UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Thursday, July 9, 2009

The public hearing convened in the United States Court of International Trade, One Federal Plaza, New York, New York, at 8:40 a.m., Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

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

STAFF PRESENT:

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

INDEX

JULY 9, 2009

ACTING CHAIR HINOJOSA: Good morning. It is a special honor for me on behalf of the United States Sentencing Commission to welcome you to the third in a series of regional public hearings that we are having across the country with regards to the 25th anniversary of the passage of the Sentencing Reform Act of 1984.

We are extremely happy to be here at the Court of International Trade in New York City. We want to especially thank the chief judge of the court, Jane Restani, and all of the judges of the court as well as Tina Kimble, the Clerk of the Court, and Gail Jeby, who works with the court's office for providing this space, and all the work they have done to make this possible.

Also, a very special thank you to Chief Judge Dennis Jacobs of the Second Circuit and Circuit Executive Karen Milton for the work they have done with regard to our participation here in New York City, and certainly the chief judge of the Southern District of New York, Loretta Preska; former Chief Judge Kimba Wood; and also Elly Harold from the District Court

Clerk's Office for the great help they have given helping us organize this hearing here in New York City.

As we all know, this is the 25th anniversary of the Sentencing Reform Act of 1984. Some of us have been on the bench even before the passage of the Sentencing Reform Act, and I think it is clear to many of us that there were many who felt that the sentencing process that existed pre-passage of the Sentencing Reform Act needed some changes in a way to make it a more fair system.

As a result, we did have the passage of the Sentencing Reform Act of 1984, a bipartisan act, and you have Senators Thurmond and Senator Kennedy sponsor the same piece of legislation. I think it is fair to call that a bipartisan piece of legislation.

It took a while. It wasn't something that was passed in the first year it was introduced.

The purposes of the Sentencing Reform Act was to make the sentencing process in the federal system a more fair and transparent system.

The Commission felt that it would be appropriate to go ahead and on the 25th anniversary of the passage of the Act, to have regional public hearings, much the same way as the original Commission did when they started working on the initial set of guidelines that went into effect on November 1st of 1987, and to hear from judges, both at the appellate and district court level, and to hear from Commissioners, to hear it from practitioners and hear it from the general public with regard to their thoughts about the federal sentencing process 25 years after the passage of the Act.

As we all know, the Commission itself was created by the Sentencing Reform Act of 1984, and it is a bipartisan, seven-member commission with two ex officio members.

The statute itself indicates there have to be at least three federal judges on the Commission, three judges, and the ex officio members, of course, are composed of the representative of the Attorney General and the chair of the Parole Commission.

The initial Commission obviously had a time deadline with which they passed the

first set of guidelines that went into effect on November 1st, 1987. The guidelines have basically been in effect for about over 20 years.

There has been a constant revision as the Act itself [inaudible] would be of the guidelines themselves, and new guidelines are promulgated on a regular basis with regard to the passage of new legislation.

The Commission works under the statutory system, within the ambit of the statute that created the Commission, which is part of the Sentencing Reform Act, and the Commission is given the directive by statute to make sure that its work is in compliance with the purposes of the Sentencing Reform Act, which the commissioners through the years do and have worked hard to make sure all the guidelines have been satisfied in the Sentencing Reform Act and certainly in accordance with Section 3553(a).

There have been a lot of changes. Some of us have been on the bench since November 1st, 1987. Certainly the size of the docket has changed. The number of individuals being sentenced under the federal system that

would come under the sentencing guidelines has doubled since 1987.

The makeup of the federal docket continues to be about 80 percent of drug, firearms, fraud and immigration cases.

However, there have been some things that have changed in this period of time.

As of the statistics that we have received for 2009, fiscal year 2009, this is the first time the immigration cases have overtaken the drug cases as a high percentage of the cases.

There has been a change in the makeup of the defendants with regards to race and citizenship.

For fiscal year 2008, about 40.5 percent of the defendants sentenced were not citizens of the United States. 42 percent have become Hispanic, largely as a result of the increase in the immigration caseload.

Those numbers have even risen when you start looking at the 2009 figures.

Some things, as I said, have changed, others have not. Drug trafficking does continue to be a substantial portion of the

docket and continues to represent the highest percentage of the offenders.

Men continue to represent the majority of the defendants. The age makeup has not changed. It continues to be more than half of the federal defendants are between the ages of 21 and 35, those that are sentenced within the guidelines.

As I indicated, the Commission does its work under the directives and under the statutory responsibilities, and has striven to continue to do this for the many years during its operation.

Of course, there is no doubt that although there have been changes, both from the Supreme Court as well as by statute, the Commission has operated within those changes and has proceeded to continue its work during this period of time, and, of course the sentencing courts, the district courts, the judges.

It is also true that sentencing courts continue to use the guidelines as the starting and initial benchmark with regards to every single federal sentencing; that occurs at the rate of about 83 percent, and as far as

within the guidelines, the government-sponsored departures and variances continue to be an important part of every federal sentencing that occurs in the country.

On behalf of the Commission, I do want to indicate that we are very grateful for every single person who has agreed to come and give us your thoughts during this two-day period.

The judges certainly are very busy, and we certainly appreciate everyone's time with regards to being here and sharing your thoughts with us.

I do want to introduce the members of the Commission.

To my right is Chief Judge William Sessions, who has served as vice chair of the Commission since 1999 and has served as United States District Judge for the District of Vermont since 1995, and he is presently the chief judge of that district.

From 1978 to 1995 he was a partner with a Middlebury firm, and he has previously served in the Office of Public Defender for Addison County. He has served as a professor at

Vermont Law School, and my condolences to him, because he has been nominated as chair of the Commission and is awaiting confirmation.

My condolences I guess once you receive the confirmation.

To my left is Judge Ruben Castillo, who has also served as vice chair of the Commission since 1999. He has served as a U.S. District Judge for the Northern District of Illinois since 1994.

From 1991 to '94 he was a partner in the Chicago office of Kirkland & Ellis, and he has been a regional counsel for the Mexican American Legal Defense and Educational Fund from 1988 to 1991, and he did serve as an assistant U.S. attorney for the Northern District of Illinois before he became a judge.

Also to my right, the newest member of the Commission, Vice Chair William Carr, who has been a member of the Commission since the latter part of the year 2008. He previously served as an assistant U.S. attorney in the Eastern District of Pennsylvania from 1981 until his retirement in the year 2004, and in 1987 was actually designated as the Justice

Department contact person for the U.S. Attorney's Office.

To my left is Commissioner Howell, who has been a member of the Commission since 2004. She was the executive managing director and general counsel to the Washington D.C. office of Stroz Friedberg.

Prior to joining the firm she was the general counsel for the Senate Committee on Judiciary, and she did work for Senator Patrick Leahy when he was chairman and when he was the ranking member of the full committee.

She also has assistant United States attorney experience and was the deputy chief of the Narcotics Section of the U.S. Attorney's Office in the Eastern District of New York.

Also to my left is Commissioner Dabney Friedrich, who has been a member of the Commission since 2006. She previously served as associate counsel at the White House, counsel to Chairman Orrin Hatch of the Senate Judiciary, and she also was an assistant U.S. attorney having worked in the Southern District of California and the Eastern District of Virginia.

To my extreme right is Commissioner Jon Wroblewski, who is the designated ex officio member of the United States Sentencing Commission for the Attorney General, and representing that particular office and the Department of Justice, and he serves as the director of the Office of Policy and Legislation in the Criminal Division of the department.

I do want to thank everybody on behalf of the Commission for being present, and if there is any member of the Commission who would like to say something, it would be appropriate to do so, and I hope you will not fade out like I do.

COMMISSIONER WROBLEWSKI: Mr. Chairman, thank you very much, and I am very, very pleased to be here. This is a homecoming for me. I was born and raised in this city, and at the island just off the shore of this island, about 100 years ago, my grandparents arrived after a month's long journey from eastern Europe so it is a great pleasure to be here.

When I was growing up in this city in the 1960s and 70s, this city was a very, very

different place. Like most families who lived here for any length of time, my family was touched by crime and the criminal justice system.

I remember very vividly when my brother came home after being the victim of an armed robbery. I remember very vividly Times Square being a place infested with drug dealing, prostitution, three-card monte games, and all sorts of organized crime.

This was a very dangerous city at that time, and as late as 1992 there were 2,300 murders in this city.

Today as we meet here, this city is a very, very different place. Crime has come way down. Last year homicides in this city numbered between five and six hundred. That is five or six hundred far too many, but it represents a stunning achievement in government to go from 2,300 to 500.

The reasons for the reduction in crime are many: more police, better policing, economic development, drug treatment, drug courts and sentencing policy, including federal sentencing policy.

In the last ten years, crime has continued to come down in this city, although around the country it has not been so consistently, and imprisonment rates in this city have gone down, and in this state have gone [down].

I think that is something we ought to keep in mind and think of as a model or as a goal, to continue to bring down crime rates and do it at a lower cost and less reliance on imprisonment.

The Attorney General is in this city today. He is going to be giving a speech uptown. He will be talking about this in greater depth, but I think it is something we ought to keep in mind.

I join with Judge Hinojosa in thanking all of you for being here, and I am very much looking forward to hearing all the witnesses and questioning them.

Thank you, Judge Hinojosa.

VICE CHAIR SESSIONS: I just want to express my appreciation for whoever will come to testify, particularly Judge Newman, for all of us in the Second Circuit. We all consider

him to be -- I should not say our father, but our guiding light in many ways.

This is a very exciting proposition for all of us, especially those of us who have been on the Commission for a number of years. Twenty-five years the guidelines have been in effect, and it is at this point that it is wise for us to sit back and think about how the guidelines have worked, what can be changed, what can be adjusted, and gain a broader perspective on sentencing policy. Not just the guidelines themselves, but also policy in general, including mandatory minimum sentences, et cetera.

The purpose seems to me, and it has been true of the other two hearings we have had, is for us to listen, to question, and to get honest observations from people who are the stakeholders in the sentencing process to tell us how it is working and what they suggest for changes.

You know, from all of us, I would say, this is just a very exciting time, because we are now engaged in a really open-ended review of the process.

ACTING CHAIR HINOJOSA: With that, I will go ahead and introduce the first panel, which is a "View from the Appellate Bench," and we do have Judge Jon Newman, who is a senior judge, U.S. Court of Appeals for the Second Circuit, having served on that since 1979. From 1971 to 1979 he served as U.S. district judge for the District of Connecticut. He also was a senior law clerk prior to that for Chief Justice Earl Warren, and he served as a U.S. attorney for the District of Connecticut 1964 to 1969. Judge Newman received his bachelor's degree from Princeton and his law degree from Yale.

We have also the Honorable Brett Kavanaugh, who has been a judge on the Court of Appeals for the District of Columbia Circuit since the year 2006. Prior to that, he served as a law clerk to two circuit judges, and then to Supreme Court Justice Justice Kennedy, and Justice Kavanaugh, Judge Kavanaugh, has also engaged in the private practice of law and served as an associate counsel for the president from 2001 to 2003; senior associate counsel to the president in 2003; and an assistant to the president and his staff secretary from 2003 to

2006. He received his bachelor's degree from Yale and his law degree from Yale.

We also have Judge Jeffrey Howard, who has been a judge on the U.S. Court of Appeals for the First Circuit since the year 2002. Prior to that, he served as an attorney in the New Hampshire Attorney General's office as the Attorney General, the Deputy Attorney General, and then as the U.S. Attorney for the District of New Hampshire from 1989 to 1993, and he also served as the State Attorney General. Judge Howard received his bachelor of arts degree from Plymouth State College and his law degree from Georgetown.

Then we have Judge Michael Fisher, who has been a judge on the U.S. Court of Appeals for the Third Circuit since 2003. Prior to that, he worked, served in the Allegheny County District Attorney's Office from 1970 to 1974, and Judge Fisher was also a member of the Pennsylvania House of Representatives, a member of the Pennsylvania Senate, and the Pennsylvania State Attorney General from 1997 to 2003, and he holds his bachelor's degree and law degree from Georgetown.

There is no attempt to make this a Georgetown/Yale law school presentation, but it appears to have become that.

Nevertheless, we appreciate it very much.

Judge Fisher, Judge Newman, which one of you wants to go first?

Judge Newman, you will start on my right.

JUDGE NEWMAN: Thank you, Mr. Chairman, members of the Commission. I really appreciate the opportunity to appear before you.

The only other biographical point I would add to what the chairman so kindly said is that I was with the guidelines before there were guidelines. I was presumptuous enough in my statement to cite a 1977 article, urging the need for restructuring sentencing discretion. It was then totally unfounded, set by statutory maximums. I thought that was inappropriate.

I think I was one of the few judges in the country who actually spoke out in favor of the Sentencing Reform Act as it was moved through Congress. It was a lonely group

of us who thought this was a good idea; most judges did not.

So I come to this not with any hostility to the principle of guidelines. I still believe in guidelines. I still believe in structuring the sentencing discretion.

My quarrel, very frankly, is with these guidelines.

Now, some have said because of the *Booker* decision, we need not worry too much about the precise nature of the guidelines because, after all, they are advisory. I think that is an incorrect view.

The Supreme Court has made it clear that while the guidelines in a sense are advisory, they remain the starting point of all sentencing decisions. As our circuit, most circuits have ruled, the district judges are obliged to make a guideline calculation, and then decide whether it should be a guideline sentence or non-guideline sentence.

Indeed, an error in guideline calculation gets a reversal almost always from the court of appeals so the role of the guidelines remains central after *Booker*.

Various proposals have been made for some changes. I am sure you have heard some already in the hearings, you will hear some today, you will hear some in the future.

I am not here to suggest any precise amendment, although there are several things I think could be changed, but I am here to speak to a much more fundamental point.

I think the guidelines are in need of basic reform; basic reform because, in a word, they started out, remained and now are way too complicated.

The easiest way to demonstrate that is just to remind you of this book. 534 pages of detail to instruct district judges how to calculate the guidelines.

It started with a much smaller book, only 105 pages back in 1987, and now it is 534. They don't have to be so complicated. Many states have guideline systems and do it in just a few pages, and they work very well.

There is no guideline system anywhere that is as complicated and detailed as the U.S. sentencing guidelines.

I can just give you a couple of

examples that you are familiar with. You decided that losses should be precisely calibrated, the punishment should be geared towards precise amounts of loss so you have 16 categories of loss.

That means judges have to figure out not generally whether it is a small loss, a medium loss or big loss, but they have to know almost exactly.

In tax cases, for example, in a criminal tax case, the judge has to figure out the tax loss.

Ironically, in a civil tax case, he or she doesn't, because it is usually settled, but in a criminal tax case you have to know the exact amount in order to know what the appropriate guideline is.

There are other examples. I am not going to go through all of them, but I just want to mention one or two.

On injury, you have five categories of the degree of injury. You have injury as one, the third one is serious injury, fifth one is life threatening injury.

Then you have a second one that is

between injury and serious injury, and then you have a fourth one that is in between serious injury and life threatening injury.

I don't think it is a useful time for the district judge, or a sensible system of penology, to make a fine gradation between an injury that is a little bit less than serious injury but a little bit more than injured.

Judges understand that if people are injured in a crime, the sentence ought to go up, and there ought to be some arrangements within which they adjust their injuries, but they don't need to decide is this a category three where it is serious, or category two where it is a little less than serious, but more than injury?

And the same with the quantity table and the drug table, which is 36 levels.

How did the Commission get into this, the first Commission? They got into this because they followed a principle that was presented to them by the early commissioners, the first commissioners, notably one or two professors who were then on the Commission. It was a principle that I refer to as incremental

immorality, or perhaps precise incremental immorality.

The premise is this: The premise is for every small degree of wrongdoing, there must be a measurable penalty, added penalty.

In principle, there is nothing wrong with that. Everyone would agree that for murder you should get more than for theft.

Everyone would agree that to steal a million dollars, you should be punished more severely than if you steal $10,000.

So the idea of roughly calibrating punishment to severity is old hat. Every sentencing system in America follows that. Indeed, every judge in America followed that before there were guidelines.

But what we never did before guidelines is worry about whether the crime was $6,000 or $4,000, and then give a different quantitative base level adjustment depending.

As I said in other context, no crook gets up in the morning and says, "I feel like committing only $4,000 worth of wrongdoing but not 6,000."

He may decide whether to rob a

bank or convenience store, but if he goes to a convenience store, he opens the till and he takes what is there. That is his crime. It is not either a $6,000 crime or $4,000 crime. It is robbing a convenience store.

So the detail that is in this system was launched on the wrong premise, that everything had to be calibrated.

The reason the calibration stayed precise is because statisticians persuaded the early Commission that the worst thing you could do is have what the statisticians have [called] discontinuity. The progression had to be smooth. There could be no cliffs.

Well, it satisfied the statisticians but does not make sense for district judges who have to apply it every day, nor more fundamentally does it make sense from a penological standpoint.

They are too complicated. They have to be simplified and still structure discretion in a sensible way.

I want to mention one thing from the first Commission report, which you still contain in your writings now, a tiny wording

change, but the thought is exactly the same.

A couple of things you said. First as to quantity, you pointed out that robberies of a few dollars and robberies of millions would be too broad. No question about that. You shouldn't lump a few dollars with millions, but you don't need 16 levels of loss.

You also said -- I will skip that one and go to the basic point. This is what the Commission wrote back in 1984 and still says in the current. I will just read this.

"The larger the number of subcategories of offense and offender characteristics, the greater the complexity and the less workable the system. Complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple broad category system."

Finally, and perhaps most importantly -- these are your words: "Probation officers and courts in applying a complex system having numerous subcategories would be required to make a host of decisions

regarding whether the underlying facts were sufficient to bring a case within a particular category. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity the guidelines were designed to reduce."

That was marvelous advice at the time; it is still marvelous advice. I urge you to keep it.

Indeed, what the complexity does is create the illusion of eliminating disparity, because it sounds like, "Well, two fellows get the exact same guideline, same adjusted base offense level, and that's fair," but that decision obscures the fact that the calculation results from things that often have very little to do with underlying criminality.

How much the loss is in a postal inspector's investigation or SEC investigator's case doesn't depend on the act of the criminal; it depends on how long the investigation progresses.

A busy postal inspector with a full docket ends his investigation in a few days so the level is X. Another one in another part of the country has a lighter docket, and he continues the investigation a little more. The amount is higher so they get three or four years different sentences. They both did a mail fraud scam. They should be punished approximately the same.

Here is one other thing you said. You still say this. This is in your current guideline.

"A sensible system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment."

For example -- this is your example. I love it -- "A bank robber, with or without a gun, which the robber kept hidden or brandished, might have frightened or merely warned, injured seriously or less seriously, tied up or simply pushed a guard, teller or customer, at night or at noon in an effort to obtain money for other crimes, in the company of a few or many others."

That is your example of something that is too detailed, but other than the time of day, your present guidelines assign different values for every one of the characteristics your own introduction says would render the system too complicated.

So I urge you to step back from the current system. I appreciate that you are going to hear many small suggestions, not unimportant suggestions, but small in scope, and they are useful, but I urge you to step back and look at the whole system.

Your guideline manual right from the very first manual to now says this is a, quote, evolutionary process.

In fact, it has never evolved. It has simply gotten more complicated, more refined, more adjustments, more explanations.

As the chairman has pointed out, we are now 25 years from the Sentencing Reform Act. In 2012 it will be 25 years from the effective date of the guidelines in 1987, a quarter of a century of experience.

The evolution that you, your predecessors -- I don't mean to state you --

your predecessors promised us in 1987, that evolution is long overdue so I urge you to take a look at the premises on which the guidelines were originally adopted, look to the state systems which are working marvelously as a flexible system, and I think the way to do it, I think the hearings you are having are marvelous. When you finish your hearings, I urge you to do one other thing: I urge you as a commission to take a retreat for a day or two, just the commissioners, no staff.

If you want to occasionally invite some respected scholar to take lunch or dinner with you and discuss broad thoughts, fine, but basically the commissioners should step back and rethink the premises on which the guidelines were first developed and on which they remain.

There has been no change whatsoever in the philosophy of the guidelines.

My plea is simply you promised an evolution; let the evolution begin.

We have the talent, the wherewithal, the intelligence and the dedication to do this job, to structure discretion in a useful way so that punishment in this country

can be, instead of, frankly, ridiculed around the world -- which it is. When I travel abroad, foreign judges, when we talk about discretion, they say, "Well, we are certainly not going to have the federal guidelines. They are too complicated."

I say, "They are not the only guidelines. You should look at our states."

The time has come for this Commission to step back, take a long look and let the evolution begin.

Thank you, Mr. Chairman.

ACTING CHAIR HINOJOSA: Thank you, Judge Newman.

You will be happy to know that there is nothing about the time of day offense changes with regards to any additions to the manual on that.

Judge Kavanaugh?

JUDGE KAVANAUGH: Thank you, Mr. Chairman and members of the Commission. I first want to thank you for the work that all of you do on this important topic.

I am sure, and I know, it is often a difficult and sometimes thankless task, and

all of us who are members of the judiciary and studying your work appreciate the effort and the time that all of you spend on this task, and at this particularly important moment in federal sentencing, the 25th anniversary of the Sentencing Reform Act, as the chairman stated.

It is a good time to assess where we are in terms of federal sentencing and where we are going.

Of course, I don't think we can assess where we are and where we are going without first pausing to say, "How did we get here?"

How we got here is not just the history, of course, of the original Act with Senator Thurmond, Senator Kennedy, and Judge Newman's description of how the guidelines came about in the first place.

Of course, the more recent history is dominated by the Supreme Court's decision in *Booker*, and in later cases.

So I will begin by talking a little bit about *Booker*.

When it came out, of course, after people digested it and it didn't go down easy on

first read or second read, *Booker* seemed quite unstable; eight of nine justices in the *Booker* decision disagreed vehemently with the ultimate result.

It was only by the strange group decision-making process at issue in *Booker* that you could end up with a system where the courts said the guidelines were advisory; recall, four justices would have said the guidelines as mandatory and as they existed then were fine, the four dissenters from the *Booker* constitutional ruling, and four of the justices in the *Booker* constitutional ruling would have said the guidelines as mandatory are fine so long as the jury finds certain additional facts that are used to enhance the sentence.

Eight of the nine justices were fine with a mandatory guideline system. Eight of the nine justices were not in favor of an advisory guideline system.

It was only through the odd dynamics of how the decision came about that *Booker* ended up producing what we now call advisory guidelines.

It was odd for other reasons, and

the ironies of course abound in the wake of *Booker*.

Indeterminate sentencing, completely inderminate sentencing the court acknowledges is completely constitutional.

At the same time, completely determinate sentencing, where judges had no role at all to determine the exact sentence, perfectly constitutional, yet the court said that the way the guidelines were structured, something between completely determinate and completely indeterminate, was unconstitutional, and that presents a logical challenge, as Judge McConnell has eloquently written in his article entitled "The Booker Mess."

*Booker* is a bit of a jurisprudential mess. Not because any one justice wanted it to be that way, but, again, because of the dynamics of how the decision came out.

Now, when I said it was unstable, when I first read *Booker*, I thought this may not have staying power, right? When so many justices disagree with the bottom line, even though you know that's the way it had to come

out in that case, that is not the most stable precedent in the Supreme Court.

I think now, four years later, I think *Booker* is likely here to stay. *Booker*'s approach to the constitutional issues is likely here to stay.

Justice Thomas, of course, has had second thoughts and said he is now off the train; he no longer would rule as he did in *Booker*.

Justice Alito, who was not on the court at the time, has expressed grave misgivings about the whole line of decisions.

Obviously Justice Souter will no longer be there; Judge Sotomayor, Justice Sotomayor, may have different views.

That said, I think *Booker* is here to stay in terms of the decision itself.

Why is that? Because I think ultimately the current advisory guideline system is workable. It may have been jurisprudentially messy, and no one can figure out why this part of the decision fits with that part, but at the end of the day what we now have is a fairly workable system.

The guidelines are workable because the Court has made crystal clear that they are advisory only.

That was still somewhat debated in the wake of *Booker*, that first year or two. When I first confronted a *Booker* issue as a judge, I wrote an opinion really questioning whether we have departed that far from *Booker* at all or really just reverted back to the same system.

I think *Gall* and *Kimbrough* removes much of the doubt that existed previously about whether the guidelines are truly advisory, and the *Spears* summary reversal this year certainly underscores that the guidelines are advisory.

