaps going to Congress and  
14 suggesting an increase in good time at the end, maybe  
15 minimal, but increase the good time at the end, and then  
16 ultimately, is there anything the Commission can do to  
17 help you in this endeavor?

18           DIRECTOR LAPPIN: Both very good  
19 questions, and I'd be more than happy to answer them and  
20 provide my opinion. Given the fact that I'm now  
21 retirement eligible, if it does go sour, I can kind of  
22 move on.

23           But anyway, one, we like, and I'm, I'm  
24 really encouraged by the recent sentencing, and working  
25 group, sentencing and corrections working group that the

1 Attorney General has established, and Jonathan is very  
2 much a part of that, and our staff are participating in  
3 that, to consider these options. Quite honestly, I  
4 think it's long overdue, especially considering the fact  
5 that we are struggling acquiring the funding we need to  
6 run the Bureau of Prisons in the manner in which we  
7 think it needs to be run, and if that's going to  
8 continue, I think it's long overdue to look at other  
9 options to lower the burden of additional inmates.

10           And in doing that, you have to look at  
11 two options. Two things: how many and how long?  
12 Adjust either of those, and you can see a trend going  
13 one way or the other. And so as you mentioned, I think  
14 the residential drug abuse program is a perfect example  
15 of the benefit of incentivizing those opportunities.  
16 They need to earn it. We need to teach responsibility.  
17 They need to be able to make choices. And 35 percent of  
18 our inmates we have are addicted to drugs or, to drugs  
19 or alcohol, such that we think they need, should have  
20 treatment. Ninety-two percent of those inmates are volunteering  
21 for treatment. What's interesting is that 40 percent of  
22 those inmates get no time off their sentence. So about  
23 60 percent of those volunteering can get some time off.  
24 Certainly they're there in part for that reason. And 40  
25 percent get no time off. They're there because they've

1       come to the realization they need help, and they want  
2       treatment, and I think that's noteworthy.

3                   A real brief example, I, not long after  
4       becoming Director, I was visiting an institution in  
5       Alderson, West Virginia and I happened to be there on  
6       the day that the drug treatment program was having  
7       graduation. And I walked into this class, and they're  
8       crying. I said, "Geez, I didn't mean to have that kind  
9       of an impact on you." I said, "Well, tell me of your  
10      experience. You know, how has this impacted you?" And  
11      of course, there was a lot of brown nosing going on and  
12      all that kind of stuff, but this one lady says, "I did  
13      this program for one reason and one reason only, I  
14      wanted time off my sentence. And when I began this  
15      program, I didn't think I needed help to begin with,  
16      but," she says, "soon into this program, I realized the  
17      burden I had carried my entire life, the trauma I'd  
18      experienced coupled with drugs addiction. It has had  
19      such an impact on my life that I stayed in prison longer  
20      than I have to," not beyond her sentence, but she could  
21      have gone to a halfway house earlier, and she decided to  
22      stay and finish the entire treatment program before  
23      going to a halfway house, she says. That's noteworthy.  
24      because this, she says, "I'm a whole different person  
25      than I was when I came to prison." And so I think that's

1 critically important.

2                   We would like to see more of that. We've  
3 had some candid discussions going on about that, the  
4 first step being let's look at the other group of  
5 nonviolent offenders, the least risky group of inmates,  
6 less risky than the nonviolent drug or alcohol addicted,  
7 given the fact that they don't have that burden, and  
8 looking at programs or strategies in which we might be  
9 able to offer some time off their sentence if they  
10 complete certain programs, as well.

11                   Today we're doing much better than we did  
12 years ago. Inmate comes into prison, we do a skills  
13 assessment, and we know, we've identified the nine  
14 skills that most inmates lack. The inmate does an  
15 assessment, and we identify which of those skills they  
16 have the greatest need for improvement in, and all of  
17 our institutions eventually will have programs to  
18 address each of those skill categories, and so we can  
19 quickly lay out a program plan that will identify here's  
20 what you need to do, here's what we expect you to do,  
21 and then if they are successful in completing those  
22 things, a strategy could be considered to offer some  
23 additional time off their sentence.

24                   So I think the discussions on additional  
25 good time incentives - again, it has to be earned. You

1 just can't show up and get it. I think you'd have a  
2 huge, huge impact.

3                   On the other hand, we need more leverage.  
4 You're right, leverage encourages people to behave  
5 better. On the other hand, it gives us more leverage  
6 for those inmates who misbehave. That's the other  
7 problem is that today, unlike in the '80s and before,  
8 when you had more flexibility for good time, when  
9 inmates misbehaved, you could take large amounts of good  
10 time away, and for some it had huge, huge impact on  
11 them. Today our most severe sanction for misbehavior is  
12 isolation, segregation. I don't think that's wise  
13 long-term. It is for some, but for some, break my  
14 heart, throw me in a cell where I don't have to work and  
15 feed me three meals a day. They could care less. Time  
16 out. But take six months of good time away from them.  
17 Tell them you're going to serve more time in prison  
18 because of your misbehavior, may have a much greater  
19 impact than us throwing them into a segregation cell for  
20 60, 90, 120 days. So we think that's an important part  
21 of the discussion, as well. It's tragic, but we've got  
22 this group of inmates, a small group, a small group, who  
23 are misbehaving very severely. Again, we're pursuing  
24 prosecutions on a number of them, but that's, it's  
25 unrealistic to prosecute them all. But I think that

1 type of leverage is critically important to really step  
2 up and meet the demand.

3 CHAIR SESSIONS: So it's a two-pronged  
4 approach, that is to increase good time, obviously with  
5 a congressional act.