So I think it is really important for all of us who think about sentencing law now to recognize that from the perspective of an appellate judge, at least this appellate judge, the guidelines are advisory, and therefore the appellate role with respect to substantive review of sentences is going to be very, very limited.

Our circuit has issued opinions saying it will be the very unusual case where we

reverse a sentence, whether above, below or within the guidelines as substantively unreasonable, and ultimately that is because we take it seriously, and if we didn't take it seriously after *Booker*, or even after *Gall*, after *Spears*, we are taking seriously the guidelines are advisory only.

It is important not to be in a state of denial about that as judges, as people who think about federal sentencing.

Now, as advisory guidelines, this Commission still has an incredibly valuable function to perform, because, number one, the Supreme Court has said you still have to calculate the correct guideline sentence before the judge does the full 3553(a) analysis, and, number two, many judges still want to sentence within the guidelines. They take comfort in the fact that this Commission, with its expert analysis, and hearings like this, and its constant review and excellent staff, has assessed sentences throughout the country and has been able to come up with guidelines that reflect for the most part what most judges are doing around the country so many judges will

still sentence within the guidelines even though they are advisory.

But the fact that they are advisory in *Booker*, I think the elephant in the room is, from the perspective of the Congress and the Commission, do you want the guidelines to be advisory? Do you want them to be advisory only, or do you want them to be mandatory again? Does Congress want them to be mandatory again?

Because *Booker*'s result does not mean that you can't go back to a mandatory guideline system. It is easy to tweak the current system to make it mandatory again and to pass muster onto *Booker*.

You could, for example, broaden the ranges that are out there and allow judges to sentence within the range based on the jury's finding without having enhancements or adjustments based on offense characteristics or offender characteristics, or you could, as Justice Souter proposed in one of his separate opinions, that the jury find individual facts relating to the offense or offender that are used to bump up or bump down the guideline range from that determined by the offense conviction.

So it would be very easy to go back to a system that is mandatory and that passes muster under the Supreme Court jurisprudence.

It seems to me there is a fundamental choice that needs to be assessed by Congress and the Commission, and I won't purport to decide who can do what in that, but a fundamental choice, do we want advisory guidelines? Because we now have them. It is clear we have advisory-only guidelines, or do we want mandatory guidelines? Do we want to go back to mandatory guidelines?

In terms of that policy question, it seems to me I share -- you know, in opinions I have written, I have said the Supreme Court has said advisory, advisory, advisory. I have hit that theme multiple times in opinions I have written, and I believe that strongly. I don't think that is wise as a policy matter.

I am greatly concerned. I share the concerns expressed by Justice Alito about the disparities that result.

It is the same problem ultimately that existed before Senators Thurmond and

Kennedy got together in 1984 to create the Sentencing Reform Act, the same problem that troubled Judge Newman in the late 1970s when we have advisory-only guidelines.

We are seeing more disparities now. We are going to see more and more.

Even if it seems okay now, remember that the judges who are on the bench now, most of them came up under a guideline system. That may not be true five, ten years from now. Things could change dramatically. Judges could have an entirely different view about the guidelines so there needs to be fundamental consideration of whether the disparities that are going to result in an advisory-only system are acceptable.

The other thing that concerns me about advisory-only guidelines is when we become judges, and we go through this process, often difficult process to become judges, the one thing we always say, which is true, is: "When I become a judge, I am going to follow the law, I am going to hear the law. My personal policy views, check those at the door. My personal views, political views on issues, check those at

the door."

We all believe that very strongly as judges. We try to apply that on a daily basis.

When sentencing becomes completely unbounded, though, it seems to me that the sentencing judge almost necessarily will be bringing his or her personal views or policy views on certain kinds of sentencing issues right into the courtroom and right into the individual defendant's sentence, and have an effect on that person's liberty.

Some judges might think drug crimes should get really long [sentences], some might think they should be shorter. Fraud crimes; longer, shorter; violent crimes . . . .

Judges are going to have very different philosophies. We do have different philosophies. In an advisory-only system, judges not only are going -- the disparities are not only going to result, but judges necessarily are going to bring their own personal philosophies, their personal views on particular issues into the courtroom, and that troubles me as well.

So it seems to me there should be consideration given to returning to a mandatory system with the kind of tweaks that Justice Souter proposed or other tweaks that could be made to pass muster under *Booker*.

Now, I think it would be easy to make those tweaks. As a substantive matter, I recognize it may be hard as a political matter reopening something as major as this where the Congress, for example, threatens to create a whole set of collateral issues, and can be problematic. I realize that.

As a substantive matter, it would be easy to make the guidelines mandatory again. That is a fundamental choice.

Whether they are mandatory or advisory, there are a couple of other quick points I want to make whether the guidelines are mandatory or advisory.

I second completely, from my far more limited experience, Judge Newman's point about simplification.

It seems to me the guidelines are, in fact, way too complicated. We see it constantly on the appellate bench; obviously

district judges see it much more often.

When we are having lengthy oral arguments in our court, which we did on minor versus minimal versus in between minor or minimal participation in the offense, and whether it is two or four or maybe three levels, that struck us as not the most wise construction in the guidelines.

In fact, it seemed to us that it was too complicated so I would second Judge Newman's point about simplification, particularly when the guidelines are advisory.

Our oral argument when we were having it about this minor or minimal issue in one case, let's make sure the thermostat is on 68 when the house is on fire. It just didn't make as much sense.

It seems simplification is a good goal regardless, but it is particularly important if the guidelines are advisory.

One personal point: Whether they are mandatory or advisory, I think acquitted conduct should be barred from the guidelines calculation. I don't consider myself a particular softy on sentencing issues, but it

really bothers me that acquitted conduct is counted in the Guidelines calculation.

I have written about this, and I think I am not alone. I know I am not alone. Other judges have written about it. I know Justice Kennedy has written about it, and other members of the judiciary. It is just very problematic symbolically.

Put aside the substance, because I realize it still can come in on the back end, particularly in an advisory system, but telling a defendant, "Yes, you are acquitted but yes, we are going to calculate that sentence to include that acquitted conduct" just sends the wrong message. It seems to me in too many cases it seems inconsistent with the nature of our system. I would urge careful consideration of that issue.

Finally, I would say that it is important to recognize from the Commission's perspective and from our perspective, as appellate judges and as district judges, Congress has a hugely important role here. I think there is sometimes a perspective on the part of the judges of, "Well, sentencing is our

thing. Congress should stay out of it. Congress doesn't have a particularly important role here. When they get involved, they mess it up."

It is important to deal with or criticize particular decisions Congress might make on certain sentencing issues, but it seems to me Congress is assigned by the Constitution with the legislative power, the power to define offenses. They are the ones who are more in touch than anyone with the community, the reaction to sentencing issues that go on, with the crime issue.

It seems to me that as judges, we need to remember that Congress has an important, powerful and proper -- it is not an improper -- a proper role to play in this whole sentencing issue.

With those thoughts, Mr. Chairman, I will conclude.

I want to thank you again, and all the members of the Commission, for inviting me. I want to thank you again for all the work you do that is so valuable to all of us.

ACTING CHAIR HINOJOSA: Thank you,

Judge Kavanaugh.

Judge Howard?

JUDGE HOWARD: Thank you, Chairman Hinojosa.

My name is Jeff Howard, for the record, and I sit on the United States Court of Appeals for the First Circuit. My chambers are in Concord, New Hampshire.

I, of course, have an advantage of having just listened to two very thoughtful presentations so I get to either agree or disagree, but I am going to spend most of my time probably on what would be considered nits.

But before I get there, three things I want to mention: First, Judge Sessions threw out the term mandatory minimums.

My own personal view, I grew up as a state court prosecutor, then I was a U.S. attorney, and then I went back and I was an attorney general back in the state court system. My state does not have mandatory minimums for any crimes.

We considered them when I was working for the state. I especially considered them when I was the Attorney General having had

experience as a United States attorney.

The judgment call we made at that time was that we thought judges knew what they were doing, and mandatory minimums were not something we would support and I didn't support them.

Having served as a federal judge now for seven years, I am convinced that they are a bad idea. I am not saying they were a bad idea at the time when they first started being enacted. I just think they are unnecessary.

I have seen too many cases where the mandatory minimum sentence is what makes the case unjust.

I hadn't intended to talk about this, but I will try to do it in one or two sentences.

Also from my state court experience, I think Judge Newman is probably right. A much simpler system would probably work better.

Federal judges, at least in my experience, know what they are doing. They know when a sentence -- sure there are going to be some differences -- but they know when a

sentence is good or bad.

Frankly, I would endorse what Judge Newman has said.

With respect to some of the things Judge Kavanaugh said -- actually, they were all things that, having read some of his opinions I thought about, I thought they were very good points, but he did say, I believe, that the advisory system is, in fact, working.

As one who became really enamored with the mandatory system, both as a federal prosecutor and in my first couple of years as a judge, I was not in favor of what happened after *Booker*, and it becoming an advisory system.

My view is changing. I think it is working so I don't envy any of the large or small decisions that you have to make, but I just wanted to add those thoughts, and then get into some of my perspective.

You know, we do get these sentences over the transom, and they give us a certain perspective, and I will tell you how I perceive things in my circuit and then address four specific issues for you.

In the few years before *Booker* was

decided, which roughly coincides with my time on the court, three-fourths, three-quarters of the sentences in the First Circuit were within the guidelines ranges.

Since *Booker*, it has been about two-thirds so there has certainly been an impact.

In fact, in the last several months to a year, it is even lower. There is a greater trend downward toward within guideline sentences so certainly there has been an impact.

However, the lion's share of sentences outside of the guideline range continue to be, in our circuit anyway, government-sponsored downward departures.

I can't go behind that number to tell you why that is. I have some sense that it varies from district to district, but, nevertheless, that still seems to be the case.

However, variant sentences, off the guidelines, based on the 3553(a) factors, do make up between 10 and 15 percent of all the sentences in our circuit, and that has held true for a few years now.

We are a small circuit, but there

are disparities across our circuit.

In Puerto Rico, for example, non-guideline sentences make up, depending year-to-year, between five and eight percent of the sentences, whereas in Massachusetts, it is 15 to 25 percent. They are our two busiest districts. They produce about the same number of criminal cases, but there clearly are some distinctions.

I am not going to try to get behind them to tell you what I think the reasons are, because I would just be speculating. It is not my area of expertise. I suspect that it is yours, and you may want to look at that; if those same kind of disparities are holding true across the country.

The one other statistical insight I want to offer comes from fiscal year 2008. My take on the national statistic is that sentences were upheld on appeal when challenged about 80 percent of the time, and the First Circuit was about there, it was about 77, 78 percent.

But as best I can tell, in that year, as well as any other year since *Booker*, my circuit has not overturned any sentence on the basis of reasonableness. It has always been on

the basis of procedural errors with a couple of outlier cases where -- actually the names of them are *Godin* from the District of Maine in 2008, and [*Ahrendt*] from the District of Maine in 2009, where the Commission had come out with further guidance after the sentencing while the case was on appeal, and although the new guidance didn't apply to that particular sentence, we thought that the district judge in those two cases might want to know about that guidance so we did sort of a prudential remand in those two cases.

You know, soon after *Booker*, actually a number of weeks after *Booker*, our circuit did its first post-*Booker* case, called *Jimenez-Beltre*. We took the case en banc.

In that case, my view was -- I am getting into reasonableness, following the theme of reasonableness -- my view was that a within-guideline sentence was conclusively reasonable. To paraphrase Paul S. Graff (phonetic), I didn't think reasonableness should be determined in the air but should be tethered to what the experts thought about what was a reasonable sentence.

That view of mine gathered precisely one vote, my own, so it is not the view of the court, and I have learned since that time as well, because, after we all, we have had *Rita* and *Gall*, and things have changed.

But the first issue of the four that I wanted to mention, which are more in the area of nits, are sort of harkening back to my first point that going to reasonableness, it seems to me in that area, the First Circuit, at least, is basically taking a very limited role, and the role is becoming even more limited.

Since *Gall*, we have described sentencing decisions as judgment calls. We did so first in a case called *Martin* last year, and later in a case that I authored called *Thurston*. We upheld the sentence of three months, in which the bottom of the guideline range was 60 months.

We upheld that case largely on the basis that the district judge -- and I disagreed with the sentence, but the district -- and twice before we had said the sentence was unreasonable before *Booker* -- the district judge gave an explanation for it, and it was very hard for us to say that a reasonable person could not accept

that explanation, even though I thought that the Sentencing Commission's guideline range made a lot more sense, but so be it.

We call them judgment calls.

That said, many circuit courts of appeals, not our circuit, but several have gone out of their way to emphasize that deference does not mean abdication, and ultimately in my view it boils down to two things, really, and that is the degree of variance from the guidelines, and the explanation given, which is pretty much what *Gall* said.

The court said that if the sentencing court decides that a non-guideline sentence is warranted, it must consider the extent of the deviation to ensure that justification is sufficiently compelling to support the degree of variance.

Even post-*Gall* in my circuit, we said that there is still a sliding scale effect from the guidelines.

I don't think any of that is necessarily bad. You know, I have had a chance to review a lot of sentences, even since *Gall*, and we can understand what the district court is

thinking, and I figured I would give it a chance.

The second issue involves the teaching of *Kimbrough*. This is not following any theme. I am now moving to a different topic.

As you recall, the Supreme Court made evident that district courts may vary from guidelines ranges based solely on policy considerations, including disagreements with guidelines.

*Kimbrough*, of course, spoke to the issue of the crack cocaine disparity.

I should mention in that regard, we have a case called *Rodriguez* that applies *Kimbrough*'s teaching to fast track. There was a defendant from Puerto Rico who argued to the district court -- I think it was a reentry case -- he had argued to the district court that there was a disparity in the sentence that he was receiving compared to fast track districts, and the district court determined that it had no authority to consider that disparity.

When we got the case, we applied *Kimbrough*, and we said this is an area where as

in *Kimbrough*, the Sentencing Commission had criticized the congressional policy that was at stake, and, as in *Kimbrough*, the Sentencing Commission at the direction of Congress had issued a policy statement that sort of went outside what the Supreme Court considers the traditional expertise of the Sentencing Commission relying on empirical data, but instead was relying on policy considerations.

So we sent this fast track case back to the district court overturning our own prior precedent, saying that it ought to consider these *Kimbrough* factors in resentencing.

There are other areas where the *Kimbrough* teachings I think are going to come into play. Perhaps cases like our *Rodriguez* case can be instructive. One is in the child pornography, child obscenity area.

Defendants are making the same sort of arguments as were made in *Kimbrough* in our fast track case that the sentencing ranges in child pornography cases are not necessarily based on the Commission's reliance on empirical data and its traditional expertise.

Furthermore, that the commissioner[s], or at least members of the Commission, have criticized the direction the sentencing has headed in some of those cases, and you probably know that several of the district courts, at least, have accepted those arguments, and circuits are going to be dealing with them soon.

The third issue I want to mention is also a recurring one, and it involves section 4B1.2, the Career Offender guideline, which substantially increases the guideline range for a defendant convicted of a drug or violent felony who has had at least two prior felony convictions for either a crime of violence or controlled substance.

One definition of crime of violence in the guidelines is burglary of a dwelling, or an offense that involves conduct that presents a serious potential risk of physical injury to another.

For many years, the First Circuit held that prior conviction for any burglary, including a non-dwelling, constituted a crime of violence within the meaning of that guideline.

Just last year in a case called [*Giggey*], we took that case en banc, and we changed our mind. It seemed to us that it was not the Commission's intent that all burglaries be considered crimes of violence. That left us to consider the residual clause.

We went to the Armed Career Criminal Act for guidance, but, then again, we noted that the Armed Career Criminal Act has a slightly different definition of burglary than the guidelines do, and we thought that might also play into the residual clause.

Ultimately we decided on a categorical approach for determining whether the burglary of a non-dwelling would qualify.

You may wonder why I am going on about burglaries. We see a lot of those cases in our circuit. I don't know about other circuits, but the New Hampshire state prison is full of burglars, which is another issue, I suppose.

It comes up all the time, so we said that we are not going to look at the facts of a case; we are going to take a categorical approach.

Some circuits agree with that, some circuits have a per se rule one way or the other, and I think others are somewhere in the middle.

You know, I know that the Commission has been looking at this issue. It would be useful, I think, in terms of a nit, anyway, if you could tell us what the Commission intends if you are able to get to the bottom of that, and we will follow it, of course.

And then lastly, I just want to briefly mention a circuit split with regard to the counting of victims in economic crimes cases. This is pursuant to section 2B1.1 of the guidelines.

In a case involving debit credit card fraud, recently my circuit concluded that there is no requirement that the victim bear final burden of financial loss. Thus, in that case, numerous consumers whose accounts had been accessed were victims who suffered, in our view, actual pecuniary loss, even though they were ultimately reimbursed by their banks and other retailers.

So we joined at least one other

circuit in this holding, but there are several circuits that go the other way and say you are not a victim unless you bear the final ultimate loss.

I also know the Commission is working to resolve this circuit split in one way or another by giving some guidance, and I do commend you for those efforts.

Again, I just want to thank you for holding these hearings, and especially for letting me come speak to you.

Thanks again.

ACTING CHAIR HINOJOSA: Thank you, Judge Howard.

Judge Fisher?

JUDGE FISHER: Thank you, Mr. Chairman.

My name is Mike Fisher, a member of the U.S. Court of Appeals for the Third Circuit, and my chambers are in Pittsburgh.

I came to our court in 2003, having served primarily in the state system for the prior 30 years, and my familiarity was much greater with the state guidelines and state sentencing system in Pennsylvania than it was in

the federal guidelines when I arrived in our court.

In the early 1980s, as a member of the Pennsylvania State Senate, I was involved with legislation which at that time created the Pennsylvania Commission on Sentencing, which led to the Pennsylvania sentencing guidelines, which have been referred to very favorably by commentators across the country since that period of time.

I quickly learned when I got to our court of the thoroughness of the federal sentencing guidelines, and the enormous work that the United States Sentencing Commission put in to those guidelines.

Certainly the framework which was in place prior to *Booker* brought about uniformity and eliminated much of the unwarranted sentencing disparity that prompted Congress to pass the Sentencing Reform Act in the 1980s.

That said, even 20 years into the guidelines, it hadn't stopped, it wasn't stopping defendants from continuing to litigate various aspects of guidelines themselves.

And then along came *Booker*, and *Booker* obviously ushered in a new era of sentencing by making the Guidelines advisory, and directing the courts of appeals to review sentences for reasonableness, which was a function which we did not have before, and certainly we have still been trying to determine what that means.

What I would like to do just briefly is touch upon some of the issues we have dealt with on the Third Circuit since *Booker*, and then give you my perspective on where I see the sentencing system, the federal sentencing system, where it is today.

In the four years since *Booker*, our court has said that a district court should continue to adhere to, or should adhere to a three-step process in imposing a sentence.

First, the district court should start by calculating a defendant's guidelines sentence.

Second, in doing so, the court has to rule on departures.

Third, the district court has to give meaningful consideration to 3553(a)

factors.

Following *Gall*'s instructions, we have said that our court's appellate role is two-fold. More specifically, we must first ensure the district court committed no significant procedural error in arriving at its decision, and then review the substantive reasonableness of the sentence under abuse-of-discretions standard, regardless of whether it falls within the guidelines range.

We said that the touchstone of reasonableness is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated, and that is very important, because in many, many appeals you have reference to some specific comment that the sentencing court may have made. It didn't reflect at all the totality of the sentencing record, and we continue to see that from time to time.

We said that the Due Process Clause affords no right to have the facts that are relevant to enhancements or departures proved beyond a reasonable doubt, but rather that the preponderance of the evidence standard

continues.

We have said that although the guidelines are advisory, the district court must still calculate the applicable sentencing range using the guidelines extant at the time of the sentencing, and we will continue to review the propriety of a sentence based on those same guidelines.

We have said that where the district court miscalculates the advisory guidelines range, and that still happens from time to time, our court will hold such procedural error harmless only if it is clear that the error did not affect the district court's selection of the sentence imposed.

We have said the defendant is not required to object at sentencing to the district court's explanation for imposing a particular sentence in order to preserve his or her right to appeal.

We have also said that we will not apply a presumption of reasonableness. This is where we differ from -- a point in which our circuit differs from others on appellate review to a within-guidelines sentence. A

within-guidelines sentence is more likely to be reasonable than one that lays outside.

Most recently, our court sitting en banc decided a case *United States v. Tomko*, in which we explored the contours of substantive reasonableness under *Gall*.

The *Tomko* case was interesting, the facts were interesting, because the defendant pled guilty to tax evasion, and [his] advisory-guidelines sentence was 12 to 18 months; however the district court chose to impose a downward variance, which included community service, probation and one year home confinement, and ordered a fine of $250,000.

This case was interesting because it was a contractor who had passed through the expenses of building his own home, a multi-million dollar home, and put those expenses into a school construction contract which reduced his tax obligation to the federal government, plus there was an indication the contractor had done the same thing in building a vacation home prior thereto.

It was argued that if appellate reasonableness review means anything, that this

particular sentence had to be substantively reasonable.

But our court in *Tomko*, by an eight to five vote, found that *Tomko*'s sentence was, in fact, reasonable.

I was part of the minority in that vote; in fact, wrote a dissenting opinion when it first came through to the panel.

At the same time our court decided the case of *United States v. Olhovsky*, or shortly thereafter, which vacated the defendant's six-year prison sentence for possessing child pornography on a computer, and concluded the sentence was substantively unreasonable.

What the *Tomko* and *Olhovsky* decisions, which have just recently been handed down by our court, indicate, some of us believe at least in our court, where a district court adheres to the correct processes for imposing a sentence and fully explains its reasoning, it is unlikely that the resulting sentences will be found substantively unreasonable so it should not take long for sentencing judges to realize that this is, in large part, what our circuit

expects.

Under our current sentencing system, the Sentencing Commission is responsible for providing its expertise in this field to district courts by compiling data that provide the ranges within which a particular sentence should fall, but the ultimate decision of tailoring the sentence to fit the individual rests in the hands of the district court, which is responsible for fully explaining the reasons.

Absent significant sentencing disparity, this kind of advisory guideline system may be the best that we can expect at this time of history.

That said, such a system may not be what Congress intended when it implemented the federal sentencing system and federal guidelines 25 years ago. Again, we begin to see why the disparity.

Particularly in those areas where Congress believes the American public expects incarceration, Congress might be prompted to impose a more rigid sentencing system than the one the Supreme Court reviewed in *Booker*. That would be my fear.

I have heard my colleagues on this panel talk about the need for simplification. Simplification probably has a lot of overhaul for this Commission to pursue, but I would have, and I have concern that too much simplification -- not correcting some of the nits referred to with specificity here -- too much simplification is only going to promote further disparity in the calculation of the guidelines sentence.

I would refer you to, and I have included with my written remarks that I have submitted, a law review article that I authored in the *Duquesne University Law Review* in September of '07 entitled "Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing," which called for a form of what I referred to as "guided discretion."

I think this kind of discretion, implemented and utilized by sentencing judges, and applied in our role by judges on courts of appeals, is the kind of discretion that would take into consideration the work that you have done, and the data which has been accumulated,

and the reasons why the guidelines specifics have been incorporated in the guidelines system, and use that as a guide for sentencing judges to temper their discretion.

I think if that is done, we probably will continue to have a system that Congress will accept, but if it isn't done, as one who over the course of my career has felt the judges should have significant discretion, and mandatory minimum sentences do nothing more than set down arbitrary guidelines that don't fit the particular cases, I would be fearful if we don't use the discretion given to us through *Booker*, that in some year, maybe not this year, next year or the next five years, in some year, Congress will wade back in in the system, and 25 years from now this Commission will be sitting here saying -- the courts will be sitting here saying, "What did we get ourselves into? Because we have a system that really provides no discretion at all across America."

I thank you for the efforts that you put in over many, many years and I know many, many hours, and I would encourage you to continue, as others have said, to look carefully

at what has taken place, and we thank you for your efforts.

ACTING CHAIR HINOJOSA: Thank you, Judge Fisher. We will open up for questions.

VICE CHAIR SESSIONS: I appreciate very much your testimony, and you talked about simplification. It is an issue we have been dealing with for years and years and years.

One of those issues is very positive, and yet difficult to implement.

What I would like to ask, Judge Newman, I like the fact you said simplification should have been addressed by the first Commission. I guess I am interested to know how you do that in light of 25 percent rule?

Historically, you look back at the guidelines and you see all of the categories, the 43 categories, and then you delineate criminal behavior and try to punish based upon the individual behavior, but one of the reasons there are so many offense levels, and one of the reasons there are so many different enhancements which dice and slice behavior is because of, it seems to me, the 25 percent rule.

Because if you can only have small

ranges of sentences which you want to reflect individual criminal conduct, then you have to do it in such a small and precise way to be able to reflect that punishment for that conduct.

Is the only way we can deal with simplification to eliminate the 25 percent rule, or can you think of some other way in which you can reduce the number of offense levels, reduce, perhaps, the number of criminal history levels, broaden up the ranges so there is more flexibility?

I guess my question is, how do you do that when you have a current sentencing structure which is regulated by the 25 percent rule, which was, of course, set by Congress in the Act in 1984?

JUDGE NEWMAN: I recognize the 25 percent rule is an issue, and in my testimony I acknowledge it.

The first part of the issue is to what does the 25 percent rule apply?

In the statute, it applies to the difference between the top and the bottom of a sentencing range so clearly it applies to that.

You can have, instead of the

43-step table, a table with fewer steps. I am not here to argue any particular one, but various writings have suggested different models of tables, sentencing tables, that conform to the 25 percent rule and have much broader ranges that you can do.

The second issue under the 25 percent rule is one that I am sure you are aware of, because it has been discussed within the Commission, and that is, does the 25 percent rule apply not only to the difference between the top and the bottom of the sentencing range that you described, does it also apply to the process by which the sentencing judge calculates the adjusted offense level?

A former commissioner wrote an extensive brief saying it applies to that.

There is an opposing brief written by Catherine Goodwin, an associate counsel of the Administrative Office of the Courts, which is in your records, which argues the other side.

Not surprisingly, I think Ms. Goodwin was correct.

I would take the 25 percent rule only as far as Congress literally applied it,

and you can meet it, as I said, by broadening the ranges of the sentencing tables. It need not affect at all the addition and subtraction of the various adjustments that go into the calculation of where the person should be within the sentencing range.

So I think Ms. Goodwin was right and you can have that flexibility.

If the Commission thinks she was wrong, then I think you do need to go to Congress to get some added flexibility and modify the sentencing rule.

Before you do that, I wish you would take a look at the two opposing briefs.

I hope you decide with her and on her view. I don't think the 25 percent rule poses a significant barrier to fundamental simplification.

COMMISSIONER HOWELL: I just wanted to join my colleagues here in thanking all of you for coming.

I have to say that I joined the Commission in 2004, just before *Booker* was decided so I never went through an amendment cycle on the Commission, but the congratulations

I got, mostly from my smart-alecky friends from the U.S. attorneys in the Eastern District were, "That's great, you got on the Sentencing Commission, but do you have a job anymore? It is advisory."

It has been very interesting that we have been incredibly busy on the Commission, and one of the things that keeps us busy is Congress.

Congress, although clearly recognizes that the guidelines system is now advisory, hasn't slowed down its directives to the Commission.

Among the things that I want to talk about were the two issues that most of you addressed, simplification as well as acquitted conduct.

On simplification, among the complications we have in simplifying the guidelines, because it may not look that way from the bulk of the *Guidelines Manual*, every time we consider an amendment, we look at the most simple way to do it, and sometimes we fail at that effort more often than we succeed.

One of the complications, it is

not just the 25 percent rule, which is -- I know, Judge Newman, you have been a counselor to many commissions, including not just now but also given very good advice to the original Commission, and you have commented on the 25 percent rule, but in addition we have Congress to consider, and as Judge Kavanaugh said, Congress has a very important role and takes its role very seriously in sentencing policy.

A number of the specific SOCs that complicate the manual are the product of directives from Congress. Just in our current amendments that are pending before Congress are a number that are responsive to congressional directives.

In some of those directives we told Congress, "We don't think the directive you gave us warrants, after consideration, any change in the guidelines." I am thinking specifically of the identity theft record where we were given 13 separate factors to consider, that if after study we thought all 13 factors warranted an amendment, you would have seen more complicated SOCs as a result of the

congressional directive. That is not what happened.

How do you -- do you have any recommendations on how to deal with not just what Judge Newman calls "our philosophy" in the manual of incremental factors that contribute to sentencing, but it is a philosophy of Congress that they give us directives of specific factors that they want expressly articulated in the guidelines that also help complicate -- that also complicate the manual so do you have any suggestions on how to address, you know, the interaction with the Congress on these directives?

JUDGE NEWMAN: I have two thoughts on that. When they say that there are several factors that they want you to consider, it seems to me the key word is "consider." The problem comes when you start assigning values, precise numerical values, to a factor.

If they want to say there are 13 factors to be considered in identify theft, I have no problem whatsoever with a guideline or a commentary or a note -- I don't care -- that says in the case of identity theft, the judge

should consider, or may consider, should consider, must consider, if that is what the Congress says, the following factors, and assess an increment within a range of whatever you all think is right; one to four, one to six, one to eight, within that range, but don't price each one. So I think can do the flexibility if you will take them at their word, and their word is considered.

Let me add one other point that I think is perhaps more responsive to your very, very good question.

If there is to be significant simplification, it cannot be done by the Commission alone laboring in a vineyard and then serving it up on a platter, if I can mix metaphors, to the Congress, and they say, "We don't like this; we are sorry. We are going to vote it down."

It would have to be a cooperative effort. This is a political problem.

As you begin the process, it seems to me you are going to have to enlist in a cooperative effort with certainly the leadership of the judiciary committees and their staff.

Whether you take the route that Judge Kavanaugh pointed out, going back to mandatory instead of advisory, mandatory might work as part of a package in which there was some simplification.

It strikes me as very interesting that the very precision of the first system drove the court to say they are unconstitutional, which evokes from Judge Kavanaugh the response, "Well, go back to mandatory, and you can get there by making them simpler." It is full circle. It is not a circular argument; it just happens to complete the circle, and it may be the way to do it.

But I think working with the Congress, you could work out a package. It may include modification of mandatory minimums. It probably would not include elimination. I think politically, that is not feasible today.

But eliminating some of them, yes, I think that is feasible, but a package that says to them, "We want to do the general outlines of the Sentencing Reform Act, but we want it to work," and work with them to find out what is acceptable politically even as you bring to bear

your expertise on what appropriate sentences are, so I think it can be done.

JUDGE KAVANAUGH: I would second Judge Newman's point that it is going to require cooperation from Congress, and I understand completely when we say "simplification," if simplification were simple, it would have been done by now so it is difficult.

When we say this, I think we say it with the understanding that you are striving for that, and that Congress makes your life more complicated at times.

I think it also -- I go back to what I said in my comments -- the initial fundamental question to me is are you sticking with advisory, are you going to go to a mandatory system, for you or the Congress working together, or however it works out.

If it is advisory only, maybe you will have a different approach to simplification than if you are going to mandatory. I can't game all that out, but it seems to me that is wrapped up, as Judge Newman was just saying, in the same question.

I understand it requires work from

Congress, and I understand simplification is complicated by the fact that Congress gives you those directives. I don't have particular advice on how to succeed necessarily other than it will require their support.

COMMISSIONER HOWELL: Among the things we may consider doing is aggregating a number of the SOCs that now have specific value increases attached to them, and there is a possibility for simplification to aggregate those.

We do on a number of occasions do exactly what you suggested, Judge Newman, essentially to say for a factor that Congress directed us to consider, whether downward or upward departures -- we do have to look -- parts of the manual says if a judge sees this factor, they may consider upward departure without giving any factor or numerical increase, you know, attached to that.

You know, I take your point, and I think it is well put, that for a wholesale simplification effort, this is something we have to do in close consultation with the Congress.

Let me turn just for a second to

acquitted conduct, because acquitted conduct is also something if you explain it to laymen on the street, they just find it, you know, surprising and blame the guidelines for it, when the guidelines are, in fact, silent on the use of acquitted conduct, and the use of acquitted conduct by sentencing judges was long before the sentencing guidelines were even a flicker on the scene.

So one of the -- and I think that judges who have heard a trial and heard the evidence related to conduct for which the defendant is ultimately acquitted, can't -- I guess can try, but may, in fact, be influenced by it.

Do you think that in the ultimate sentencing of that defendant, do you think addressing acquitted conduct in the guidelines by indicating that should acquitted conduct be considered by the sentencing judge, it should just be considered in the context of where within a guideline, the adjusted guideline range to sentence the defendant as opposed to being used as part of a calculation of relevant conduct to actually increase the offense level

and the range?

Is that sort of a compromise between barring consideration of the acquitted conduct all together, and basically requiring a judge who may have heard all the evidence related to it to wipe it out of his or her mind, but to preclude it from being considered as part of the relevant conduct calculation? Is that something that would be practical?

JUDGE KAVANAUGH: That seems to me good progress on the issue, and to go back to the premise of your point, one of the things the guidelines did was to bring into the open, into the sunlight, things that had happened for years that no one knew or didn't think about in the same way, and all of a sudden you are having a precise increase based on acquitted conduct, and people say, "Well, it always happened that way."

Well, okay, but now you are actually seeing it, the actual impact.

As you say, quite rightly, no one understands that in the real world. It fails the common sense test, and it brings disrespect to the process, and it weakens confidence in the judicial process, and maybe you can reason your

way from point A to point B to point C logically for why it should be part of the process, but when you take a step back, it just doesn't work, and I think even if it is purely symbolic, the effort to bar the consideration of acquitted conduct; even, in other words, if there is a logical reason to do it and the only reason not to do it is symbolic, symbolism has value in the criminal justice system at times, and I think this is one of those areas where it would be warranted.

ACTING CHAIR HINOJOSA: I have a follow-up question on that. What is the difference between saying that and then saying when you have been convicted of something and I'm giving you 20 years -- I think part of the problem with acquitted conduct is the general public thinks you are going to sentence somebody to higher penalties than they have been convicted of, and you are not being sentenced to a higher penalty; it is within the conduct of the conviction that you actually received where the maximum is 20 years. Should the judge be able to take that into account in trying to determine where within that 20 years you

sentence somebody?

For example when you have two defendants that got convicted of the same count that you heard no evidence whatsoever of any other involvement on the part of one of the defendants, when you have the statute that says a sentencing judge should be able to consider any evidence with regards to making a decision as to the sentence, what is the difference between staying within the guideline range or within the statute of the conviction if you use that information that you have seen to make the determination as to where to sentence?

A lot of the concern, I think, about acquitted conduct, when you talk to the general public, they think that you are going to sentence somebody to a higher sentence than they were convicted, and you are not, because you are still at whatever the maximum was of the conviction.

JUDGE KAVANAUGH: I guess I am still on for this question since I bought it up initially.

In my mind, blending in the multiple factors and saying it is just one part

of an overall calculation really just blurs the issue, because when you unpack those pieces at the end of the day, you are using the acquitted conduct to sentence at a slightly or greatly higher level than you would have sentenced had you not considered the acquitted conduct, and I think that, when it is unpacked, and explained to people, people just don't understand.

There are reasons, very sound, logical reasons, and the equitable reason that you point out when you have several defendants together, I understand that completely, but I do think it is just hard to explain a system that says, "You can go to a jury, and this is the system we have set up, and you are not guilty until you are proven guilty beyond a reasonable doubt," and you win, and then the judge says, "Oh, you won, but I am still jacking your sentence up as if you were convicted." It just doesn't feel right.

We had a case recently with a sentencing transcript when I read it on appeal, the defendant in speaking to the judges, "I just don't understand this. How can this be?"

He went on at some length about

that.

To me that was fairly compelling. It is not the first time I have heard it, but just to see it right there in the transcript in a way that harmed that individual's sentence, it just struck me as a point that is widely shared.

VICE CHAIR CASTILLO: I want to thank all of you for the work you do on opinions, and I will tell Judge Fisher, we did read the *Tomko* opinion on-line -- there was pages of it -- and we saw the back and forth.

One of the things we are dealing with here is just what the Supreme Court itself has done with sentencing.

For example, in acquitted conduct, the Supreme Court in the *Watts* case said on the one hand you can consider acquitted conduct in sentencing, and on the other hand we have *Booker* that is seemingly doing justice to a jury's verdict.

Let me get to one other thing, which is downward departures and departures in general under the sentencing guidelines.

It seems to me if you do justice to the Supreme Court opinions, Justice Breyer in

the [*Rita*] case says that departures are still very much viable under the advisory sentencing guidelines, and I think the Third Circuit, Judge Fisher in particular, has gotten this right in emphasizing the three-prong analysis to sentencing, and, unfortunately, my circuit has not gotten it right and said downward departures are obsolete.

I saw that just the other day, that the Third Circuit has vacated a district court opinion where the district court judge refused to rule on the downward departure motion, and one of the interesting things about downhill is that the district court judge did not rule on the downward departure motion that was a very viable motion, but instead varied.

So I would like to get the judge's reactions to what about downward departures and departure authority in general?

It seems that whatever we do, the sentencing, the architects of the Sentencing Commission and the sentencing system wanted judges to have departure authority, and yet we are now in a world where judges would rather vary than actually use their departure authority

that exists under the guidelines.

JUDGE FISHER: If I can comment briefly, in our case of *U.S. v. Gunter*, 2006 case, one of the earlier cases post-*Booker*, we made it clear to calculate the guidelines first, and it just seemed to us, and still seems very clear to me, the district court calculated the guidelines but ignored the departures, because part of the guideline calculation also is the determination on departure that is before the court so that is our second step.

The third step is 3553.

We are still seeing cases, 2009, that you pick up a 2008, 2007 appeal that gets to you, where the court, at least in its sentencing, you know, sort of combined the discussion on departure and variance, and it wasn't clear. That is why we have taken a look at the sentencing record as a whole in making a determination as to whether or not the calculation was procedurally reasonable or unreasonable.

I think it definitely has to stay a part of the process.

VICE CHAIR CARR: Judge Kavanaugh,

you paid enough attention to these matters probably to know among the district and appellate court judges we have heard from, you are somewhat unusual in calling for a return to the mandatory system.

Most of the judges that we hear from at both levels say it is working much better and it is much more fair now that it is advisory.

We routinely hear judges complain that the system needed to be simplified, that, as Judge Newman mentioned, the ways in which it gets complicated also tend to make the guidelines harsher as you keep tacking on penalties for different kinds of factors; that the mandatory minimums are too severe; and that the Sentencing Commission tailoring guidelines to mandatory minimums to encompass them makes the sentences for those crimes that have mandatory minimums too harsh; in particular, the drug and child pornography guidelines are too harsh.

What we hear from many of the district court judges is, "We do care about the guidelines, we want your guidance, but if you

could deal with some of these other problems, both by making them more simple, by sort of fighting back against Congress and issue the drug guidelines that you think should be in effect -- there are going to be cliffs out there because of mandatory minimums, let Congress sort of take the heat for that -- don't keep jacking things up the way that you do; that district court judges will have more respect for your guidelines and they will have more credibility, and that the district court judges will therefore not feel the need to vary as much."

Do you see that, again, understanding maybe the political unrealities of going back to a mandatory system, as a way to get more following the guidelines and less deviance from them?

JUDGE KAVANAUGH: The last part was?

VICE CHAIR CARR: If we have guidelines that district court judges are more comfortable with because the other problems of simplification and dealing with mandatory minimums have not jacked them up so much, then the concern that you have about more deviance

from the guidelines may not, in fact, be true several years down the road.

JUDGE KAVANAUGH: A couple of points in response.

First, mandatory minimums are a separate issue so the question of mandatory versus advisory guidelines is a separate issue.

VICE CHAIR CARR: Except they have affected the guidelines that the Sentencing Commission has promulgated so they are not out of whack with the mandatory minimum.

JUDGE KAVANAUGH: I understand that, but it still seems to me that is an issue that is somewhat logically distinct from mandatory versus advisory guidelines system.

Secondly, to have mandatory guidelines is not to say they should be high or low. The goal of mandatory guidelines is uniformity. That was the goal of the 1984 Act due to the problems that existed before; to reduce the disparities. I think we are seeing more disparities now, and I think we will see even more in the future so I think mandatory guidelines might have a value in preventing those kind of disparities, but they can be

improved as well, and part of that is simplification, broader ranges.

I think most district judges, most judges, would like more flexibility within the range, and that may bring greater support for mandatory guideline systems; simplification, greater ability, maybe the 25 percent rule -- I am not sure exactly how that will play out, but maybe that is a hinderance to proper reform that would have the support of the district court judges as well.

But it seems to me the sole reason, I think, I am concerned about advisory-only guidelines is the disparity that I think we are seeing and going to see more of. That is not to say the sentence should be high, low or where you come out on particular guidelines.

VICE CHAIR CARR: Just to bring you back to acquitted conduct, because this is something my colleagues have heard me say, there are many things that are not obvious about what happens if you take acquitted conduct off the table.

One of them is just the

relationship to relevant conduct in general.

If I am an assistant U.S. attorney and I charge someone with five drug offenses, and for the first one I only have the word of an informant, for the second one I have some surveillance because it is the beginning of the investigation, and transactions three, four and five I have DEA agents wearing a wire. As long as we have relevant conduct out there, I may charge three, four and five and not give the defendant the opportunity of getting acquitted of one and two, knowing that that is still going to come in in terms of relevant conduct.

If I do charge all five, some defense attorney might say to his client, you know, "Normally I would say you can plead guilty, but we might be able to beat number one and two so we are going to go to trial because there are more drugs in those."

I only mention that because while it strikes everyone at first as flunking the smell test, how could you ever take into account acquitted conduct? It is not as simple an issue as just saying, "Okay, we will [take] it off the table."

JUDGE KAVANAUGH: I couldn't agree more that it is not as simple as that. Again, another example, if it were that simple, it wouldn't be done.

There are reasons why it is used, and I know that, and they are strong reasons, and people understand those, but I think in the end they are outweighed by some of the points I made.

JUDGE NEWMAN: Two points. Point one, I just want to fully agree with your thought that the mandatory minimums need not drive the Sentencing Commission's judgment as to what the appropriate sentence should be. I thought the Commission made a mistake years back in building its guideline table on top of the mandatory minimums.

The Congress is a political body. They will react to political pressures.

You are the Sentencing Commission within the judicial branch. What we need from you, even under the era of mandatory minimums, is your best judgment of what the sentence should be for a person who transports a certain amount of heroin or has a certain kingpin role

or a certain mule role.

We, the country, needs your judgment what the right sentence should be.

If you come out below the mandatory minimum, that sends a message the mandatory minimum is too high. Some might think it is too low, but at least we will have your dispassionate judgment so I agree with you on that.

As to the other use of mandatory, and we have to be very clear there are two uses of mandatory here, Judge Kavanaugh in your question was talking about whether the guidelines should be mandatory.

You say, "Well, the district judges are happy at having them advisory."

The effort here is not to make district judges happy or even appellate judges, I might add. If we are happy, so much the better. That is not the objective.

The objective is to have a sentencing system that is politically viable, because if it is not politically viable, you are not going to get it past the Congress so it must touch first base and be politically viable.

But in the end, whether it is good or not depends on whether it makes sound penological sense, whether it is a good way to administer criminal justice.

If the system is mandatory in its application, but is sufficiently flexible in the way the guidelines are structured, and the departure authority is adequate, in penological terms there will be virtually no difference between a mandatory system and an advisory system.

The judge will calculate the guidelines under either system, the judge will have departure authority under either system.

If there is enough flexibility in the mandatory system, the outcomes will be, for the most part -- there will be outliers -- for the most part, it will not be different than the advisory system.

Politically, if making them mandatory but simple is the way to work out a package that is politically feasible, then I think it is something you ought to consider very seriously.

ACTING CHAIR HINOJOSA: Thank you

all very much.

COMMISSIONER FRIEDRICH: Judge Kavanaugh and Judge Newman, if the Commission were to take your advice and create a binding, more simplified system, [and] succeed in doing that, have either of you given any thought to what the appropriate standard of appellate review should be? Should it be the deferential abuse of discretion standard that exists today, and the pre-PROTECT Act reasonableness standard, or should a more rigorous standard of review be applied on appeal?

JUDGE NEWMAN: I guess I would want to see what the system was before I voted on how a court should implement it and review it, but taking the question in your terms, if it were generally simplified, I am not sure you are going to get away -- you are always going to have the issue of did the judge start with the right guideline. That is sort of a yes or no decision. If it is right or wrong. If it is wrong, it is going to be sent back.

On the issue of whether the sentence is too high or too low, substantive, what many courts call substantive, the word

"reasonable" is going to be in the articulation of the standard no matter what else we call it.

If you say abuse of discretion, you will then drive courts to looking at different bodies of law in which abuse of discretion is somewhat strict, and in [] others [in which] it is very lenient.

I think what is going to happen is, no matter how you verbalize the standard, and I think reasonableness will always be part of it, in the end you will develop something of a common law of sentencing, the way the British have lived with it for decades, and you will build up a body of case law.

One sentence that is thrown out because it was too high, whether it was called unreasonably too high, abuse of discretion too high or some other standard, it was too high.

And then the district judges, at least in that circuit, and maybe the Supreme Court if they took it as a national issue, would say, "Oh, in that kind of case it is too high; in some other case, government appeals, that kind of sentence is too low."

You will develop your benchmarks

of what is too high and what is too low by outcomes, I think, more than the articulation of the standard. If I had to have a standard, I think reasonableness is going to be in it no matter what else you call it.

JUDGE KAVANAUGH: I would just add, I think in a simplified system it would go back if it were mandatory to no appellate second-guessing of the district court's choice of a sentence within the range so conclusively reasonable if it is within a probably devised range based on analysis of the offensive conviction and offense characteristic.

As to the legal determinations, de novo and applying the law to facts, the standard was due deference before, which is a little bit hard to apply, but if it is more legal it tends to be more *de novo*, and if is more factual, it tends to go to clearly erroneous type of review.

I think your question went to would we second guess the sentence within the range if there were broader ranges or simplified ranges, and the answer is no.

ACTING CHAIR HINOJOSA: Judge Howard, Judge Fisher, would you want to add

anything?

JUDGE FISHER: I would concur with what Judge Kavanaugh has just said. I think you would significantly lessen whatever remaining role the appellate courts have in review, and I think you would -- perhaps you may want to look up [what] Pennsylvania has done, called presumptively reasonable sentences, which really has led to very few sentences being overturned over the 25 years.

ACTING CHAIR HINOJOSA: Thank you very much. We took more of your time than you bargained for.

Instead of a 15-minute break we will take a 5-minute break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: Next we have a "View from the District Court Bench", and we are very fortunate to have judges from the federal district court from this area.

We have the Honorable Richard Arcara, who has been the chief judge of the U.S. District Court for the Western District of New York since 2003. He has been on the court since 1988.

He has also served as an assistant U.S. attorney in the Western District of New York from '69 through '73, when he was first assistant U.S. attorney in that district, and then was the actual U.S. Attorney for the district from 1975 to 1981.

He received his bachelors degree at St. Bonaventure University and his law degree from Villa Nova University.

Next we have the Honorable John Woodcock Jr., who is a judge in the U.S. District Court of the District of Maine where he became the chief judge of that district court this year, and he has been on the court since the year 2003.

Prior to that he was in private practice where he also served part-time as an assistant district attorney in Maine.

He received his bachelors degree from Bowdoin, his masters degree from London School of Economics, and his law degree from the University of Maine.

Then we have Judge Denny Chin, who has been a judge for the U.S. District Court for the Southern District of New York since 1994,

and has been recently in the news. Prior to that he served as a law clerk to Judge Henry Werker in the Southern District of New York. He was in private practice and served as an assistant U.S. attorney for the Southern District of New York. He also serves as a part time professor at Fordham University School of Law, and he holds his bachelor's degree from Princeton and his law degree from Fordham so we are very fortunate to have all three of them, and we will start with Judge Arcara.

JUDGE ARCARA: Good morning, Mr. Chairman and members of the Sentencing Commission. I want to thank you very much for inviting me here to make my remarks at the 25th anniversary of the Sentencing Reform Act. I am honored to appear before you to offer my "View from the Bench" on the state of sentencing jurisprudence post-*Booker*.

I feel like I am really getting a little bit older here. I may be one of the few speakers that testified back in 1986 before the Sentencing Commission.

At that time I was the president of the National District Attorney's Association.