6 DIRECTOR LIPPAN: Uh-huh.

7 CHAIR SESSIONS: But then you also  
8 increase the ability to use the imposing of time or the  
9 removal of good time, so that you can enforce behavior.

10 DIRECTOR LAPPIN: Soon after the passage  
11 in '88, when it went to 54 days a year, until a few  
12 years ago, that was, it was vested yearly. So the most  
13 good time you could take from an inmate, until a few  
14 years ago, was 54 days. That's the most you could take  
15 from an inmate. 54 days, an additional 54 days, they  
16 could do that standing on their head, no big deal. But  
17 then they did away with that, so you can take more now.  
18 Still, it's just not a lot to take over the course of a  
19 sentence.

20 VICE CHAIR CASTILLO: Thank you both for  
21 your testimony. My question is for Director Lappin. It  
22 seems to me, going to the two questions of how many and  
23 how long, which I'm very sensitive to, your big growth  
24 is with defendants who are not citizens, and at the same  
25 time, all of them, who by definition probably have

1 immigration detainees, are not eligible for a lot of  
2 your good programs that reduce recidivism or could  
3 reduce their sentence. So by definition, they're  
4 serving effectively longer, possibly an abusive, more  
5 onerous sentences.

6 Now, some judges throughout the country  
7 are taking this into consideration at the front end and  
8 reducing their sentences, some others are not. So  
9 there's a certain amount of inconsistency. How would  
10 you feel if we encouraged some type of consistency by  
11 making this one way to reduce sentences at the front  
12 end, taking into consideration that somebody is not  
13 going to be qualifying for some of these great programs  
14 that the Bureau of Prisons has?

15 DIRECTOR LAPPIN: Just so you know, we  
16 offer most of these programs to all the inmates.

17 VICE CHAIR CASTILLO: Okay.

18 DIRECTOR LAPPIN: Many of them do  
19 participate.

20 VICE CHAIR CASTILLO: Okay.

21 DIRECTOR LAPPIN: There are some  
22 restrictions that result in fewer of them participating.  
23 There are some restrictions if you have a detainer, you  
24 can't earn over a certain pay grade in the Prison  
25 Industries, and as a consequence, they don't have as

1 much of an interest. But we encourage them to  
2 participate in the literacy programs and the work  
3 programs. There are a few limitations, not many, and I  
4 could get those for you and provide them for the record.

5 Just so you know, the average sentence  
6 for an immigration inmate, it is actually one of our  
7 shorter sentences. The average immigration offender is  
8 serving like 27, 28 months, comparatively speaking, to  
9 the average drug offender, it's in the seventies. In  
10 fact, I was sharing with some of you that sex offenders  
11 have just exceeded some of our highest average sentences  
12 slightly.

13 So we do encourage them. I think that,  
14 I'm not sure how to respond to should we consider it at  
15 the front end. But you're right. I mean 54,000 of our  
16 inmates are non-U.S. citizens, the vast majority of them  
17 serving immigration violations. Many of them have  
18 detainers. As I mentioned, we transitioned 18,000 to  
19 ICE last year, and they deported the vast majority of  
20 those folks.

21 VICE CHAIR CASTILLO: Like you say, this  
22 is at the top of page eight of your testimony, and I  
23 think this is what you're referring to, you're talking  
24 about a recent March 19th, 2009 Bureau of Prisons  
25 regulations adds treatment in community correctional

1 facility as a mandatory component of the program. One  
2 consequence of this change is the exclusion from the  
3 residential drug abuse program participation of inmates  
4 with detainers. I take it you're talking about  
5 immigration detainers.

6 DIRECTOR LAPPIN: You're correct. Those  
7 inmates, and that's, I think it's unwise, to be honest  
8 with you. I think they should be in treatment, to be  
9 honest with you, because they're going to return to  
10 their communities and continue to have drug and alcohol  
11 addictions. And so we, we've limited it some, because  
12 we've been struggling to get the U.S. citizens through,  
13 who are returning to our communities, so they've taken a  
14 higher priority.

15 VICE CHAIR CASTILLO: I take it the  
16 thinking behind whoever implemented that policy is since  
17 they're going to be deported, the taxpayer is not  
18 getting the bang for the buck -

19 DIRECTOR LAPPIN: That's right.

20 VICE CHAIR CASTILLO: - in having them  
21 go through the drug treatment program.

22 DIRECTOR LAPPIN: Yes. And I really  
23 believe that we should be providing that treatment, if  
24 we have the resources available to do that.

25 Just so you know, in 2009, we were able

1 to treat all the inmates who volunteered. So unlike in  
2 '07 and '08, we've added enough resources that we were  
3 able, we were able to do that. Also, the crack powder  
4 adjustment released some of those inmates from our  
5 waiting list, so our waiting list wasn't quite as long  
6 as it had been.

7 VICE CHAIR [CASTILLO]: Thank you.

8 CHAIR SESSIONS: Any other questions?  
9 Well, thank you very much for coming. This is a  
10 fascinating discussion, and we know you've put a large  
11 amount of effort into coming, and we really appreciate  
12 it.

13 DIRECTOR LAPPIN: It was a pleasure.

14 CHAIR SESSIONS: Thank you.

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1           I, Jane Demars, Certified Shorthand Reporter for  
2 the State of Texas, certify that the foregoing is a  
3 correct transcription of the proceedings in the  
4 above-entitled matter.

5           I further certify that I am neither  
6 counsel for, related to, nor employed by any of the  
7 parties to the action in which this transcript was  
8 prepared, and further, that I am not financially or  
9 otherwise interested in the outcome of the action.

10           Certified to by me this 4th day of  
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