I was serving as the president, and the Commission invited the National District Attorneys Association to give input on the guidelines, and I remember quite vividly, and needless to say I was probably somewhat nervous appearing before the Commission in D.C. circuit, D.C. court -- I was in the courtroom there, and there were a number of judges, district judges, that were sitting off to my left, and I was giving a strong argument, proponent of the guidelines and how valuable they would be in the future because of the unwarranted disparity that I had seen when I was the U.S. Attorney in Buffalo.

I can tell you quite candidly, I was getting the evil eye from those district court judges, because they were not well received at that time.

I think that has changed dramatically, because most of the judges who are sitting today have grown up with the guidelines. I, on the other hand, had a couple of years where I was [a judge] pre-guidelines, and I think that they are certainly a very valuable asset to district court judges.

I would like to begin by commenting on how the advisory guidelines after the *Booker* decision has changed at the district court level.

We are the ones that are really under the microscope every day by the appellate courts in what we do.

Perhaps the greatest benefit from the *Booker* decision has been the return of sentencing discretion to judges.

I know some of my colleague, and I read some of the transcripts of some of the other proceedings, and you now had the pleasure of hearing four very distinguished appellate court judges, and Judge Newman in particular who I am very familiar with -- he always took a high interest in the guidelines right from the very beginning, and certainly many of his opinions helped us in the district court level.

Much of the remarks I am making now you probably have heard them, but I think they are important to repeat, and I hope you will bear with me.

I am in agreement with many of the comments that were made earlier. I do not agree

with Judge Kavanaugh on mandatory guidelines.

Permitting judges to consider the factors in 3553 and impose a sentence that is just and fair in all circumstances is, I think, tremendously beneficial to the parties and the public.

I believe the guidelines in their advisory state continue to serve a very, very important function. The systematic approach provided by the guidelines provides judges with an understanding of what is a fair and just sentence for the criminal conduct at issue in a particular case, and the task of imposing a sentence is, by far -- and I think this has been said many times by some of my colleagues -- a very difficult job we have as district court judges.

I always thought from my prior background that it would be quite easy to impose a sentence, put the person in jail for the rest of his life, coming from a prosecutorial background.

That is not the case. We have much more personal contact with an individual when you are sentencing someone than maybe when

you were prosecuting an individual.

There you are sitting there in judgment, there is the family out there waiting for a sentence, and there is a lot of anxiety in the courtroom at that time.

I believe all of us at the district court level take this very seriously.

First, we need a very complete and accurate picture of the criminal conduct at issue, which is the information that is normally provided from the probation office and from the government.

Then we need a complete picture from the defendant, the nature of the characteristics of the individual, his or her family history, the extent of the remorse, which obviously is a very important factor, and any other mitigating circumstance that may be available, and that is ordinarily performed by the probation office and particularly defense counsel.

But another crucial piece of information that is needed is what is provided by the Sentencing Commission guidelines, how the information about the sentence that we are

considering compares with the overall sentence that is being recommended or suggested for this particular type of conduct.

For me this puts things in a better context. It helps me assess whether the sentence that I am considering is in step with the sentences that are recommended for the conduct at issue, and where it is not, it causes me to pause and consider whether the circumstances that I believe warrant a different sentence are sufficient to justify a deviation from the norm.

All of this is to say that my view of *Booker* has improved the quality of the sentencing jurisprudence.

On the one hand it provided judges with the authority necessary to impose a sentence outside the guidelines range when the circumstances so warrant, without being limited to the more strict departure that existed in pre-*Booker*.

On the other hand, *Booker* mandates that judges continue to consult with the advisory range before imposing sentence, and I believe this serves a very important check --

reminding judges that uniformity and unwarranted disparity are also important sentencing goals.

That is what this is all about, not disparity -- I have heard that word used -- it is unwarranted disparity.

In my opinion, these two elements together have led to the imposition of more reasoned and just sentences.

Now, we heard this a lot this morning, and I am going to repeat it again, and I think it is important, and I know you are aware of it, but I am going to talk about it again.

And that is the simplification of sentencing, and I think imposing a sentence, I said we take it very seriously.

As of last week, I had over 230 criminal cases on my docket consisting of over 340 defendants. This is in addition to my civil cases.

The reality is that preparing for and imposing each sentence is a very time-consuming task, and post-*Booker* the task has become even more consuming, in my opinion.

Before *Booker*, judges were

required to perform guidelines calculations, resolve objections and address any applicable departure motions.

Now, in addition to that, the judges must address motions for a non-guideline sentence under *Booker* to determine whether a sentence outside the guidelines range is appropriate.

In my experience, a motion for a sentence outside the advisory range is made in almost every case, unless it is precluded by a plea agreement.

I mention this only because I think it is important for the Commission and for the appellate courts to be mindful of this reality in determining how extensive an explanation will be required for any given sentence.

Regardless of whether a sentence is within or outside the advisory guideline range, judges, I believe, district court judges, should not be required to render a treatise justifying the reasons for a particular sentence.

A brief explanation as to the

basis for the sentence should suffice, particularly where the sentence being imposed has been agreed to by the defendant and the government in a plea agreement.

This ties into another comment that I have regarding the highly detailed findings that need to be made before arriving at the advisory guidelines range.

The number of specific defense characteristics applicable to each type of crime seems to be increasing. When the guidelines were mandatory, the Commission undertook considerable efforts to address all of the different circumstance that might warrant an increase or decrease in the base offense level so as to ensure uniformity in sentencing.

But now that the guidelines are advisory, I question whether so many sentencing enhancement determinations need to be made before arriving at an advisory guideline range.

Let me give you an example: a bank robbery case. Before the sentencing, the court is required to determine whether taking the property was the object of the offense; whether a gun was brandished, discharged or

otherwise used; whether any other dangerous weapon was possessed; whether a death threat was made; whether anyone was injured, and, if so, the extent of the injury; and whether a person was abducted or physically restrained.

The court is also required to determine the amount of loss with the same degree of certainty.

Where a weapon is used, the court is required to apply three levels if a dangerous weapon was possessed or brandished, four levels dangerous weapon was otherwise used, five levels if a firearm was brandished, six levels if a firearm was otherwise used, and seven levels if the firearm was discharged.

Each of these specific enhancements requires the court to not only look at the facts, but also to the applicable case law to see how the courts define the terms "used," "brandished" and "discharged."

The incorrect application of any enhancement is reversible error, at least in the Second Circuit.

Certainly the existence of the numerous specific offense characteristics made

sense when the guidelines were mandatory. This would serve to reduce unwarranted disparity. But now that they are advisory, I question the utility of requiring sentencing courts to make so many factual determinations before imposing sentence.

In my view, requiring a sentencing court to determine whether a gun was brandished so that a five-level enhancement would apply, or whether it was otherwise used so that a six-level enhancement would apply, unnecessarily complicates the sentencing process.

What is important is the entire context surrounding the use, brandishing or possession of the weapon, and whether such conduct warrants a four- or seven-level enhancement, should be left to the sound discretion of the sentencing judge.

I would offer this as one illustration of how restructuring the guidelines might [make] sentencing proceedings more efficient post-*Booker*, without compromising the overall goal of eliminating unwarranted disparity.

Judge Newman today quoted -- and I am going to quote it again, because I thought it

was important -- the Commission noted in its initial guidelines that a sentencing system "tailored to fit every conceivable wrinkle of every -- each case can become unworkable and seriously compromise the certainty of sentencing and its deterrent effect," and it goes on, and Judge Newman quoted further. I won't repeat that.

Perhaps in light of *Booker*, the Commission should revisit the issue of creating broader subcategories.

You have heard this time and time again this morning, and I don't know that I want to keep repeating that.

I add that although the Commission initially rejected this argument years ago, a broad category system out of concern that it would have risked correspondingly broad disparity in sentencing, you might be wise to reconsider it.

Another area that I highlighted -- well, I want to mention another point, and it is in my statement, but I think it is worth noting, and that is in the area that relates to the parsimony clause of 18 U.S.C. 3553(a), which

instructs a sentencing court to impose a sentence that is "sufficient but not greater than necessary to meet the objectives of sentencing."

This provision was quoted to me as the reason why I should impose a sentence below the advisory guidelines range.

Many defense attorneys take the position that a sentence within the guidelines range is greater than necessary to achieve the purpose of sentencing and cite this quote, and I think it happens in almost every case that I have, and I think it would be helpful for the Sentencing Commission to provide some guidance as to how this clause interacts with the guidelines and the other 3553(a) factors.

When you hear that, you can see it on the expression of the defense lawyers saying like, "Judge, you don't have to do any more than is greater than necessary," and it is quoted so many times to me that it doesn't mean anything to me anymore. It is just a phrase. I listen to it and just dismiss it, because it is used so often.

I guess the defense lawyers feel

that they have an obligation to say it in the hope that the judge will give a sentence lower than the guidelines range, even though they agreed to the guidelines range during the plea agreement.

In the plea agreement it indicates that you won't ask for a sentence lower, but then they put this phrase in, and obviously the purpose of it is you give a lower sentence than maybe the guidelines and what they agreed to.

Another area where I think we get these incremental enhancements -- and I am not going to go into it. This is in my statement -- that is in the area of child pornography.

I probably have one, maybe two child pornography cases a week. I never even knew that this stuff existed until maybe about three, four years ago, but there seems to be more and more cases. It has a high priority with the FBI, and they are very difficult cases to get.

In every case I have, the enhancements are always there in every case, whether it is masochistic misconduct, whether it is on a computer. Every one I did is on a

computer. It automatically gets a higher level.

It just seems to be, as we talked about earlier, there should be some simplification in this area.

No one wants it in any way at all or doesn't understand the seriousness of child pornography. It is something that I had no idea that existed to the extent that it does in our country, and I guess the computer brought this out.

It is certainly one of those areas that you have an individual who, let's say, is somewhere in the area of 60 years of age, whatever, is involved in this kind of activity, and he is an individual that deserves a very, very tough sentence; and then you get someone who is 17, 18, 19 years old who has a computer at home, and based on his curiosity, whatever, is looking at this stuff, and he is facing sentences that are really very, very harsh.

I think the circuit courts are very sensitive to this; that in many of these cases, maybe the sentencing range should be lower, and the district court should have more discretion in this area. I guess we have it now

with *Booker*.

I feel very uncomfortable following the guidelines, putting a 17, 18 year old young man in jail for an extended period of time.

You got the family out there. There [are] 20 people sitting out there, they are all out there crying, and you are trying to give a just sentence, and the family is in total shock that their son or their brother, whatever, has been involved in this kind of activity.

I think that is something I would like you to take a further look at; again, the simplification argument.

Another area -- and I guess I am running out of my time here -- and this is the area -- I don't know how the Commission can address this, but that is the prosecutorial influence over sentencing.

I think the sentencing guidelines place a great deal of emphasis on, for example, the amount of drugs that are involved, and, unfortunately, the consequences has been to cause the government and defense counsel to engage in sort of fact bargaining regarding the

amount of drugs to be included in the relevant conduct.

I know the Department of Justice has a policy against fact bargaining, but the simple fact is that it exists, and I believe this is a byproduct of the emphasis that the guidelines place on the quantity of the drugs over other equally important factors such as the defendant's role in the offense.

I believe that this leads to the prosecutor -- and I guess rightfully so -- it is an avenue where there is manipulation of the guidelines, based on my experience, and which I believe causes unwarranted disparity out there in the real world of sentencing.

I also think that with regard to the substantial assistance motion, which I think was a very important aspect of the guidelines -- I know when I testified back in 1986, there was a limit that the original draft in the guidelines had that it would be no more than 25 percent, and at that time I was a prosecutor, and I argued to the Commission that you have to give more than just a 25 percent reduction.

When you are dealing with

organized crime, when you are dealing with major drug dealers, someone who is facing 30 years in jail says, "Well, you know, I can knock off about six, seven years if I help the government, but, again, my life is in danger, my family's life is in danger; it isn't worth it to me to cooperate with the government."

I remember talking to Judge Wilkins, and I mentioned to him, "You have to give us more latitude," which they did, which I think is very responsible today for the large number of pleas that we get in our district court, 98 percent rate of pleas, and a lot of it deals with the 5K1s, particularly the drug area and the area involving guns.

Again, I think that is an area that I don't know how the Commission can deal with, but it is certainly something that is out there, and that we have to deal with in our world.

To summarize, ladies and gentlemen, I believe that the Advisory sentencing guidelines do provide great assistance to the district courts in giving us an idea, a context as to what a sentence should

be, and I believe it does help in the world of uniformity, and I think it helps even under the post-*Booker* sentence decision.

I want to thank you again for this opportunity to provide you with my comments and my observations, and thank you for inviting me here.

ACTING CHAIR HINOJOSA: Thank you, Judge.

Judge Woodcock?

JUDGE WOODCOCK: I too join in thanking members of the Commission for the opportunity to be here today.

Although, Judge Hinojosa, you were very kind in your remarks, you omitted one essential part of my background, and that is my sister Elizabeth was a Supreme Court fellow years ago for the Commission and so around Maine, I tend to be known as Judge Woodcock, but around the Commission, I am Libby's brother.

ACTING CHAIR HINOJOSA: That is definitely true.

JUDGE WOODCOCK: I think it is remarkable how far we have come in 25 years. The Congress created the Sentencing Commission

in 1984 based in large part on the perception that the phrase that is above you here today, "Equal Justice under the Law," was not initiated in this country; that it was an aspirational goal, and that we had not fulfilled the promise; that it mattered too much, all too much, which judge you drew in terms of the sentence you received.

There are regional differences, racial differences, gender differences and other differences which are impermissibly infiltrating the sentencing process.

Congress directed the Commission to create a guideline that would provide a national analytic uniformity for sentencing, and that was extraordinary challenging, but somehow that guideline was created, and it has changed, I would submit, the way we think about sentencing, and I think much for the better.

We are now closer to the aspirational goal and the constitutional mandate of equal justice under the law.

Now, the *Booker* case and its progeny have tested the effectiveness of the guidelines as a national standard for

sentencing.

What I would like to talk about briefly is what has not happened post-*Booker*, the dog that did not bark, why it did not happen and discuss some implications with the Commission.

Before *Booker*, the conventional wisdom was that sentencing judges in this country did not like the guidelines; that they rankled with the restraints that the guidelines imposed, and they looked fondly back at the good old days when they could act as judges and impose a fair and just sentence; that the guidelines forced them to engage in endless arguments over subtle distinctions, reducing the art of judging to an act of calculation; and that once free from the guidelines, the judges would do what judges like to do best: Exercise judicial discretion.

But what has happened since *Booker*, *Rita*, *Kimbrough* and *Gall* has defied conventional wisdom.

Although the statistics can be analyzed in many ways, somewhere between 83 and 90 percent of the sentences fall within the

sentencing guidelines, and once certain outliers such as child pornography are removed, percentage of guidelines compliance is even higher, and upward variances are at a paltry one percent. Why?

I think there are a number of reasons. The first could be judicial inertia. Judges, despite *Booker*, are arguably simply continuing with the familiar, but that credits judges very little, and I think the main reason is the desire to avoid unwarranted sentencing disparities, which is, of course, a 3553(a) factor; the thought that the same defendant with the same criminal history who has committed the same crime should get roughly the same sentence regardless of the court before whom he appears.

The third, however, is another factor, and that is the convincing power of numbers.

We have been taught early on that there is a right answer to a mathematical equation, and when we work through the guidelines and we arrive at an answer as reflected in the sentencing grid, we have a tendency to credit the result.

Fourth, it seems to me the guidelines have thoroughly permeated our sense of what is a fair and just sentence.

We think we know what it is a felon-in-possession with a criminal history category of II should get as a sentence, because we have sentenced a number of those people using that guideline.

The fifth is that the specificity and comprehensiveness of the guidelines tends to predict, and to some extent preempt, the generality of the 3553(a) on analysis.

3553(a), for example, may tell us to consider the nature and circumstances of the offense, but if we have already considered the salient aspects of that offense, we have already considered what we have been directed to do.

The sixth is appellate review, and the function of appellate review.

It is much more likely for a sentencing judge to be reversed if he or she has made a mistake in calculation under the guidelines, and a mistake in judgment under 3553(a).

As a consequence, taking into

consideration appellate review, a district court judge refocuses on the guideline.

The last is that 3553(a) represents a sentencing cliff; that once you walk out of the confines of the sentencing range, where do you go? Do you go higher, do you go lower, and how much lower do you go assuming it is lower?

Once you begin to consider the generality of the statutory directives, we run the risk, we fear, of reinfusing into the sentencing guidelines the very regional, social, philosophical and religious differences that were unacceptable in 1984 and are even more so today.

So the judges, as a practical matter, start with the guidelines, and often after applying 3553(a), return to the guidelines to impose a sentence.

With that said, it seems to me the *Booker* legacy does free sentencing judges to do what is fair and just in a case where the guidelines do not properly address the unique circumstances of the crime and the defendant, but they have tended to operate more as a safety

valve than what would have been anticipated post-*Booker*.

This leads me to a couple of thoughts. One is that the sentencing judges have given the Commission a road map, it seems to me, as to the area of variance with the guideline that the Commission would be well-advised to review -- we have heard them today, those two areas are mostly drug cases and child pornography -- and determine, reevaluate whether the Sentencing Commission got it right.

The second thought is this: I think, and I would respectfully suggest, that the Commission should re-examine its emphasis on the guidelines alone and run to a different task, one that it is statutor[ily] required to perform, and that is to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy.

In many ways, that is a more difficult task than creating the guidelines was. In effect, the Commission should be and could be, it seems to me, a national advocate for sentencing policy.

We know under the guidelines how to calculate the right sentence, but do we know that the sentence is right?

And there are very few people in our political process who are going to speak for reductions in sentences.

Now, the Commission as I said, has the statutory authority to do this. It is uniquely positioned to do it. It has recognized expertise in sentencing. It alone can call upon, as it is here today and tomorrow, members of the federal judiciary, probation, the Justice Department, the defense bar, law enforcement, academia and, I would add, the Bureau of Prisons.

It has over time amassed an impressive set of empirical data. It can be mined and analyzed, and it has constituted the political balance and speaks with authority, and it has retained an excellent staff.

It seems to me that the Commission has an obligation, and it has a directive, to challenge the assumptions that underlie our sentences, to challenge what we have assumed is correct: The impact on the defendants, the

impact on the victims, the impact on our community of our current sentencing policy.

I know the Commission is engaged in this work. It seems to me, and I am urging you to continue to press ahead, to re-examine the basic assumptions that underlie our sentences even when the results run against conventional wisdom and against the popular grain.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge.

Judge Chin?

JUDGE CHIN: Judge Hinojosa and members of the Commission, thank you for this opportunity to share my thoughts with you, and welcome to New York City.

Last week I presided over one of the most anticipated and closely watched sentencings in recent years in the Madoff case.

The sentencing was scheduled for a Monday, Monday morning, and news trucks started jockeying for parking spots outside the courthouse over the weekend.

By early Sunday afternoon, there

were fifteen news trucks up and down Worth Street trying to claim the best spots for their reporters for Monday, and Monday morning by six o'clock there were lines of media and victims waiting to get into the courthouse for the proceedings, which were scheduled for 10:00 o'clock.

In the days since, since the sentencing, the sentence I imposed has been dissected and debated both in the popular press and the academic media.

I think the discussion has been healthy: What are the goals of punishment? Did the sentence further those goals? Should helping victims heal be a goal of punishment? Is a financial crime such as securities fraud really evil?

There has been much discussion about whether my use of the word "evil" in describing the crime was appropriate.

Is there any point to a sentence of years far longer than a defendant is expected to live, and is such a sentence merely pandering to the public?

Of course, we are here today not

to take on these questions, but to discuss the sentencing guidelines, but the Madoff case underscores how difficult the process of sentencing a defendant is.

Judge Arcara put it well, I thought. It is a very personal process and very personal decision.

Even when you have the right answer in the grid, it is still hard to impose the sentence.

The challenge is not just to decide the appropriate sentence to impose, but to preside over the proceedings in an efficient manner in a way that will give parties and victims a fair opportunity to be heard while maintaining the dignity and decorum that the public should expect from proceedings in our courts.

I have been sitting now for almost 15 years, and I never had a challenge of sentencing under pre-guidelines law. It must have been extremely difficult. I don't know that I would describe them as "the good old days." I have heard some of more senior colleagues refer to it as a free-for-all.

From the time I started, I found the guidelines to be enormously helpful. They provided a useful starting point for me, and in the vast majority of cases, I felt I had sufficient flexibility to depart if the circumstances warranted, including, for example, the departure based on the combination of circumstances.

On some occasions I did find the mandatory minimums to be unduly restrictive, and I join my colleagues who have expressed the view that mandatory minimums sometimes result in unjust sentences, as they often require judges to ignore sentencing factors that usually are an important part of the mix.

On the other hand, we have some additional flexibility through the safety valve and the 5K1 departures, and I think Judge Newman is correct, a mandatory system isn't so bad. There is sufficient flexibility.

It was a real challenge for me as sentencing law evolved so dramatically with *Apprendi*, *Blakely* and *Booker* and the other decisions that followed, but I have to say it was a lot of fun to be there on the cutting edge

applying these cases as they were decided. Seemingly on a daily basis between the Supreme Court and guidance from the circuit, the law seemed to be changing every day, and we were trying to determine what the cases meant and how to proceed.

As the law in this area has continued to develop, we district judges have gained even greater discretion and flexibility, and the Supreme Court has now held that the guidelines are not even presumptively reasonable, and that district judges are free to reject a particular guideline based even on personal policy disagreements.

One could argue under these circumstances that the guidelines have lost their significance.

In my view, however, the guidelines still play a critical role. They still provide an enormously helpful starting point, for it is comforting to be able to begin with an empirically-based heartland range which is drawn from the collective wisdom and experiences of colleagues from all around the country.

In addition, the required analysis frames the issues in a way that makes it more likely that we will reach a fair and just result.

Finally, the goals of the guidelines, honesty in sentencing, reasonable uniformity in sentencing, and proportionality in sentencing, are still laudable, and the guidelines continue to advance these goals.

The guidelines are now as they should be: true guidelines, advisory in nature, rather than mandatory rules. They are something to which we should give, appropriately, fair and respectful consideration.

I do believe that post-*Booker* is much better than pre-*Booker*, and I am confident that most, if not all, of my colleagues in the Southern District of New York would agree.

We have more [inaudible] flexibility to do what we are supposed to do -- to judge -- and we are not limited to merely applying mechanical rules and doing mathematical calculations.

Notably, sentencing is more difficult post-*Booker* than before when the guidelines were still mandatory. Back then a

judge could hide behind the guidelines and say, "Sorry, my hands are tied. There is nothing I can do." Now we can't say that, and instead we must make the hard decisions.

One by-product of *Booker* is that defense lawyers are now talking longer, but I think that is a good thing, because it means that defense lawyers are trying harder, as they now have a greater chance of getting a below-guidelines sentence for their clients.

There are a few areas that I wanted to mention specifically, briefly.

The first is the question of departures versus variances. Judge Castillo posed a question earlier, are the departures obsolete.

I wonder whether there really is a need for both. Very few lawyers even ask for departures anymore, and when they do, they usually pair the request with a request for a variance and do not distinguish between the two.

I know the Sentencing Commission has encouraged district judges to rely more on departures and less on variances, but to me it seems inefficient to do a departure analysis

first under the stricter standards for departures, and then to do the analysis again in the more flexible context of a variance.

I also think it is more intellectually honest in most cases to consider the mitigating factors in the context of a request for a variance rather than to force the issue in the narrower confines of departures.

Although departures and variances clearly are distinct, the courts have recognized that at times the same analysis must be applied to both.

The second area I wanted to mention is a technical issue that arose in the Madoff case. What happens when there are multiple counts of conviction? The guideline calculation calls for a sentence of life imprisonment or a range of a fixed term to life, and no count carries a possible sentence of life.

The relevant guideline section is section 5G1.2(d), but there is some ambiguity in the language.

The section tells us to impose consecutive terms of imprisonment to the extent

necessary to achieve the "total punishment," but what is the total punishment? And there isn't guidance on that.

Fortunately for the Madoff case, we found a Second Circuit case that was right on point, because the guideline range or the sentence called for by the guidelines was not a range but just life, and there is a Second Circuit case that says you stack the maximums for all counts to reach the total, and that is the total punishment.

But I did have another sentencing the same day as the Madoff case in a child pornography case, and there the guideline calculation called for a range of 360 months to life.

The two counts in question had statutory maximums of 30 years and 20 years respectively, and thus life imprisonment was not a possibility.

There I had to determine the total punishment, but, frankly, I just didn't know how to do so. I could not find any guidance, because I think the language suggests that one should pick a single number as the total

punishment, but it was unclear whether that number should be 30 years or 50 years, stacking the two together, or something in between, and it was unclear how I should make that determination so I think that section should be clarified.

The third area I wanted to mention is the early disposition program under section 5K3.1 of the guidelines.

Under this section, a court may depart downward up to four levels on motion of the government if the district has an early disposition or fast-track program.

We do not have a fast-track program in our district, although we do have many illegal reentry cases, which is where this departure is most often applied in other parts of the country.

Some defendants have argued in our cases that we should impose a below-guidelines sentence to account for the disparity that results because of the unavailability of this fast-track program in our district.

In preparing for today, when I looked at the numbers, I saw that for the

country as a whole, seven percent of all sentencings applied a government-sponsored below-guidelines sentence on this basis. In other words, seven percent of all sentencings apply to departure based on the fast track, and yet it is not available to defendants in our district, and this is a significant disparity that is inconsistent with the goals of the guidelines, and I think it should be addressed.

Some judges in our district have granted variances to account for this disparity, and I think our district I know is high in terms of variances, and I think this is one of the reasons why.

Thank you for giving me this chance to share my thoughts with you, and thanks to the Commission for its continuing efforts to help make the difficult task of sentencing a little bit easier.

ACTING CHAIR HINOJOSA: Thank you, Judge.

We will open it up for questions.

COMMISSIONER HOWELL: Thank you all for being here.

Judge Woodcock, I just wanted to

say that I think this Commission has also looked at the statutory mandate that you also cited about advising Congress about sentencing policy more broadly, and I just wanted to point out that in our priorities for this, for the next amendment cycle that we have issued for comment, one of them is to review the child pornography offenses and possible promulgation of guideline amendments and/or report to Congress as a result of such review, and included in that report, some of the things that we are contemplating includes a review of the incidents of and reasons for departures and variances from the guidelines sentences, and more to your point, a compilation of studies on and analysis of recidivism by child pornography offenders, which I think is the kind of policy research you are also talking about to help advise Congress about what are the recidivism rates that might warrant sentences of a particular length, because child pornography sentences are quite lengthy, and recommendations to Congress on any statutory changes that may be appropriate.

I just wanted to point that out to all of you, that the Commission keeps close

track of where there are significant variances, and child pornography is certainly one that I think many judges have told us, both directly and through our review of departure and variance rates, that is an area where the sentences are quite high and they are opting for sentences below the guidelines. That is one area that we want to focus attention on.

At the same time, and this goes back to something we talked about with the prior panel, one of the policy decisions the Commission has made with regard to how we address mandatory minimums, and whether or not there should be linkage or de-linkage between the guideline offense levels and the mandatory minimums, is that generally the Commission has opted to link guideline offense levels to the mandatory minimums for a number of reasons, and I'll just name a couple of them: One, proportionality within the guidelines and avoiding the cliffs, and part of the equal justice under the law is ensuring proportionality between -- in sentences between similarly situated defendants and avoiding the cliffs that de-linkage might provoke.

I am interested in what your views are on whether that is a policy decision that the Commission should reconsider. Certainly we heard from the prior panel, Judge Newman thought it was a mistake when the Commission before us linked mandatory minimums and the guidelines.

I am just curious about what your views are.

Certainly the mandatory minimums that are applicable to child pornography offenses have helped -- have resulted in higher guidelines.

What is your view on the linkage issue?

JUDGE WOODCOCK: Let me first talk a little bit about child pornography.

I think the basic assumption I gather from a calculation of the guidelines is that these unfortunate defendants are virtually irredeemable. They represent an ongoing lifetime risk to children. That may be true, and it may be true particularly to some defendants, but I don't know it is true of all defendants.

To some extent, the child

pornography has become our modern day scarlet letter.

My thought about how you approach that, along with mandatory minimums, is that Congress has a constitutionally imposed responsibility to do what it feels best in the interest of this country in terms of mandatory minimum.

We wish occasionally they were not there, because it seems to us when we look at an individual defendant across the courtroom, that they are not fair and just.

My thought about it is that generally I would try and avoid, if I were in the Commission's shoes, a confrontation with Congress over congressional authority. I don't think it is going to bring you down the road very far, because ultimately they have the final say.

What I would urge you to do, and I am sure you do this, is to open the lines of communication with the appropriate congressional committee. It is hard work, it is terribly hard work. You have to have ongoing continuing staff interaction -- it really takes place at the

staff -- between this Commission and the appropriate staff members of Congress so that not in a sense that you are educating them, but you are listening to them as well in order to avoid the imposition of congressional mandates that you know, because of your empirical determinations, are not in accordance with the best sentencing practices.

And you do have, I might add, now an enormous amount -- you have so many sentences that have gone on that you calculated, and you have empirical data to back up your sense of what is right and what is wrong, and it seems to me that if you have those lines of communication open, as open as they can possibly be, that you might deflect Congress from doing what it has the authority to do but should not do in your best judgment.

JUDGE ARCARA: In the area of child pornography -- I think I alluded to this earlier -- it seems like in many of the cases, at least in my experience, if not most of the cases, the sentencing is imposed is right at the statutory maximum because of all the enhancements under the advisory guidelines. it

just seems to me it is almost a built-in unfairness that in almost every case, because of all the enhancements, we are right up to the statutory maximum.

I really question whether Congress really intended that, and I have done a lot of research and reading on the child pornography, because I am dealing with it so often, that it seems to me some of those cases where I am up in the advisory guideline range at the statutory maximum, that is this really the fair and just sentence, to put a young person in jail for really a very, very lengthy period of time?

In my experience, it is a very difficult thing for me to do, be in that courtroom and to have that family there, and they have this young man out there -- it is usually a young man -- who is absolutely decimated because of the embarrassment to his family -- his family is in a state of shock -- and here this person is going to jail for 10 or 20 years. That is a long time.

COMMISSIONER HOWELL: We are hearing you.

JUDGE WOODCOCK: If I could just

also respond, I think that regarding child pornography, a lot of us analyze child pornography in a way that is not reflected in the guidelines at all, and when I am talking about that, I am talking about one of the ways I look at a child pornography case is when you look at pornography, how young are the victims? Is this a victim who was 15 years old or 12 years old, or is it a victim who is one year old? That, of course, is going to change your attitude toward what you see.

The second is, what is the nature of the pornography? Is this pornography that is simply a picture of somebody, or is it a picture of somebody engaged in a sexual act?

And there are a number of other factors that I look at that don't have anything to do with the guidelines.

I also look, for example, at whether or not there is any indication that the defendant has been using the Internet to approach victims.

If a person has not, has just been sitting in a room downloading pornography, that may be one thing.

If he is reaching out and actually trying to attract victims, then I think of that as being much more serious.

The guidelines don't deal with this at all so I see these as being an area the Commission really needs to look at.

JUDGE CHIN: If I could just add something on the area of child pornography, I was struck when Judge Arcara said he sentences perhaps two defendants in these cases a week, and it shows you the influence of the charging decisions.

In my 15 years, I have had perhaps five child pornography cases total; just very, very few.

I have only had one go to trial, and in the one that went to trial, I actually had to see the pornography. When you actually see the materials, you can understand why there is so much emotion in Congress; because the videos that I saw and that the jury had to see were repulsive and despicable, and this was not a young man. The defendant also was convicted of actually producing child pornography and molesting a 5-year old in the process so it was

an easy case sentencing-wise.

I haven't had the ones where you have a 17-year old who is looking at 20 or 30 years.

VICE CHAIR SESSIONS: Judge Woodcock, you made a really interesting observation about our role with Congress. Frankly, that is one of the most significant functions we play – [to] try to ameliorate directives through Congress. We are in a very political world, and we are in particular almost at the vortex of the branches of government, all demanding a role in the sentencing function.

I am interested to know -- this is the general policy, and I know it is a very difficult question to ask and to answer, but in *Booker*, of course, the court said the ball is now in the court of Congress.

You know, as I, that various proposals were made after *Booker*. Obviously those were not implemented to this point, but could be very well implemented in the future.

You heard Judge Newman talk about even a mandatory guideline system which may be acceptable to the judiciary, assuming that you

get, if I heard him correctly, a reduction in a number of mandatory minimum sentences. My guess would be it would be in the field of drugs and child pornography, but a reduction in the number of mandatory minimums; elimination, perhaps, of the 25 percent rule, but more flexibility within the guidelines structure so that there is flexibility for the judges with wider ranges, perhaps fewer offense levels, but then ultimately a mandatory system would replace, theoretically, in Congress' eyes, mandatory minimum penalties.

I know Judge Arcara -- we have talked about that many times. You believe that the *Booker* system is the best there is at this point.

I am concerned about going to my next Second Circuit retreat and being bombarded by judges who assault me because I proposed a mandatory guideline system.

My question is, is there a system that you can imagine that would be fair and that would be acceptable to the judiciary that would also be mandatory? Would there be things that you would look for that could possibly be

acceptable to judges? Because you are so -- obviously so vital to the system.

JUDGE WOODCOCK: I would say no, and the reason I say no is because I think the sentencing process is too variable, and I will give you one example.

I don't think, with all due respect to the Commission, that either the guidelines or we as a society have been able to handle mental illness very well.

Many, many people who come before me for sentencing have significant mental illnesses, and if you look, they don't follow the very strict provisions of insanity, and for one reason or another they may not get diminished capacities, but I see a number of people who really, when I take a look at the guideline, the guideline really does not address somebody who is pretty severely mentally retarded and has somehow done something violent.

How do you deal with someone like that? What is the appropriate sentence?

There are other examples we can all think of.

I think the *Booker* safety valve is

an essential component of the sentencing process, and ultimately -- I say this with a great deal of respect for Congress, because they have the constitutional obligation to do what they do -- but the people in this country do not want to be sentenced by their Congressmen. They want to be sentenced by judges, and ultimately I think the people of this country want to have a judge who has the authority to consider the guidelines and the policies that have been promulgated by this Commission, but also to allow the judge who is sitting in the room to make the ultimate decision.

JUDGE CHIN: I guess I would ask, if we go back to a mandatory system of some kind, wouldn't we have a *Booker* problem again? Wouldn't the constitutional issues exist again as to whether defendants would be entitled to a jury trial for these factual findings?

JUDGE ARCARA: Judge Sessions, one thing about mandatory, it was a lot easier to impose a sentence. Sentencings, as you know, are not easy. When you had mandatory, it made life a lot simpler for us. It is a lot more difficult for us today.

In fact, pre-guidelines, I had two years where I was sentencing a bank robber, and he had this probation for 20 years, and talk about just pulling things out of the ear at times in the sentence that was imposed. Mandatory makes it a lot easier, but our job shouldn't be easy. Our job should be difficult.

When you put somebody in jail, as you know as a district court judge also, it is not an easy thing to do.

I was shocked how hard it is for me to do that.

It is always easier, many times, to go to a lighter sentence than maybe a harsher sentence.

The mandatory is easier. If we have it again, I will deal with it again, but right now it makes my job harder, but that is okay. I like it being hard. I don't want to ever feel comfortable imposing a sentence on somebody and saying, "I really feel good putting that guy in jail." It never feels good.

VICE CHAIR SESSIONS: Judge Newman was talking about increasing the discretion within the guidelines ranges, much

broader ranges, but you don't think that would in any way ever be acceptable to the judiciary?

JUDGE ARCARA: That you have a wider range?

VICE CHAIR SESSIONS: If you have a much wider range. That is basically what he was talking about.

I am interested to know, when you said well, maybe you would agree with Judge Newman, I wondered if that is what you meant.

JUDGE ARCARA: You are asking a very difficult question.

VICE CHAIR SESSIONS: That is what judges do, ask tough questions.

JUDGE ARCARA: I don't know the answer to that, I really don't know. This whole area is so gray. We are all stumbling around, let's face it, to try and have a fair system.

There is never going to be a simple way to do this, and I think we have to realize no matter how many studies, how many statistics you get, it is never going to be an easy thing to do, and it is never going to be perfect.

Okay, we are human. It won't be

perfect, but is it fair and just? Under the circumstances right now, I think post-*Booker* it is going to be fair and just. As a society, I think we are going to have a better system than when it was mandatory. That is my view.

Again, mandatory, that is easy. You go out there, you make the calculations, and then where do you want to put it in the range? Okay, you figure out some way to do that. If there appears to be true remorse, plea, it's easy, you usually go with the lower end. I do.

If there is a trial, I will start considering other factors because I learned more about the case.

Mandatory, if that is the wish of Congress -- I hope it isn't, that we go back to that again somehow or other, because I don't know how it will withstand *Booker*, but we will deal with that, I guess, some other day.

JUDGE CHIN: I think ultimately we accept it. We may not like it, but if it is imposed upon us, as long as it is constitutional, we will deal with it as best as we can.

ACTING CHAIR HINOJOSA: Judge

Arcara, I like you sentenced people for five years before the guidelines, four-and-a-half years, and I agree with you about what the system was like before the guidelines, but what I always wondered is the use of the term "mandatory guidelines."

I don't think Congress intended that there would be no departures within what we call the mandatory system, and there was a lot of discretion, just like there is today, under what we called the mandatory system in that judges had to make individual decisions with regard to the fact finding as to relevant conduct, as well as all the other offenses and all the other factors we had to decide. I found it difficult that you still had to go through that whole process.

It was much more open, as you had pointed out, because we were at least telling people what we were thinking about and needed to be convinced about, either mitigating or intensity, and there was a departure availability. It was not prohibited. I think the post-PROTECT Act pre-*Booker* period was more difficult, but post-*Koon* pre-PROTECT Act, we are

not that far from where we are today. Can you tell me about that?

JUDGE ARCARA: I think one thing about the departures, the departures the district court made were scrutinized very carefully by the circuit courts.

ACTING CHAIR HINOJOSA: What situation and what circuit?

JUDGE ARCARA: In the Second Circuit, they looked at it very careful.

The question came up variance and departure, if you had a choice to go either way, variance is a lot easier. You have a much better chance of getting an affirmance. We like to get affirmances; at least I do. Most judges do. I don't want to get reversed; yet again, I don't want to be sitting here paranoid about the fact if I make a mistake I am going to get reversed.

You can't operate that way. You make a decision the best you can. If you are in error, a higher court will take the appropriate action.

The variance is just a lot easier to go that route, and if everyone is happy, that

is the end of it, rather than go through the departure, which if you don't go -- maybe the one side requested it, or the other side, the government, appeals it, the circuit court is going to look at that very carefully.

In a variance you have so many different options. You can use a lot of different factors in there, and I find it a lot easier to do that.

I find also I as a judge sentence most of the time within the guidelines. I think -- I know you can't say they are reasonable, but by and large they are, in my opinion. I find the guidelines in the range many times to be very fair.

The calculations, again, like in the child pornography area, in some of these other things, bank robbery and all that, some of those kind of bother me a little bit, but generally speaking, the number of sentences that I impose every year, I find the guidelines are very, very meaningful, and to be in most instances reasonable.

I know I can't use that as a district court judge. I know that is a standard

for the appellate court, but I find it to be very important, very helpful.

VICE CHAIR CASTILLO: I appreciate the honesty of all of your testimony, but don't you think -- I wasn't going to touch this -- this issue of departures versus variance, don't you think in light of *Booker* that there is a lot of antiquated circuit court case law on departure that is no longer valid, and that if a judge really follows what the Supreme Court is saying we should do in terms of the three-prong analysis, that there is a lot of departure authority that is out there and probably has even overtaken some of its older circuit court case law that is out there?

JUDGE ARCARA: I think you are right. Variance is definitely -- departures are out there, but, as I said, Commissioner, I don't want to get involved in all of that. We are trying to simplify it. When you sentence so many people -- as I indicated in my statement, I sentence anywhere -- I have as many as four a day in addition to doing everything else.

To review a presentence report on the average take an hour, I would say.

Complicated ones could take a lot more time.

I had one this week that I think my law clerks and I, we probably spent six to eight hours trying to work through some of the issues that were being raised, and that is a lot of time in the course of a day.

I don't accept that, because you want to be -- most district judges, in fact, if not all, want to do the right thing. No one is sitting there trying not to make the right sentence. I hope there isn't anyone who wants to do that.

JUDGE CHIN: There are also more procedural hurdles. If I am going to do a departure, I am supposed to give the government notice. Does that mean we adjourn the sentence for another day? With the variance, I can just do that.

JUDGE WOODCOCK: The irony on that is you have to give prior notice if you anticipate or begin to contemplate a departure on the ground it has not been previously identified, but then you can go right ahead and do exactly the same thing without giving any prior notice under 3553(a) so there is an uneasy

analysis currently between downward departures and the 3553(a) analysis.

ACTING CHAIR HINOJOSA: You are going back to where we were pre-guidelines for people don't really have the notice to be able to respond whether it is the prosecution or the defense. That was one of the things that was batted about the pre-guideline system, that either a prosecutor, defense attorney or defendant didn't really know we were thinking of certain issues, and we might just do it without notice.

A lot of times, whether it is departure or -- if I was going to give a variance, I think it is the fair thing to do to go ahead and have somebody respond to what you are thinking, because they might be able to convince you that they didn't know you were thinking of doing this and didn't have time to get the information.

Wouldn't that at least be a notice aspect of it?

JUDGE ARCARA: I think, Mr. Chairman, when that happens, you just don't surprise them, just sentence them to a different

sentence. You say, "I think I am considering a variance here, and here are some of the reasons why I am going to consider that. If you want me to take a recess, you want to think about it for a moment, please do. If you even need a day, but I am just thinking about it." You say what the reasons are, you tell them what the reasons are.

ACTING CHAIR HINOJOSA: Giving them notice?

JUDGE ARCARA: Due process, I think, requires you to do that, I think. In all fairness, the last thing you want to do is shock people and surprise people.

One of these things that these guidelines have done, and they have added so much assistance to the defense lawyers when they are working on a plea, "Look, here is the guidelines. Here is what I think the judge will probably sentence in this range -- I can't be certain -- but here is the range, zero to 20 years" when he had no idea what the sentence would be.

I think in the sense of fairness, Mr. Chairman, you have to at least give him some

type of notice. You can't hit him cold turkey out there. That is unfair. That is ambush, and I don't think we want a system where we are ambushing anybody. I don't do it, and I doubt if most judges do it. I can't imagine a judge doing that.

COMMISSIONER WROBLEWSKI: I just want to pick up a little bit, Judge Woodcock and anybody else on the panel, from the discussion with Judge Sessions and also Commissioner Howell.

I take issue with a couple of things I heard. One is, Judge Woodcock, you suggested that the changes that have come about since *Booker*, I think you said the dog hasn't barked yet, or something along those lines.

JUDGE WOODCOCK: I was referring to the federal judge dog.

COMMISSIONER WROBLEWSKI: It seems to me that the *Booker* decision was very fundamental in a lot of ways.

In the older system under the guidelines, and in the current mandatory minimum system, the sentences are driven largely by the offense conduct and criminal history. Other

offender characteristics were not largely taken into consideration.

Now under *Booker*, for those cases that don't have mandatory minimums applicable, offender characteristics like you were describing in terms of mental illness, can be taken into consideration to a much larger degree or at least easier without going through the departure analysis under the existing guidelines.

So in that sense it seems to me it was fundamental change.

The other thing I have some problem with is this discussion between mandatory guidelines and advisory guidelines as though it were a binary choice.

There are now mandatory minimums that apply to a very large percentage of the cases across the country, and in those cases we still have sentences driven by the offense conduct and criminal history.

What I want to know from you is, should we try to reconcile all that? Should we have one system where the sentences are driven by a combination or a coherent combination of

offense conduct, criminal history and offender conduct, or should we have this sort of strange hybrid system that we have now which is if you don't have a mandatory minimum, you can take into consideration the mental illness or the background, other offender characteristics under 3553(a)(1), but if you are in a mandatory minimum case, in large measure you can't. Should we try to reconcile that, even if it means some restrictions on the judge in terms of how much of the offender characteristics can be taken into consideration or not?

JUDGE WOODCOCK: That is a great question. I heard, I think it was, Judge Newman discussing his strong impression that the Commission went off the tracks basically in trying to reconcile the guidelines with mandatory minimums.

I guess my reaction is first that we don't have that choice. That is not a discretionary decision for us. It is mandated by the Congress so it is what it is, and we'll simply do it.

COMMISSIONER WROBLEWSKI: Should we as a commission go back to Congress and try

to reconcile that, which means engaging Congress on mandatory minimums and, in essence, with the very possible result that there is some mandatory nature to the guidelines, but addressing the fundamental question?

JUDGE WOODCOCK: I would have to see what the ultimate result is before I commit myself on it.

I think that the mandatory sentences in part cause a counter-intuitive problem as well, and that is if you take many of the child pornography cases where the guideline is below the mandatory minimum, the defendant is virtually guaranteed to go to trial, and basically you are trying a number of cases where the guidelines are so significantly below the mandatory minimum that ordinarily it would not be tried before a jury.

I think that that -- I don't think people have -- I don't think that Congress is aware of that. You have jurors sitting there watching horrific images of child pornography for no good reason, it seems to me. If the defendant were allowed or had been allowed to be sentenced under the guideline range, which is

tough enough, rather than the mandatory minimum, he would have pleaded guilty, and he would have been sentenced, and he would have gone on.

I think it is counter-intuitive to many of the ways mandatory minimums work.

As far as dealing with Congress, my thought is that -- and I know you have tried to do this -- you need to have as much as you can a collaborative relationship, as I mentioned earlier, with the relevant people on the Hill.

If you have that kind of relationship and you continue to work it, I am hopeful that perhaps the congressional inclination toward mandatory minimums would be dissipated.

I think in the long run when they look at the impact of mandatory minimums, they are not as they seem.

ACTING CHAIR HINOJOSA: Since you brought it up, Judge Woodcock, I will not have a question, but I have one last comment.

One of the things I have learned since I have been on the Commission is the amount of congressional work the Commission actually does working with both sides of the

members of Congress and the effect the Commission has in ways that I would never have seen sitting on the bench in Texas with regard to matters that are so important to what I do in McCallum, Texas.

It is also enlightening to see that they come under a lot of different pressures that I don't as a judge in McCallum.

They may have constituents that don't want to be sentenced by them, but they certainly would want them to set sentencing for somebody else that is going to come before me in McCallum, Texas so it is a hard process, as Judge Sessions admitted, a position to be in, but rest assured we have a lot of contact with Congress as well as the courts. We do have a lot of contact with the different branches.

Thank you all very much. We will take a five-minute break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: Our next panel is a "View from the Probation Office." We are very fortunate to have four individuals who are sharing their time with us.

We have William Henry, who

actually became a U.S. pretrial services officer in the District of Virginia in 1989 and served in that district as an officer. In 1995, he was appointed Chief U.S. Pretrial Services Officer for the District of Maryland, where he served from May of 2001 until that district decided to consolidate so he has been the Chief of [the] Pretrial and Probation Office since then.

From January of 2006 until December of 2007, he served as a member of the Chiefs Advisory Group for the Administrative Office of the Courts and has been chair of that group since January of 2008.

Michael Fitzpatrick was named the position of Chief Probation Officer in the Southern District of New York on January 1st of this year. He is the brand new chief. He has a lot of experience having become a U.S. pretrial services officer in New Jersey in 1993, where he was promoted to electronic monitoring specialist in 1997. In June of 2005, he was promoted to supervising pretrial services officer, a position he held until July 1st, 2006 when he was named pretrial services officer in the Southern District of New York before he became

the Chief Probation Officer.

C. Warren Maxwell was appointed a federal probation officer for the District of Connecticut in 1992, and in 1995 he served as visiting probation officer at the U.S.N.C. Commission where he did help at some point manage the Commission help line, and in 1997 he was promoted to guidelines specialist and continued conducting investigations in addition to providing training and monitoring to the staff, and in 2002 he was promoted to deputy chief U.S. probation officer in that district.

Wilfredo Torres is the senior deputy chief of the United States Probation Office in the District of New Jersey. In that capacity he is responsible for assisting the Chief Probation Officer in the day-to-day operations of the office and overseeing budget, human resources, IT and special projects staff, and he oversees the district presentencing investigation unit, and has previously served as a sentencing guidelines specialist as a unit supervisor.

I will say that I have a lot of respect for the work that is done by the

probation officers in my district, and certainly the chiefs and the deputies so I realize what a hard job you have and thank you for taking your time to be here.

We will start with Mr. Henry.

CHIEF PROBATION OFFICER HENRY: Thank you, Judge, and thank you to all the members of the Commission for the invitation to be here at this regional hearing.

In preparation for my comments today, I reflected upon the impact of the guidelines on federal probation officers.

As you no doubt would expect, the guidelines were a major change for probation officers. Before the guidelines, our work, as was stated earlier, was on writing presentence reports, but I focused on the developing and providing information about the history and characteristics of the defendants and their background.

We were charged with discovering those underlying factors that may have had some impact on their specific offense and the conduct of the defendant. Officers tried to get to know the defendants and develop some insight into

their lives.

Our earlier reports were actually referred to as social history investigation or social diagnosis.

The sentencing guidelines brought about dramatic change in our work. The dimensionality of the guidelines redefined how our work was viewed and conducted.

The focus changed from the offender to the offense and the offense history, the criminal history of the defendant.

The *Guidelines Manual* became our bible. Its dog-eared pages showed our diligence, reliance and determination. Our language even changed. We began talking in codes like aggregate, base offense level, 5K1.1, enhancements, departures; and then there were the tables, the loss tables, the drug equivalency tables, the conversion tables. It seemed a law degree or mathematics degree might have served us better than our social science degree. The focus of these reports required hard study, analysis and the application of a complex set of guidelines and notes.

The Sentencing Reform Act created

a major swing in the criminal justice pendulum. Probation offices followed that pendulum swing. We trained and studied under the tutelage of Sentencing Commission staff. Commission staff helped us develop our expertise and to accept our critically central role in calculating the guidelines.

So where are we today? How has the advisory nature of those guidelines after the Supreme Court's decision in *Booker* affected federal sentencing?

Just a brief look at some statistics from the District of Maryland in FY 2008.

Nearly 50 percent of the offenders are sentenced within the guideline range, which is about nine percent below the national average, I believe.

Government sponsored departures, primarily 5K1.1, we are slightly above the national average at nearly 28 percent.

Approximately 21 percent of the offenders in Maryland received a sentence below the advisory guideline range based on either a 3553(a) factor or a combination of the

guidelines-supported departure and a 3553(a) background. I believe the national average is in the range of 13 percent.

So what can we conclude from those numbers? *Booker* appears to be having some impact on the sentencing practices in Maryland and throughout the country, but that impact is slight. At this point the pendulum seems only to be swinging in a slight swaying motion, not that huge swing we experience[d] 25 years ago.

The sentencing guidelines seem to be standing the test of time. Not surprising, given that they have strong empirical underpinnings and the Sentencing Commission's commitment to the dynamic and evolutionary nature of sentencing reform.

When Congress enacted the Sentencing Reform Act of 1984, it was seeking honesty, reasonable uniformity and proportionality in sentencing. Although the Sentencing Reform Act has and will continue to have its critics, I believe most could agree that the sentencing guidelines have made federal sentencing more rational, more certain and more transparent than it was two decades ago. There

can be no doubt that punishment is far more predictable.

The development of the guidelines were intended to further the basic purpose of criminal punishment: to deter, incapacitate, provide just punishment and to rehabilitate.

The deterrence aspect is complicated given the multi variant factors. It is not apparent that crime has been deterred to the extent that was anticipated or hoped. What is clear, however, is that since the implementation of the guidelines, more defendants who enter the federal system have been incapacitated.

The question now being posed by some critics of the guidelines is whether the punishment is just, or is it too severe? Justice Kennedy expressed that sentiment in 2007 when he stated, "Our resources are misspent, our punishments too severe, our sentences too long."

So what is the right amount of just punishment? This is an ongoing analysis that I recommend be made by the Commission in collaboration with the legal community and those of us in the criminal justice profession.

There are many factors to consider, including the cost of incarceration, and many viable and effective alternatives to incarceration. Collaborating on these topics to include sharing data will improve decision-making and continue to help the evolutionary process of sentencing reform.

What recommendations should the Commission consider? Well, practices that will keep the pendulum in sway towards the center to achieve the right balance.

As a system, we are learning more about what motivates and controls criminal behavior. We have better data collection systems today than we did 25 years ago. In probation we are looking more closely at evidence-based practices that focus on outcomes of various treatment and intervention modalities in reducing recidivism.

The Second Chance Act is yet another sign that the pendulum is in a sway toward that middle, recognizing that reintegrating offenders back into our communities is critical to their success and to the safety of our communities.

What can probation officers do? I would suggest refocus and recommit. In a sense, go back to our roots. We must look more closely at 3553 factors in preparing our presentence reports, in my opinion. The advisory nature of the guidelines makes this matter.

Over the years, we have disproportionately spent less time evaluating those factors than calculating the guidelines. We must help officers to refocus and again look more closely at the characteristics of the defendant and the rationale and justification for variances.

What might the Sentencing Commission consider? Well, any work the Commission can do to simplify the guidelines and remedy the seemingly conflicting intent between the various policy statements in the guidelines and the sentencing factors enumerated in 18 U.S.C. 3553 would be helpful.

As for the big picture in sentencing reform, two important areas to address are eliminating the sentencing disparity between crack and powder cocaine, and revisiting the role of mandatory minimums.

The pendulum is in motion. The slow, deliberate and balanced sway towards the center, towards purpose, will help achieve the goals envisioned by the Sentencing Reform Act.

In the words of Oliver Wendell Holmes, "The great thing in this world is not so much where you stand, as in what direction you are moving."

I think the evolutionary direction of federal sentencing reform shows the character and value of our system. The direction is important to every defendant who appears in our courts and to every citizen of our country.

Thank you again for the opportunity.

ACTING CHAIR HINOJOSA: Thank you, Mr. Henry.

Mr. Fitzpatrick?

CHIEF PROBATION OFFICER FITZPATRICK: I would first like to thank the United States Sentencing Commission for giving me the opportunity to address this group today. On behalf of the United States Probation Department, I am pleased to welcome you to the Southern District of New York.

Those of us who work in the Southern District sit in the cradle of the federal judiciary. The Judiciary Act of 1789, which created the Supreme Court, the circuit courts and district courts, was enacted by Congress when it sat in session in Federal Hall, which is only several block away from this courthouse. The District Court for New York, which was later split into four districts, including the Southern District, first sat on November 3, 1789, making it the first district court to sit under the sovereignty of the United States.

Of equal importance to the probation department is the fact that in 1927, the first salaried federal probation officer was appointed in the Southern District of New York.

When I consider the role of the probation officer in relation to the judge in the sentencing process, I find that it can be compared to the roles of personnel on a ship, an appropriate analogy as we sit in the Court of International Trade. The probation officer can be likened to the navigator. The role of the navigator is to plan the journey, to advise the

captain of the estimated time of arrival at ports of call, and to identify any potential hazards and make plans to avoid them.

The probation officer plans the journey to sentencing by conducting a presentence investigation and computing an accurate guideline range. The probation officer keeps the captain, or in our case the judge, on schedule by meeting the deadlines for first and second disclosures and identifies hazards by investigating any areas where the judge can depart from the guidelines, or can cite 3553(a) factors as a means of a variance.

The judge, who fills the role of the captain in this example, will have the final decision by imposing a sentence, and does so after weighing information provided by the probation officer.

I already mentioned the Southern District of New York's historical significance in relation to the establishment of the federal court system. The Southern District of New York is also prominent in the formulation of the federal sentencing guidelines. United States District Judge Marvin E. Frankel sat in the

Southern District from 1965 to 1978. Frankel's book, *Criminal Sentences: Law Without Order*, was a principal influence on the sentencing reform movement which led to the creation of the federal sentencing guidelines.

Drawing on his experience as a federal judge, Frankel argued that unrestrained sentencing discretion on the part of individual judges resulted in arbitrary sentences and wide disparity between the sentences imposed on similar defendants for similar crimes.

His proposal to create a commission on sentencing has been credited with being the foundation for sentencing commissions which were created in the late 1970s and early 1980s, first in the states of Minnesota, Washington, Pennsylvania, and eventually in the grandest of these agencies, the United States Sentencing Commission.

Recently, the Supreme Court has issued several decisions which have had a major impact on the sentencing guidelines. These decisions are notable on their own, but I believe they take on even greater significance when they are viewed within the context of the

state of sentencing in 2005.

Only two years earlier, in 2003, Congress had amended the Sentencing Reform Act when it passed the Feeney Amendment of the PROTECT Act. The Feeney Amendment contained numerous provisions which would have a negative impact on the district court's ability to depart from the guidelines. The amendment substituted a *de novo* appellate review as opposed to the previous abuse of discretion standard. It barred district courts whose departures have been reversed on appeal from giving a new reason to depart again on remand.

The amendment required the Sentencing Commission to collect and report more data on departures, and it required the Department of Justice to report its efforts to oppose unwarranted departures. It instructed the Sentencing Commission to amend the guidelines within 180 days "to ensure that the incidence of downward departures are substantially reduced." It also imposed a two-year moratorium on guideline amendments that created new downward departure grounds.

This amendment, to say the least,

was not popular with the federal judiciary. In December of 2003, 27 federal judges from around the country issued a statement calling for repeal of the Feeney Amendment. The Judicial Conference of the United States Courts voted unanimously to support overturning the law. It wasn't long before the Supreme Court weighed in.

Starting with *United States v. Booker* in 2005, which rendered the federal sentencing guidelines as advisory, and then with *United States v. Gall* in 2007, which established an abuse of discretion standard for appellate review of sentencing, the Feeney Amendment has been nullified, and the district court has been granted greater sentencing discretion.

More recently, in December of 2008, the Second Circuit in *United States v. Cavera* conducted an en banc review of a case from the Eastern District of New York. In this decision, the court affirmed the decision of the district court and provided a clear explanation of the guidelines.

The court held that the guidelines are the starting point and the initial benchmark

for sentencing, but in the same opinion, the court also held that a district court may not presume that a guidelines sentence is reasonable. It must instead conduct its own independent review of the sentencing factors.

In determining the effect of *Booker* and these subsequent opinions, one can look at the departure rates in the Southern District of New York and see a clear relationship between these decisions and sentencing decisions as they relate to the guidelines.

In 2003, a pre-*Booker* year, 78.4 percent of offenders received sentences within the guideline range; 13.2 received a downward departure based upon substantial assistance; 8.3 received a downward departure; and 0.1 received an upward departure.

In 2006, a post-*Booker* year, 58.2 percent of offenders received sentences within the guideline range; 15.2 received a government-sponsored downward departure; 7.9 percent received a non-government sponsored downward departure; 18.2 percent received a non-guideline below range sentence; and 0.2

received an upward departure.

And now in 2008, a post-*Booker* and post-*Gall* year, 44.4 percent of offenders received sentences within the guideline range; 20.2 percent received a government-sponsored downward departure; five percent received a non-government sponsored downward departure; 30 percent received a non-guideline below range sentence; and only 0.3 received an upward departure.

I believe the guidelines, as they exist in their present form in the Second Circuit, satisfy Judge Frankel's concerns, and also allow the judge the opportunity to consider all of the 3553(a) factors when imposing sentence. In the *Gall* case, the court gave new legitimacy to the competency of the district court in sentencing, by acknowledging the sentencing judge is in a superior position to find facts and judge their import under 3553(a) in the individual case.

As a matter of substantive sentencing policy, a system of carefully thought-out guidelines that are subject to broad judicial discretion to depart, but accorded

respect by the courts and followed more often than not is a highly desirable system for the federal courts. It would be difficult to not have a starting point when imposing sentence, and by calculating an offender's criminal history and assigning a severity to an offense, a judge has an excellent point at which to start.

And now, with the freedom to not only depart from the guidelines, but by also having the ability to use 3553(a) factors to vary from the guidelines, judges have the ability to take into consideration factors not considered by the guidelines.

The role of the probation officer will be to conduct thorough investigations, calculate appropriate guideline ranges, and identify all possible areas for departure and variance. By doing so, the probation officer will help the sentencing judge when they craft their sentencing decisions.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Fitzpatrick.

Mr. Maxwell?

DEPUTY CHIEF PROBATION OFFICER

MAXWELL: Thank you, esteemed members of the U.S. Sentencing Commission, for allowing me to appear before you today. At the onset I'd like to thank Senior U.S. Probation Officer Ray Lopez for his assistance in helping me prepare my statement. I have read the testimony of other chiefs and deputy chief U.S. probation officers and will try not to reiterate their well-articulated points.

After sitting through this morning's hearings I am deeply encouraged by the practices you bring in improving the system. Thank you very much.

How has *Booker* affected us?

My observations relate primarily to the District of Connecticut, which has a reputation for having a high departure rate. I don't want to reiterate the statistics I have in my written statement.

Suffice it to say in 2008, 41.8 percent of our cases were sentenced within the range compared to 59.4 percent nationally.

As our statistics reflect, in our district the guidelines have always been viewed

as more flexible than many other districts, given that we've embraced the fact that departures are a part of guideline sentencing and authorized by the guidelines.

In addition to offense conduct, criminal history and victim information, our presentence reports tend to have robust social history sections. It is in these social history sections where mitigating circumstances are often uncovered and often relied on at sentencing.

Our courts have always calculated the guidelines honestly, and by this I mean that if special offense characteristics or criminal history points were applicable, they were factored into the calculations, not jettisoned or ignored or plea bargained away.

In short, our judges, who are passionately committed to justice, have tried not to let the math take precedence over the people, situations and circumstances that make some cases genuinely unique.

If the guideline range appeared too high and mitigating circumstances were present that justified a departure, our courts

departed.

Shortly after *Booker*, there was concern that Congress might enact a radical legislative response. This was a season of wait and see. We have come a long way since then, and case law has provided sound direction for the court.

The advisory nature of the guidelines since *Booker* has allowed further flexibility in this regard.

What should the role of federal sentencing guidelines be in federal sentencing? And what, if any, changes should be made to the sentencing guidelines?

Federal sentencing guidelines should be what they finally are, guidelines. In terms of what changes should be made, I have one observation that may lend itself to changes in the future.

One of the greatest impacts of the Sentencing Reform Act of 1984 was that it transferred jurisdictional authority for revocations from the U.S. Parole Commission to the district courts as parole was abolished and replaced by supervised release.

Perhaps because Chapter Seven has always been advisory, the Commission has not promulgated much sentencing data regarding revocation sentencing.

I hope the Commission studies whether disparity exists around the country in terms of revocations. I would be very interested to know how judges feel about this added responsibility, and whether they think that jurisdictional authority over violation conduct is the most efficient use of judicial resources.

I wonder whether a hybrid approach might lend more consistency to violations nationwide. For example, with statutory modifications, district courts could retain the authority to handle modifications of conditions and technical violations including drug use, while the Parole Commission or another like organization could handle all Grade A violations, and perhaps Grade B violations, as well as warrant requests. Such an approach might alleviate some of the workload courts are under, while at the same time allow district courts to participate in evidence-based

practices that work, such as drug courts.

Does the federal sentencing system strike the appropriate balance between judicial discretion and uniformity and certainty in sentencing?

Keeping in mind that the guidelines as we know them are the result of over 20 years of sentencing practice, judicial review and legislative reform, I believe that they lend to uniformity and some certainty that similarly-situated defendants will receive relatively the same sentence.

However, research regarding incarceration, its benefits and detriments, must be conducted to determine what to do about mandatory minimum sentencing as some of the guidelines are set by the statutory minimums.

Sentencing length in mandatory minimums seems to have been chosen arbitrarily without much regard to research in what is most effective in deterring crime and reducing recidivism. It could be five years in prison is appropriate for most offenders dealing a certain amount of a certain drug, but what is the justification?

It could be that mandatory minimums should only apply to defendants with criminal history categories V and VI. Judges, I note, are required under 18 U.S.C. 3553(c) to state their reasons for imposing sentence. Perhaps something similar should be required of Congress when setting the minimum number.

We need to ask ourselves the tough questions. Does the gender and racial makeup of a legislative body significantly impact the law in ways that may be unfair? Despite the best of intentions, might one racial group legislate harsher penalties for another racial group? Is the Sentencing Commission, under its legislative duty to reduce disparity, able to research whether such issues exist? Are there other more creative ways to increase uniformity than tying the hands of district court judges? What percentage of disparity among sentences should be expected and is appropriate?

Sorry to be asking so many questions. I know you had questions.

How should offense and offender characteristics be taken into account in federal sentencing? What, if any, change should be made

with respect to accounting for offense and offender characteristics?

There should be a logical balance between the offense and offender. Again, the guidelines provide a starting framework, which is enlarged by the existing case law. The goal of simplification regarding offense characteristics should still be a priority.

Regarding offender characteristics, I think Chapter Five is fairly adequate and complete; however, I would recommend the following change to guideline section 5H1.12, which reads, "Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted."

I think it might allow courts the ability to fully appreciate defendants' characteristics if the guideline did not prohibit the departure, but rather discouraged it by noting that lack of guidance as a youth and similar circumstances are not ordinarily relevant in determining whether a departure is warranted.

Finally, there may be disparity across the country in the application and interpretation of 5K1.1 that can be addressed. In some districts like Connecticut, defendants typically only receive 5K1.1 motions if they have assisted in the prosecution of a defendant. The assistance had to have led to a conviction, while in other districts a motion can simply be based on assistance in an investigation. This is a problem, not to mention the varying degrees or percentage of a departure that may cause unwarranted sentence disparity. It would be a daunting task to try to create more uniformity in this process, but one that would be worthwhile.

What type of analysis should courts use for imposing sentences within or outside the guideline sentencing range?

I believe the Second Circuit's decision in *U.S. v. Crosby* outlined a solid analysis of *Booker* and provided a sound approach, which has been followed by other circuits and framed in the most recent decisions of note, such as *Kimbrough*.

Considering that the guidelines

embrace all the 3553(a) factors in sentencing -- that was the goal at the beginning -- establishing the guideline range, or possible ranges, is a proper place to start. Thereafter, the courts look at the applicable range in making an assessment of whether it is sufficient, but not greater than necessary to comply with the statutory purposes of sentencing. If not, the courts look to see if the departure is warranted.

Finally, if there is still not an adequate range, the courts should consider a variance from the guidelines under 18 [U.S.C. §] 3553(a) that is specific to the individual defendant and his/her circumstances, rather than a rote recitation of the statutory language.

What, if any, recommendations should the Commission make regarding the Federal Rules of Criminal Procedure?

There was a recent request by the American Bar Association to amend Rule 32. Our office respectfully recommends that this request be denied for reasons that Chris Hansen, Chief U.S. Probation Officer from the District of Nevada, articulated in his testimony before the

Commission in May.

What, if any, recommendations should the Commission make to Congress with respect to statutory changes regarding federal sentencing?

Our nation's all or nothing approach to punishment has created a penal system that warehouses large numbers of men and women in huge prisons located outside our inner cities for lengthy periods of time. What we really need is a more enlightened approach to punishment.

The Sentencing Commission recently hosted a conference on alternatives to incarceration. This was an excellent step in the right direction. I think we also need a new criminal justice paradigm. I wonder whether departures or variances or even alternatives to incarceration would be so topical if prisons themselves were different; if instead of warehouses in the country, we have smaller prisons located in the inner cities. In these modern prisons certain non-violent offenders, after serving a percentage of their sentences, could be allowed out into the community for good

reason such as employment and other purposes that further the goals of rehabilitation and protection in the community. These would not be halfway houses, but prisons where inmates would remain locked up in a cell for half a day, and perhaps large portions of the weekends. Currently, all at once, we drop liberty like a rock on inmates. A few months in a halfway house does not begin to reintegrate inmates who have been imprisoned in highly structured environments for many years. It is no wonder that most violations occur during the first six months of release.

Would it make better sense if liberty was something that non-violent inmates earned a little at a time? These new prisons would allow prisoners the opportunity to still be, in some small way, contributors to the community and parents to their children. Inmates could pay victims restitution, provide child support for their offspring, and contribute to Social Security so they don't further burden the public later on down the line. If the inmate fails, we'll always have the warehouse prisons to send them back to.

Perhaps the birth place of such modern come and go prisons is in the guidelines themselves, through the expansion of Zones B and C of the sentencing table.

I note the seeds of what I described here are already in the guidelines in Section 5C1.1(c), which talks about "intermittent confinement." This is a great idea, but is unworkable in most districts because our prisons are rarely located in highly populated areas that would allow for such an idea to actualize. In the District of Connecticut, there are no centrally located male federal facilities in which offenders could be intermittently confined, nor does the current system of warehouse prisons, whose main duty is to keep people locked in, support the notion of inmates coming and going.

Additionally, the disparity between crack and powder cocaine should be eliminated, and the mandatory minimum penalties in drug cases should be amended to apply only to defendants who possess firearms.

Finally, Senator Jim Webb has introduced legislation to create a National

Criminal Justice Commission tasked to conduct a top to bottom review of our nation's criminal justice system and provide recommendations for reform. My hope is that any final recommendations will include expanding the U.S. Sentencing Commission's role to look beyond sentencing, to use its data, expertise, and connections to play an active role in bringing the criminal justice stakeholders together to help recreate how we punish and rehabilitate criminal offenders. *Booker* has not only provided for more discretion to district courts, but it can also free the Commission to create a new vision for itself, to take another look at what it does and how. The Sentencing Commission, as the nation's experts in this area, should request that Congress consider expanding its role beyond sentencing to leverage its expertise in the coming years as we begin to redefine crime and punishment.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Maxwell.

Mr. Torres.

SENIOR DEPUTY CHIEF PROBATION OFFICER

TORRES: I recall a couple of weeks ago being called into the office of our Chief U.S. Probation Officer Chris Maloney, who asked me if I wanted to come and testify before the United States Sentencing Commission. Immediately I said no. I didn't want any more anxiety. I didn't want any more work, and I walked out of his office, and I thought of my mother, by now 70-year old mother.

She always told me to never deny an opportunity to be involved in something important.

So I came back in about five minutes and said, "Is the offer still on the table?"

He said, "Yes."

And here I am. I am definitely honored to have been selected to speak before the U.S. Sentencing Commission today, and the equally esteemed community that is present here today.

From the moment that I was afforded this opportunity, I realized how fortunate I am to be part of the process that reflects the Commission's ongoing commitment to meet its statutory responsibility and purpose of

evaluating the effects of the sentencing guidelines on the criminal justice system. I sense an even greater opportunity today for all of us to advance our duty as government entities, to cooperate with increased transparency, and advance our efforts to earn the public's trust.

I had a few statistics. I am going to stay away from that.

The only thing I do want to share with you, to get away from the notion that we are the most corrupt state in the nation, subjectively I will state we are not, but I will say that we are one of the most populated.

We are clearly the number one in terms of density of the population.

New Jersey is a diverse state. Using the most recent figures, by race, persons living in New Jersey include 62 percent were White, 15.9 percent were Hispanic, 14.5 percent were Black, and 7.5 were Asian. Some of our counties are actually in terms of Hispanic population up to 39, 40 percent.

Of defendants and offenses in New Jersey, by gender, those sentenced in 2008 were

90 percent male and ten percent female.

By race they were 34 percent White, 36 percent Black, 32 percent Hispanic, 4 percent Asian, and two identified as other.

The nature of the offenses involved 34 percent drug, 34 percent property, 12 percent firearms, 7 percent violent, and 4 percent immigration. Those figures have remained consistent for the last three years.

The 34 percent property crime figure, however, is higher than national figures of 16.2 for similar crimes, fraud, non-fraud, white collar and larceny --

I would like the Commission to know that oftentimes the victims of these crimes in our state are working class and poor people when they are completely destitute. Those are the kind of people that probation officers interview consistently.

Post-*Booker* sentencing in New Jersey, I will stay away from some of the figures.

My sense from speaking to a few people within the circuit and within our region is that New Jersey has not engaged in variant

sentencing as much as other districts have.

When the *Booker* decision came down, I was lucky enough -- I think that month I had been promoted away from the presentence unit to the supervision unit, because I thought some people say the sky is falling, the whole sentencing scheme is going to go out of wack, but it hasn't. It has remained consistent.

I think that the role of the guidelines have now created a more balanced approach, and we are seeing that the way our reports are being prepared.

Prior to that decision, if you were to weigh the reports, to take the reports apart and weigh the offense conduct section together with the criminal history section versus the personal history -- personal characteristics of the defendant, clearly the offense conduct would weigh that. Now we are seeing more balance.

What we are seeing is post-*Booker* is a greater opportunity to look at the complexities of crime, the complexities of individuals that commit those crimes, and also the greater impact that occurs upon those who

suffer from those crimes.

We are seeing now a more involved probation officer in terms of really getting into the life of the defendant.

I remember back then talking to a few co-workers prior to the *Booker* decision, and I said to them, "One day we are going to sit in front of a computer, punch a whole bunch of numbers in and come up with an appropriate sentence. It is going to be some fantastic software program someone is going to come up." We may get that.

I think probation officers in general now have a sense and opportunity to get to know people I think at a much deeper level than we were in the past; to include more information about substance abuse issues; to include more information about mental health issues.

We talked about these types of situations in earlier discussions about child pornography cases. I think [] that is helping us not just to aim for a more appropriate sentence, but I think that [it] is also -- as has been testified to today and I think in prior

testimony that I read -- [helping us] in establishing a post-release system that addresses those issues that are being identified in the sentencing process.

What we have come to understand is that sentencing doesn't end when it is imposed; it just begins, and it carries through the post-release process, through the end of the supervision process, and, as we know, throughout a person's life.

I think the *Booker* world has allowed us and has moved us to really look upon those issues. I think that not only will it guarantee individual success through the supervision process, but hopefully throughout individuals' lives.

By way of recommending issues in addition to what I presented in my written testimony, I certainly welcome the Commission's decision to address the fact of disparity.

This is one of the issues that when it came down and our staff had to do the work, everybody kind of throws their hands up in the air, but we knew we were doing the right thing when we began to prepare for those

presentences.

Just to highlight that, I want to read from a letter that was sent to our chief judge concerning that, and it was from our federal public defender, who is one of probation's greatest friends. We have a great relationship.

He wrote what I thought was a very moving introduction. I want to read from that.

He said, "I want to acknowledge and thank both the United States Probation Office and District Court Clerk's Office for the resources and attention they have devoted to this project. They have responded to our inquiries with remarkable dispatch and made incredible efforts to provide assistance when possible. As a result, cases have been processed quickly and efficiently, and individuals who deserve a sentence reduction benefited directly from the full professionalism that was exhibited.

"On behalf of my staff, our clients, and particularly the client family members who have called and written to express their gratitude, I want to thank all of those

who assisted in making this such a productive and rewarding experience."

That was a letter submitted by our public defender, Richard Coughlin, to the chief judge on July 13, 2008.

To finish off my testimony, as I said, I could have gone on and on and told you about the great restaurants you will find in New Jersey because of all the diversity -- it is one of the most populated states. It does have a diverse population based on race, financial status and the issues that people who live there face in each of their unique communities.

However, as I reviewed the prior testimony that has come before you, I was impressed by the equally diverse groups of witnesses that have appeared in past hearings. Whether the dialogue emanates from the judicial or executive branch, the defense bar, law enforcement agencies, the American Civil Liberties Union, Families Against Mandatory Minimums and other advocacy groups, their inclusion by the Commission well demonstrates that the federal criminal justice system will not constrain any words that will move it

forward, including those that come from people who believe they have no voice in a process that seems to impact them the most.

Thank you for your invitation.

ACTING CHAIR HINOJOSA: Thank you, Mr. Torres.

VICE CHAIR CASTILLO: I just want to thank all of you, and I want to say to Mr. Torres, I think it is one of the greatest untold stories of federal sentencing, 20,000 individuals having their sentences reduced, and over 5,000 individuals have actually been released with very little recidivism problems, and I think that that speaks very highly of the efforts of probation officers throughout the country and so I didn't want to miss the opportunity to thank all four of you for all the work that you have done and that important aspect of the work.

It gets overlooked a great deal because people tend to focus on either criticizing the guidelines or criticizing the Commission, but this is a great story that has occurred over the last 18 months so thank you all.

COMMISSIONER HOWELL: Let me say that we have a Probation Officers Advisory Group, and we rely on POAG for their comments on everything we do, and particularly when we made the decision to apply our crack production amendment retroactively, POAG's comments were enormously helpful during the process so thank you.

I do have one substantive question.

Mr. Henry, you talked about asking the Commission to reconcile what you called apparent conflicts between policy statements and the 3553(a) factors.

I am reading between the lines, and I am assuming -- and I want you to correct me if I am wrong -- you are referring in that to our chapter 5H discouraged factors, including age, employment history and so on and the 3553(a) factors. Am I presuming correctly?

CHIEF PROBATION OFFICER HENRY: Judge, no. My answer to your question is no. My answer this time will be bingo.

COMMISSIONER HOWELL: One of the priorities we have that we are hoping to look at

in our next amendment cycle is looking at those Chapter Five departures. We have had very provocative testimony from the federal public defenders in some of our prior hearings that the Commission has, in fact, sort of interpreted statutory requirements incorrectly in the past, and it is one of the things we really want to take a serious look at.

Do you have any thoughts about what revisions to those Chapter Five departures we should make that would achieve the reconciliation that you commented on?

CHIEF PROBATION OFFICER HENRY: Specifically, at this point --

COMMISSIONER HOWELL: You can say no now if you want.

CHIEF PROBATION OFFICER HENRY: A fish out of the water -- not specifically. I think it would take a lot of study.

As I said, going back to our roots, what we do in probation, the work that we do every day, it centers on the lives of those we investigate and supervise. If they have lives, they have many, many aspects of their lives that are hard to capture in a report on a

piece of paper, in a simple analysis or even a complex analysis. There are so many different factors.

I think any opportunity we have to refocus and recommit on looking at defendants who appear before the court as individuals, and considering those individual aspects of their lives I think is critically important.

COMMISSIONER HOWELL: Does anybody else care to comment?

DEPUTY CHIEF PROBATION OFFICER MAXWELL: Only that I believe research has shown that age plays a significant role in recidivism, and it is something that we need to be considering in terms of sentencing.

COMMISSIONER HOWELL: Thank you very much.

ACTING CHAIR HINOJOSA: Just one last question before we leave.

A couple of you mentioned -- I think Mr. Henry, Mr. Torres mentioned it -- there is information, and I guess it varies from district to district. Would the report be -- I guess in some districts like in ours, we have a lot of information and continue to have a lot of

information about education, family background, brothers, sisters, whatever they were doing; mental health; with regards to the substance abuse, with regards to the jobs and a whole chronology of all the jobs they have had; their financial condition; schooling. Does that vary from district to district as to what was there pre-*Booker*?

CHIEF PROBATION OFFICER HENRY: I will go first.

I think in Maryland it seems to appear that way, and we got off in another direction and focused on the complex issues of the guidelines and calculations, and we lost sight of the fact of the human aspect.

SENIOR DEPUTY CHIEF PROBATION OFFICER TORRES: I think that what tends to happen to a probation officer preparing a report, he comes to believe that they are putting information into a report that is not going to be weighed properly or looked at or considered. They are probably going to be moved to sort of load up in those areas that they think are going to be looked at more closely, and I think in the pre-*Booker* world, criminal history, offense conduct sort of drove

that.

I think now the opportunity to take a closer look at departures under this era, and also look at variances, I think that has motivated the work force to include more information.

I think that is also the judges are requesting more and more of that information, because they are seeing how critical that is to making those decisions, those considerations, so I think there is a request and there is also more of a motivation.

I recall people basically were Saying, "I want to get to know this defendant more. I am doing all this; the defendant's conduct," and that is still being done. That is not being disregarded, but I think people are -- probation officers are feeling more a sense that -- assessing cases more comprehensively; is this the right thing to do and will it lead to an appropriate sentence.

ACTING CHAIR HINOJOSA: Thank you very much.

We will break for lunch. We do appreciate you taking the time to visit.

(A luncheon recess was taken.)

ACTING CHAIR HINOJOSA: We are ready with the next panel, which is the View from the Defense Bar, and we are very fortunate to have three individuals with a lot of experience with criminal defense work in the federal system.

We have Alexander Bunin, who was appointed by the U.S. Court of Appeals for the Second Circuit to establish a federal office in the Northern District of New York in 1999, and prior to that he established public defender offices in the District of Vermont and in the Southern District of Alabama. He is also a member of the faculty of Albany Law School where he teaches law practice. He received his bachelors from Bowdoin and went south to South Texas College of Law, where he received his law degree.

Michael Nachmanoff has been a federal public defender for the Eastern District of Virginia since February 2007. Prior to that he served as the acting commissioner and assistant in that office. He received his bachelor's degree from Western University in

Connecticut and his JD from the University of Virginia.

Mr. Robert Mann is a partner in the firm of Mann & Mitchell in Providence, Rhode Island. He has been engaged in the practice of law for some 34 years, specializing in criminal defense. Mr. Mann's caseload consists of private cases, tort appointments. He is a member of the CJA panel, and his JD is from Yale, as well as his undergraduate degree.

I will say that Judge Sessions is not here because he is sitting hearing cases on the Second Circuit this afternoon, and he told us for a long time that he would not be able to attend this session in the afternoon, and he will try to come back as soon as they finish.

We will start with Mr. Bunin.

MR. BUNIN: Thank you.

I want to thank the Commission for allowing me to come and speak to you. It is a great honor. Both Mr. Nachmanoff and I speak on behalf of federal community public defenders. We have divided up our topics. They are related but different.

I would like to talk to you about

several items, the first being that charging disparity is the greatest factor in sentencing disparity.

Second, the judges are not themselves creating unwarranted disparity.

Third, that the Commission should respond to what judges are doing by reducing severity in guidelines.

And, briefly, fourth and fifth, alternatives to sentencing, as was discussed at the Stanford hearing, should include even those defendants that are (inaudible).

I will talk briefly about that, and then at the end if there is time -- there is a proposed change to Rule 32 -- defenders opposing the change, I would have comments on that.

As far as charging disparity, I am here to talk a little bit about my own experience, having been in a number of districts, and some statistical background that is in my written statement.

As you will see in my written statement, I talk about how my career kind of tracks the history of sentencing guidelines. I

began practicing law in Houston in 1986. It doesn't say it [in] my statement, but I am from New York City, from Manhattan. I was born and raised here, went to public school, broke in the 60s and 70s, and apparently had a happier childhood than Mr. Wroblewski. I enjoyed my time here.

As far as my legal history, I began in private practice in Houston. I did towards the end of my time in Houston practice in the Southern District of Texas, mostly the Houston District, and in the Western District in San Antonio a couple of times.

My first experience practicing in federal court came when I became assistant federal public defender in Beaumont Texas, the Eastern District. After that I was called -- I was hired to go to Alabama to open the Southern District of Alabama office, and then I came up here in '99 and opened Northern New York, which is a very large district. It goes all the way up to the border. We have a huge international border. We cover the cities of Albany, Syracuse, Utica, Binghamton.

In talking about my history and

talking about disparity, I first want to begin with some of my own experiences and then talk a little bit about the statistics in terms of why charging disparity is[] as important as sentencing disparity.

I teach a class at Albany Law School, and I try to explain to my students that the federal system is not a perfectly uniform system. They come to it thinking, "Well, every district shares the same statutes, they share guidelines, they share the U.S. Constitution so it is a pretty uniform system," and my example is the one I put in my statement, which is when I was an assistant public defender in Beaumont, which was the first city on I-10 when you are going east with a load of drugs, it makes a huge amount of difference where you stop and are arrested.

If you stop in Chambers County, Texas, which is in the Southern District, and have, say, 100 kilos of marijuana, that case is probably not going to federal court; very unlikely.

When I was there, I called someone Margaret Marris (phonetic) to ask her, and she said

no, it probably wouldn't go to federal court; it would go to Chambers County, and like many small counties in Texas, that case can be negotiated, and the defendant, if he doesn't have a history can get probation and get a big fine.

If you cross that line to Jefferson County and end up in the Eastern District, he is going to federal court, and he is going to get five minimum.

It is a huge difference, two districts.

When I was in Beaumont, the two years I was there, we never had an immigration crime, never. I mean, it is Texas, and although we have an international border there, there are certainly persons that could have been prosecuted for being in the United States when they were not allowed to, but [that] never happened when I was there, and that was a function of the fact that we didn't have a border patrol or what is now INS.

Now we come to New York, and a good part of our Albany docket is immigration, and they will take every case. Every case is prosecuted at that border, and they expect a

conviction and sentence in every case.

So the person who smuggles some people from China over, all those people from China, it is a misdemeanor, and a smuggler is looking at a possible mandatory two-year sentence and more.

Anyone facing an aggravated felon, there is no fast-track in the district so they are looking at fairly substantial guidelines.

Back when the guidelines were mandatory, none of our judges tried to depart from some of those cases. They are very sympathetic cases, immigration crimes, that were tried by the Second Circuit, finding they were not sufficient -- so very different from very different communities.

Now, most of you could say, "All right, that is just a function of where you are. That is not the prosecutors going out and trying to create disparity," but when I went to Southern Alabama in 1995, Judge Sessions was the U.S. Attorney -- now Senator from Alabama. He was the outgoing U.S. Attorney in the 80s. He grew that office from I think they might have had

five assistants when he started to about two dozen people, and most of their cases when I got there, these drug cases, were these big multi-defendant cases, and they were prosecuted very vigilantly. We had large staffs, and in every case defendants were offered the opportunity to plead guilty and cooperate, and cooperation there meant you just signed a cooperation agreement. You didn't have to have any information.

If I had a client and he said he would cooperate, they would say, "Fine, he could plead guilty to a cooperation agreement and we will recommend 50 percent off." Every case, 50 percent, so it created a huge incentive for everybody to plead guilty.

When the judges got these cases, they had the government recommend 50 percent off. Well, some defendants actually did cooperate so they gave them more so it would be 60, 70 percent.

Twenty years? They might get eight.

So you had a system that was designed and created by the prosecutor that created a great deal of disparity, because if he,

a defendant said, "I am not guilty; I am going to trial," you might end up with a very significant sentence.

So those are the kinds of disparities I saw just in my own practice.

I also saw, with great help -- I am not a statistician. That is why I went to law school -- a number of -- a great deal of information from the districts and circuits that you are covering today.

From what I can see, there is not a huge change since *Booker* in what has happened to judges and how they are treating these cases.

As I said, I practiced before judges, I would say at least 18 different United States district judges, including Judge Sessions who is not here, and my experience is that most of those judges are not looking to try to be outliers; they are looking to try to follow the guidance the Commission gives them.

Initially when the guidelines came out and they were mandatory, some judges felt, as you heard from the judges today, that that was too confining, and they are like anybody else. If you say, "Do this because I say so,"

they fight back, and they don't like it as much.

If you say, "Do it because here are the reasons why this is appropriate," I think judges appreciate that and appreciate the rationality behind it and will follow that.

That is why even today without mandatory guidelines, you are seeing that there is not a great change, and some of the changes are still motivated by the prosecutors; that a lot of these below-guideline sentences are motivated for reasons provided by prosecutors. You are fast-tracked, which is cause for a cooperation agreement.

In fact, the statistics show that for the first two quarters of '09, there was only about an eight percent judicially-based, without government-based, variance from the guidelines so that is not huge.

You are going to hear from Professor Rachel Barkow tomorrow, who is going to tell you about some of the state systems where it is pretty much standard that the outlier departures or variance from the guidelines are more like 20 to 25 percent so the difference in federal court right now is

extremely small, and I don't think it is causing any great problems.

In response to that, what the judges said this morning to the defenders, you should look at the cases that they are saying the guidelines are too high: the child porn, the drug cases.

The Commission did a great job by going back and reviewing crack guidelines. We have seen that in my district. That affected 200 cases. I work closely with my U.S. attorney and probation, and we got them done. A lot of people got out on March 3rd, because we planned ahead and got that done.

I think the Commission is doing a good job and can continue to do that if it reacts to what judges are telling them.

We go by circuit-by-circuit analysis, but most of these increases are not judicially-based; they are based because they are either consistent with what has gone on before, or they are based on what prosecutors are doing.

I urge the Commission to look at what judges are doing in response to that.

Now, in terms of what you can do specifically about guidelines now, of course there is the drug guidelines. We all thought as defenders the drug guidelines are too high, especially crack versus powder. It is a big issue right now. We hope the Attorney General will take a position clearly on that for an equal one-to-one ratio.

Relevant conduct is a big issue. It is very confusing, even for the probation officers who have to figure this out. There are many examples in the guidelines, and they try to follow it, but I found in every district I practiced in, the probation officers tended to err on including -- over acquitted conduct. They felt that if the defendant should have known about it, they should have included it so it is up to the defender to object. I don't think those are very clear.

I think if relevant conduct is written out, it clearly includes acquitted conduct, and that should be addressed.

I talk to my law class. I gave them an example about how acquitted conduct can be used to increase a sentence, and they said

that doesn't sound fair, and you heard that from some judges this morning.

Career offender, again, way too high, and too broad.

I remember a case I had in Beaumont, Texas in which I had a guy. He had been using crack cocaine, pretty burned out, although not incompetent, and what he would do was to get his own crack, he would go on the street and front some for a drug dealer, and, of course, that got him a number of convictions, and now he is in federal court on a one-rock case, and he is looking at 20 years to do.

I mean, literally, we were at the sentencing, and he said, "How much is 240 months?" It was just sad, because he was not somebody who needed to do 240 months.

Again, fast track should be extended, or we should at least be able to count the fact that we lack fast track. Our district is so different from say Southern District of Texas.

I had a mother call me the other day saying her son had just been arrested at the border of Plattsburg, and he is a Canadian

citizen.

What had happened was he and his friend were going to go to Florida, and they got to the border. They were asked, "Have you ever been turned away before?"

He said no, and of course nine years before he had, and they looked and they said he lied so he filed a false statement to a federal officer.

He is facing a felony. He is not a citizen. He is going to spend at least ten days in detention before things get sorted out.

That is the kind of thing we are looking at there.

Mitigating role adjustment, it is just not enough in cases where that is a really big factor: In drug cases, quantity controls, and often we can't take that into account.

The use of information under [1B1.8], if a defendant comes in first and cooperates and has a deal, well, then that information can't be used against him, but if a second defendant comes in, even if they didn't know the first guy was cooperating, probation is going to say that is an independent source, and

they are not going to be protected from use of that calculated guideline so that is something that should be addressed.

In Stanford you heard quite a bit about alternatives to sentencing. One of the points that was brought up, a lot of defendants, especially in drug cases -- it doesn't mean you can't look at alternatives to sentencing because -- for instance, I have had instances, for instance under bank fraud, which is a no-probation type of offense, in which the judge said, "I am giving you a day time served, and then I am putting you on supervised release."

It can be the same for drug cases, or at least split sentences, as long as there is some period of incarceration to satisfy [zone C].

I think a lot of judges are scared because there is a big black line. When you divide that zone, they see that and think, "I shouldn't be going between the zones."

To the extent you can, if the alternatives are appropriate, I think you should encourage that.

The last thing I just want to mention briefly is that there is a proposal to

change Rule 32 to provide -- require the parties to provide notice of any variances, departures, or any information that would be in furtherance of that.

I think you heard this morning from the judges. I think that is true of all judges. If you got down to the sentencing hearing and somebody said, "Wait a minute. I didn't hear about that," every judge I have ever practiced for said, "Okay, we will put this off."

To have rigid timelines just doesn't work, because the first timeline that everybody misses -- at least in our district, Probation doesn't get the report done on time. You are supposed to have it 45 days before sentencing. We never have that, ever. All of a sudden the timeline is thrown off.

We just work as best we can under those timelines.

I just can't think of one instance where we had a problem because the judge, even if somebody has to file their papers at the last minute, says, "You had enough time." I don't know any judges in our district that have shown up on the day of hearing and said, "I came up

with this new idea I haven't told you about, and I am going to vary from the advisory guidelines without any notice to anybody."

I mean, they are very good about letting us know what is going on.

With that, I will pass it off to Mr. Nachmanoff.

ACTING CHAIR HINOJOSA: Thank you, Mr. Bunin.

Mr. Nachmanoff?

MR. NACHMANOFF: Thank you, Mr. Chairman, Commissioners. It is a pleasure to be here. Thank you very much for inviting me to be here and giving me this opportunity.

I want to start out with a quote, which I almost never do. Senator Webb from the great Commonwealth of Virginia, as I am sure you all know, has decided to take on, next summer, calling a quixotic venture, but it is certainly a very brave one on his part as proposed legislation to really take a look at the bipartisan commission and look at the criminal justice system overall and how it can be fundamentally improved.

I know we have several folks here

from the Washington area. Maybe you saw the article about Senator Webb in the paper the other day.

There was a quote that struck me there, and it was this: "Either we have the most evil people on earth living in the United States, or we are doing something dramatically wrong in terms of how we approach the issue of criminal justice."

Senator Webb has spoken eloquently and persuasively on the floor of the Senate and elsewhere about the fact that we have rates of incarceration that far outstrip any other country in the world; those of the industrialized world and otherwise, democracies and totalitarian governments alike.

I thank this hearing for the opportunity to reflect at least with regards to the federal system on how we have gotten to the point that we have, and where we are going from here, is particularly appropriate.

I, for one, am very grateful that Senator Webb has taken up this issue.

I refuse to believe that we have more people in need of incarceration in the

United States than in other countries of the world. I refuse to believe that in order to protect the public and to make ourselves safe, that we have to fill our jails and send people to jail for as long as we do.

I was going to read my entire written testimony into the record. I thought that might not go over well after page 14, but there are a lot of statistics in there -- not even a crack of a smile --

ACTING CHAIR HINOJOSA: I have one.

MR. NACHMANOFF: Please let that be noted for the record.

ACTING CHAIR HINOJOSA: I saw someone in the spectator section smile.

MR. NACHMANOFF: One of the things that I note is that we have a prison population of over 200,000. That is a five-fold increase from when the guidelines began and mandatory minimums.

There is a direct correlation, especially between mandatory minimums and the number of people in our prisons. That is a significant problem that is one of the issues

that I address at length in my written testimony, and it is what I want to talk a little bit about this afternoon.

The Commission has forcefully described in the past why mandatory minimums fundamentally interfere with the fair administration of justice, why they interfere and interfere with the mandatory guidelines system and, as we know, interfere with our system of justice and sentencing today.

The judicial conference has spoken forcefully on the importance and need to repeal mandatory minimums, and the defense bar have, of course, spoken for years about this.

Why is this topic important to talk about here? And this morning there was a discussion about Congress and the Commission and the relationship between the two.

I think it is important because it helps to explain where much of the problem lies in our system, and it helps us identify where it does not lie. Like my distinguished colleague here, like the federal defenders who have testified at previous hearings, I do not, and we do not, believe the problem lies with increased

judicial discretion.

To the contrary, we believe that the system has improved as a result of greater discretion, and that an area to focus to the extent of we want to look at disparity or differences in the way people are sentenced, a key to that is look at mandatory minimums and decisions by the Department of Justice as to how they charge and how they proceed with regard to sentencing.

I am not going to repeat everything that my colleague, Alex, has said, but I do want to point out a couple of statistics, things that I think are relevant and important for the Commission to think about.

At a previous hearing, and I was not there but I read the written testimony and am familiar with some of what transpired there, there was a discussion about some changes on the west coast, and it was the U.S. Attorney from the District of Oregon who testified and submitted some suggestions about problems that were perceived with regard to rates of judicial discretion being exercised in Oregon.

I noticed something very striking

about the statistics. It wasn't so much that there perhaps was more discretion perhaps being exercised with regard to how sentences were being imposed in comparison to the guideline range -- it was greater in Oregon than it is in the Eastern District of Virginia, but that is not hard to achieve. The Eastern District of Virginia has always been a tough jurisdiction for sentencing, when the guidelines were mandatory, and even now we see less variation than we do in other parts of the country.

What struck me was this: The rate of sentences being imposed below the guideline range was a product far more at the insistence of the government than it was on the part of judges.

The government-sponsored rate of departures of variances was 33.3 percent in the first half of 2009. It was 18.7 percent on the part of judges.

Well, those variances on the part of the government came in three parts: One, 5Ks, which we know is a significant reason why judges impose sentences lower than the guidelines; fast track, which they have in

Oregon, though I would note it does not have it so far as I can tell by the Eastern District of Virginia and many other places where it would be great to have fast track; and then there was another category, and that category was for reasons other than fast track and 5K. 11.8 percent of the time the government was seeking a sentence below the guidelines in the first half of 2009, and that is consistent with 10.5 in 2008, for reasons other than 5K and fast track.

I, of course, was fascinated with that statistic, and I will tell you why.

In the Eastern District of Virginia, and my good friend and distinguished colleague Dana Boente here, and I know he will have a chance to speak to you as well, and maybe he will shed some light on this, the number of government-requested departures or variances other than for 5Ks was 1.1 percent.

So what does that tell us, or what can we learn from that? Is it like Senator Webb says, that the defendants in the Eastern District of Virginia are so much more evil or deserving punishment than the defendants in the

District of Oregon, that the government correctly requests a downward departure in only 1.1 percent of the cases, or is it something else?

I, of course, don't believe that is the case, and I don't believe that the U.S. attorneys in the Eastern District of Virginia believe that is the case. It is a reflection of a different culture, a different philosophy.

It is the same Department of Justice operating under the same national policies, but, for whatever reason, in the District of Oregon, the U.S. Attorneys are obviously permitted and do, in fact, in more than 10 percent of the cases, ask the judges to impose a sentence that is lower than the guideline range.

Now, I am not saying this in order to get the District of Oregon in trouble or to suggest that they are violating U.S. Department of Justice policy. I am also not saying this to suggest that the prosecutors in the Eastern District of Virginia are not honorably trying to discharge their duties and do their job, the prosecutors.

I am saying, however, that I refuse to believe that the kinds of crimes and the kinds of people who are being punished in the Eastern District of Virginia are any worse or any better than the kinds of people being punished in Oregon.

That is a disparity. That is a difference. It is a significant difference, and I think it is where attention should be paid by the Commission, because it helps us to identify where the problem lies.

As I say, I can't tell you what those departures were. I can't tell you whether they were for fast track or 5K or for other reasons, but clearly there are differences, significant differences in the way prosecutors approach cases around the country. Not just based on region, but even within districts and within divisions, and sometimes even on a hallway in the U.S. Attorney's Office where one prosecutor takes a particular view of how cases should be resolved with regard to sentencing and punishment, and a different prosecutor takes a different position.

I would just like to emphasize the

point that I do not believe that statistics show that it is differences in sentencing based on judicial decisions, where judges are seriously taking their responsibility to follow the mandate of Congress as set forth in 3553(a), to seriously take their responsibilities in looking at the guidelines, calculating them correctly, knowing that they are going to be subject to a review by a higher court, and then making an individualized determination about what sentence is sufficient and not greater than necessary, what sentence is fair and appropriate. That I think is a good thing for the system, and it is not something that we should be attempting to restrict or prohibit in any way.

Another area of differences or disparity that I think is important for the Commission to focus on also comes from the Department of Justice, and Alex touched on it, which is the charging decisions.

The Ashcroft Memorandum sets out a national policy regarding the importance for prosecutors to charge the most serious readily provable offense, and the Ashcroft Memorandum is simply a continuation of policies that existed

more or less in the same form going all the way back to the Thornburgh Memorandum.

However, we know, and statistics reflect, that all of these policies, including the Ashcroft Memorandum, have been implemented in different ways, and they have been implemented in different ways before *Booker* and after *Booker*.

I am not in a position to talk about what happens in other districts other than to know anecdotally based on the surveys we have done as federal defenders and looking at statistics, I know the history of the Eastern District of Virginia -- I know Commissioner Friedrich was a prosecutor there -- and the Ashcroft Memorandum has always been followed faithfully in the Eastern District of Virginia.

Now, the Ashcroft Memorandum gives prosecutors some latitude, especially with regard to the most draconian mandatory minimums for consecutive time, 851 enhancements and 924(c)s, and they give prosecutors the ability to exercise judgment in limited ways, sometimes overseen by supervisors, sometimes not depending on the district, when they can give away or

agree to forgo certain enhancements, and we see that.

But, my testimony reflects that the way that is done varies widely, and it has enormous impact in skewing the sentencing process, and has an impact that is negative.

Why, again, are we talking about this? Because I think, as Judge Woodcock stated this morning and other judges have said, that the Commission can play a vital role in urging Congress to repeal mandatory minimums.

I understand that there are enormous political hurdles, and that it is not a popular topic amongst everyone in Congress; however, I think the time now is much riper than it has ever been before, especially given the interest of the administration in fixing the crack/powder problem, but of course it shouldn't be restricted to crack/powder.

Statistics reflect that almost 70 percent of all drug defendants are subject to a mandatory minimum, and yet 82 percent of all those drug cases, there was no weapon involved. In 63 percent the defendants had zero to three criminal history points.

This issue of prison overcrowding, this issue of over-incarceration must be addressed through repeal of mandatory minimums.

As Judge Woodcock said, there is a statutory basis for the Commission to urge Congress to do that, to provide its expert opinion.

I think that I am very persuasive, but I know that I don't have a lot of sway with Congress. I know that the criminal defense bar, which I think can also be persuasive, does not necessarily have a lot of sway with Congress, but the Commission, I think, can, and I think the Commission has the responsibility and the capacity to be persuasive.

It was with crack/powder. I know that from personal experience. I come from the district that has, in my view, the dubious distinction of being the number one district for crack cases in the country, and I will be forever grateful to the Commission for what it did with regard to crack retroactivity. We have had hundreds and hundreds of people get their sentence reduced.

As the Commission noted itself, it

was a partial solution, not a complete solution, and the way to fix the problem is one that requires congressional action. That is the first issue.

The second is the issue of delinking. [It] was discussed a little bit earlier today with some of the judges, and it has been discussed at other sessions. We believe strongly that the Commission should de-link the guidelines, especially the drug guidelines, from the mandatory minimums, and we know that the Commission has the power to do so, because the Commission has done so before.

In *Neal*, the Supreme Court recognized that the Commission was within its power to change the way the guidelines functioned for LSD, because when Congress determined the triggering weights for mandatory minimums in LSD cases, they did it based on the actual weight of the carrying medium.

As we know, that made absolutely no sense. If someone was dumb enough to use cardboard as their blotter, they would be facing a mandatory minimum much faster than someone that caused the same harm, had the same number

of doses, but used a lighter weight paper.

The Commission recognized this problem and decided to fix it by choosing presumptive weight.

It was the right thing to do, and when it was challenged the Supreme Court said no; there is nothing about what Congress did in setting that mandatory minimum that was a binding directive that required the Commission to follow the same path, and therefore having this presumptive weight is appropriate.

This is the exact reasoning what the Supreme Court relied on in *Kimbrough*, and I know that with crack retroactivity, it took a lot of political courage, it took a lot of effort for the Commission to get to the point to agree on how it would play out, and at two levels it was what the Commission could do at that time, but the Commission changed how that guideline worked and could do so across the board, could do so across the board with regard to other drugs.

There is no reason why the Commission can't do it, and I think it would address some of the concerns the Commission has

with regard to the way judges impose sentence, because to the extent the judges find that drug guidelines are too harsh, and many do, and many have publicly said so, they would be more likely to comply if those drug guidelines were lowered in a way that was based on empirical evidence, that was based on the purposes of sentencing, that the Commission can articulate and provide reasons for.

It would also serve as a way of showing Congress that they need to change the mandatory minimums, rather than going along with the mandatory minimums which are not based on anything other than the raw political process.

They would show that the extra body, the body created by Congress to tell them about how sentences should be imposed, recognized that these sentences are too high.

Let me just finish that point very quickly by saying that I thought that Judge Howard this morning from the First Circuit had a very interesting and insightful perspective, as a former state prosecutor who operated without mandatory minimums, and as a federal prosecutor where he had mandatory minimums at his disposal,

and as a judge. He said that they are a bad idea, and that they are unjust.

I believe fully that the Department of Justice and law enforcement objectives can be achieved without mandatory minimums, and therefore that the Commission taking the position that they should be repealed is not the same as saying sentences should be lowered, wildly, without regard to what the Department of Justice and what law enforcement is trying to achieve.

There are many law enforcement agencies at the state level, and there were law enforcement agencies at the federal level before mandatory minimums who could do their job. There are many other ways to do their job. We've talked about the problems and incentives to exaggerate and to lie on the part of cooperating witnesses when mandatory minimums have these draconian penalties, and by urging Congress to repeal mandatory minimums is a way of solving that problem as well without creating some terrible situation in which the Department of Justice is hamstrung.

We cite a number of cases in which

courts were forced to impose really draconian and outrageously long sentences, and there is the case of *Angelos* from the Tenth Circuit, and these were really classic examples where judges found themselves having to impose 55 or 45 or 150 year sentences on people not who had committed violent crimes, not who had killed anyone, not who had any significant criminal history, but people who had mandatory consecutive time, 924(c)s, that required judges to impose these extraordinarily long sentences.

Why did they have to do so? They had to do so because the Department of Justice used a tool that they use all over the country to try and induce cooperation, and I understand why they do it, and I understand that it can be very effective when defendants are faced with the rest of their life in jail during 851 enhancement or 924(c)s, there are powerful reasons to plead guilty, but sometimes people insist on exercising their constitutional rights and going to trial.

In those instances, if they are convicted, and often they are, the courts are then left with no choice. They cannot impose a

sentence under 3553(a), they cannot engage in an individualized sentencing process, because Congress gave these rules to the Department of Justice.

The Department of Justice doesn't necessarily want to see this defendant spend the rest of their life in jail. They may not believe it is appropriate for this person to be separated from their family and the public to be protected for the rest of their natural lives, but they have no choice.

It is a bargaining tool that leaves the government and the courts with no choice, and, of course, when I am faced in those cases with that situation, I say to the prosecutor, "How well are you going to sleep at night if this person goes to trial and loses?"

And I get varying answers, but, of course, they are doing their job. They are following the Ashcroft Memorandum, or they purport to be following what the Ashcroft Memorandum requires, and as a bargaining chip, the response from them is, "Well, if we don't follow through, then the next defendants aren't going to believe we are going to use this

hammer."

Well, there is something grievously wrong with a system that ends up requiring people to spend dozens of years in jail, decades in jail, because a negotiation went awry. It is just not a fair result, and the repeal of mandatory minimums is a way to address that.

My final point is that we have addressed appellate review. We think that the process of appellate review is developing as it should, and one of the things that we are seeing that we think is very positive is that judges at the district court level are required to give more of an explanation for what they do. That improves the process, it increases transparency, it provides respect and promotes with respect for the law because families and defendants understand why they are receiving the sentence they are. Judges are articulating why the sentence conforms for the purposes of sentencing, and it gives the appellate court something concrete to look at.

We see that where judges don't do that, they can get reversed so the procedure is

important, as is the calculation of the guidelines.

With regard to substantive review, I feel strongly that substantive review will develop better if we did not have a policy in which appellate waivers were made part of the bargaining process.

The appellate courts don't see the overwhelming majority of criminal cases, because defendants will generally decide that they want to enter into a plea agreement and give up that right to appeal.

That leads to my final point, which is -- also was discussed briefly this morning -- which is the elimination of the policy statements that restrict consideration of defendant characteristics, and I know this issue has been discussed previously, but I think these issues relate, and Judge Castillo raised this issue; departures versus variances.

In the Eastern of Virginia, we see very few departures; 2.5 percent. We see more variances, although they are not overwhelming, and the question is why?

I think the answer to that, Your

Honor -- you articulated a little bit yourself -- which is that under mandatory guidelines, the development of the law in the appellate courts on downward departures was really very, very unfavorable to criminal defendants.

In the Fourth Circuit it was very hard to get a downward departure and have it confirmed. In the Eastern District of Virginia -- and I know this varies around the country. There are lopsided appellate waivers. The defendant gives up his right to appeal, the government retains its right to appeal, and therefore the government picked cases and developed case law in which basically no set of facts -- or perhaps without resorting to hyperbole, very, very infrequently was there ever a set of facts in which the appellate court agreed the departure was warranted.

I think you have district judges now who aren't trying to avoid departures, aren't afraid of departures, would be happy to use departures rather than variances, but are concerned based on the many years of experience they have that if they grant them, they will set

themselves up to be reversed, because the appellate courts have not been told, either by the Commission through the elimination of these prohibited, discouraged and restricted factors, or through any other mechanism that that law is obsolete.

Now, one can infer from *Gall* and from the Supreme Court, and from the fact that there is a statutory mandate to consider many of these factors that are prohibited or restricted, that they can and should consider them, and, of course, courts are, and that is a good thing, a positive thing, but I think they feel that if they do a traditional departure on one of these grounds, the law is going to say, "You are not allowed to," and they will be reversed.

They don't want to make that assumption, and judges, district judges, have good reason for that.

And so I think the Commission could do a great service to clarifying that issue and increase probably the use of departures if it was made clear to district courts that that law that developed under mandatory guidelines that is inconsistent with

3553(a)(1) is no longer binding.

With that, I thank you and I will end my long-winded comment.

ACTING CHAIR HINOJOSA: Thank you, Mr. Nachmanoff.

Mr. Mann?

MR. MANN: I want to thank the Commission for giving me this opportunity to speak before you.

I also want to thank the public defenders who have testified today and the testimony they have given at previous hearings, much of which I read.

I think one of the problems that has been identified is the complexity of the guidelines, and nothing highlights it more clearly than the detailed presentations of many of the public defenders.

We in the private bar who practice, and particularly those of us who have CJA clients, many of whom have basically the same type of charges, same type of backgrounds as the public defender clients, are continuingly indebted to the public defender's offices for doing the kinds of analysis you heard today. We

need that support, we rely on it enormously, but I think it also highlights one of the problems the guidelines have in terms of complexity.

I want to touch first on an issue that I see in my district, but I rely on all the national data. I said in my written comments that I think most participants in the federal criminal justice system strive consciously to avoid racism, but the inescapable fact is that statistics show that in many areas, the federal sentencing has disproportionate impact on minorities. That is particularly true with respect to things like career offender, statures with respect to -- some of the mandatory minimum statutes.

It is an inescapable fact. It screams at you when you go into a prison. Clients are always aware of it, and I submit that that appearance of racism is absolutely there, is an issue that cries out to be resolved and to be addressed so that it can disappear.

I will also say -- or at least be lessened.

I will also say, one of the things we mainly haven't considered fully is how much

the effect of state court adjudications on this system imports the lingering racism of some state court law enforcement systems in the federal sentencing system. It is hard to analyze that, it is hard to get data on that.

Indeed, it is very hard to do real data even in a small district on how much impact, how much disparate impact some of these statutes have on minorities, but it is very clear that it is a large impact, and I beg the Commission to try and address that.

The second point I would make, and it is related to the adverse impact on minorities of many of the sentencing rules, the sentences are just too long. I suppose at some point that is a value judgment, but at some point it is a judgment that is based on your own guidelines. So often we see sentences driven by mandatory minimums or 851 enhancements, and that sentence will be two years, five years, ten years higher than the guidelines sentence.

I agree completely with the public defenders that have argued that the guidelines ranges for drug sentences are too high, but then when you have existing guidelines trumped by

mandatory minimum or 851 sentences or career offender sentences that are much higher, it is just way too much, and I can't say it anymore simply than say there is a need to lower these sentences dramatically.

It is not like you will be left without the tools to impose significant penalties on people if mandatory minimums are limited. I gave some examples in my written testimony.

You don't have to have a ten-year mandatory minimum. You can still impose a 40-year sentence on somebody for relatively minor amounts of drug possession.

I don't want to limit my comments to drug possession, but that is perhaps the most dramatic and most visible statute in the federal system.

Also, it is impossible to explain to a client why the fortuity of whether they have been charged by a state court system or federal court system will dictate whether they get two years probation or two years jail versus a ten years mandatory minimum sentence.

I don't understand, and I can

assure you my clients don't understand, why a fair system prosecuted -- a fair sentence in the state court system if one-fifth or no jail in the state court compared to what the federal sentence is.

I was struck this morning when I had the opportunity to listen to some of the U.S. probation officers testify, and I did not put this in my written comments, and I wish I had, that there is an enormous resource in the U.S. Probation Office, and in the few cases I have had where my clients have been fortunate enough not to suffer a period of incarceration as a result of a federal sentence, or very short sentence where I stay in touch after they get out, the value of what the U.S. Probation Office has been able to do for them through alternatives to incarceration is really phenomenal.

Some U.S. probation officers -- we are very fortunate in our district to have a great probation office, but I think that is true in large part throughout the country -- do find alternative programs, do find good programs, do find mental health programs, do find drug

programs, do find educational programs, do find vocational programs that are meaningful, and we put more of our resources into letting probation officers work with our clients outside of prison before they go to prison; not send them into prison. I think that is another way of saying there should be alternatives to incarceration, and you already have the tools in place with probation officers, officers who can marshal those resources and make meaningful differences in clients' lives.

You can go on endlessly with anecdotal stories about how painful long prison sentences are.

I said to someone it is so hard to go to prison time after time and say to clients often in small drug cases that they are going to be separated from their families for five, ten, twenty years, and explain that to them and explain that to their families, and you don't even try and explain that to their kids.

We have gone through the rest.

I think as a society one of the things that we have to look at is that we are separating parents from their children, we are

separating them with long prison sentences, then often deporting those parents, primarily men, and creating a whole society of people with a parent in jail that they hardly know at all.

As we all know, as a practical matter, most federal prisons are far away from the locale of clients facing incarceration.

I want to talk briefly about the complexity of the system. Again, perhaps the easiest way I can do this is to talk about when you go to see your client and you explain to them the guidelines, and you spend a fair amount of time explaining to them the guidelines, and then you try and explain to them what the policy directives are -- and I totally agree with the public defenders who have made suggestions in those regards -- and then you explain to them what 3553(a) means and how that may have an effect, and then the probation officer comes in and does a presentence report and does a real detailed personal history, and then you have to explain to your client "but none of that is going to matter, because an 851 is on file, and the 851 is going to trump everything."

I want to add two other comments

briefly that maybe -- one I suspect affects all of us.

I don't know how much exactly, Commissioner, you knew about this, but there is a problem at the Bureau of Prisons. It is not an easy agency to deal with. We get constant calls from clients. There are a host of issues there. One of them that cries out all the time is medical care, but there are other problems too.

If there is any way to make that agency more responsive, more transparent, more open, I think it would help the whole process.

I mentioned a separate problem that is growing, and certainly in our district, and I suspect in other places.

The public defenders' comments have often addressed problems of cases involving immigration offenses.

In lots of cases involving immigrants, regardless of whether the offense is an immigration offense or not, there are significant immigration consequences to the client.

If you are retained privately, you

have the option, and you very often use it, to retain immigration counsel to give your client advice as to what the immigration consequences of a criminal adjudication will be, but when you are court appointed in a CJA case, it creates a special problem that you can go to the court and ask them to authorize you to retain outside counsel. You ask them for an expert and have them address that issue. You begin to say there ought to be similar Gideon rights for information questions related to the criminal process. I raise that because it is an increasing issue.

I want to thank again the public defenders for all the work they do for all of us, and I just want to implore you, the two points I made, the two points I tried to make most strongly, the system has a terribly adverse impact on minorities. That is wrong. The sentences are too long.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Mann. I know you thanked the public defenders. I think every sentencing judge in the country would thank the public defenders and

the panel attorneys for the work that you do in representing such a large number of the defendants in federal court, and you do it very ably and make sure their constitutional rights are protected and make our jobs easier, and that goes for both the CJA panel of attorneys and defenders so it is appreciated.

I will open it up to questions.

VICE CHAIR CARR: Mr. Nachmanoff, I spent my career prosecuting in a district like yours that was faithful to the Thornburgh et al trial requirements so we basically charged what was readily provable and most serious as recommended by sentencing guideline calculations.

Putting aside whether or not someone gets charged locally instead of federally, and putting aside [that] one district has a fast-track program and another one doesn't, as we go around the country, we hear about different charging practices in different districts.

On the one hand, we might hear from a defender that yes, they agreed on the filing of an 851, mandatory minimums, "but they give us a short amount of time in which to

decide whether or not to plead, and they make us waive our appellate rights." And then we ask, "Would you rather have the Department of Justice uniformity?"

"Oh, no, for us, uniformity is uniformly bad."

On the other hand, unless there is some kind of uniform charging policy around the country which results in at least transparent sentencing decisions -- and I think you would agree with that -- how can we even evaluate what is being done around the country? Because if there is charging policy going on, we can't necessarily see it. It doesn't get disclosed. We don't know what wasn't charged.

Again, I understand why I would prefer to be a defender in a district where I can avoid some drastic charges, but how can the system even have a hope of some type of uniformity in transparency unless there is some kind of uniform charging decision?

I understand you have uniform charging decisions and still end up with different practices with respect to 5K and things like that.

How can we evaluate things, and how can things even approach uniformity under this system unless there is some kind of uniformity in charging?

MR. NACHMANOFF: I think that is an excellent question.

Let me first say that I echo all those who have said before me that we don't support uniformly bad policies and so we don't think a solution is to ratchet up punishment and to charge more mandatory minimums and more enhancements in order to achieve greater sameness.

I guess uniformity and disparity and these terms I think are very malleable and a little bit hard to use in a way that everyone is understanding of it the same way.

We want, I think, what everybody in the system wants, which is fairness. The Department of Justice certainly wants to be fair and therefore wants to have consistent policies. I think maybe that is a better term than uniformity.

We in the defense bar want fairness and justice for our clients.

Courts, of course, are all about fairness and trying to achieve appropriate, fair and just sentences.

I think policies that require prosecutors to limit discretion on the part of the judges interfere with fairness, and therefore to the extent the national policies of the Department of Justice tie the hands of judges and prevent them from looking at every case and every individual as a human being, that is something that I can't endorse and don't support.

Now, that doesn't mean that there shouldn't be guidance, national guidance to federal prosecutors about how to wield the enormous power that they have.

You know, it is interesting. I think one of the problems that we have as we review not only the history of the guidelines in sentencing, but also as we are talking more generally about the history of the charging policies of the Department of Justice, is that a close reading and a rereading of the Ashcroft Memorandum, which I have done, and others in preparation for this event, led me to realize

the Ashcroft Memorandum really has tremendous flexibility if it is read by the U.S. Attorney or the prosecutor to be used in a way in which not seeking the highest penalty in every circumstance is the ultimate goal.

So when I say, and perhaps in the Eastern District of Pennsylvania, Eastern District of Virginia, that there has been a rigid adherence or a faithful adherence to the Ashcroft Memorandum -- you know, it is a certain interpretation of the Ashcroft Memorandum that we have seen, where the negotiating away of 851s or 924(c)s is done in a certain way.

I am not suggesting that [in] the District of Oregon or some other parts of the country they are not following the Ashcroft Memorandum. They are simply interpreting it in a way that is consistent with their understanding of how to do justice and how to come up with appropriate punishment.

COMMISSIONER WROBLEWSKI: Should there be a uniform interpretation?

MR. NACHMANOFF: I think the problem that we, as lawyers, have is we look at words, and words are subject to multiple

interpretations, and then there is a subjective element in the decisions that prosecutors make with regard to how they treat a case; whether it is based on their caseload -- the Ashcroft Memorandum talks about, "Hey, if this is going to take you four months to try it, maybe the guy should get a life sentence."

I am not quite sure what the philosophical underpinning of that is other than convenience. We know that that is part of fast track. Fast track is on the board because they couldn't deal [with] all the cases if everybody didn't get some kind of compromise deal.

I am not sure why that is true within the fast track jurisdictions that are on board or where the pressures of convenience or volume mark the case.

This is not a hearing to try and tell the Department of Justice how to formulate its policies. This is a Commission, and the Commission has its agenda and its job to do.

I think what is important, and the point of our testimony, is to emphasize the fact that as we are looking at how the system operates now, that it is important not to focus

too closely on perhaps the greater latitude that judges have now compared to what they had prior to *Booker*, because there are many other parts of the system that are not controlled by judges that are affecting the fact that sentences are imposed differently.

VICE CHAIR CARR: But seeking the higher sentences, that is not what I understand the Department to require. There is a difference between what the Department has required in terms of charging policy versus what an assistant is supposed to seek in terms of a sentence.

If you could do away with mandatory minimums, have uniform charging policies, and an advisory system, then judges would have the flexibility to do what they need to do, and we would be able to see what they are doing and why.

MR. NACHMANOFF: I don't want to go out on a limb, but that is a very appealing prospect. The repeal of mandatory minimums and the flexibility the courts have to impose individualized sentences I think would go a long way to achieving greater variance in the system.

Whether the Department of Justice decides to try and rein in the differences amongst its prosecutors is really something the Department of Justice has to decide.

I think in a system like that, without mandatory minimums, and without mandatory guidelines, there would be freedom amongst the various players to achieve just sentences.

COMMISSIONER WROBLEWSKI: Mr. Nachmanoff, as you probably heard -- and I also want to get the opinions of Mr. Mann and Mr. Bunin on this -- you probably heard the Attorney General has testified about a working group in the department that is looking at charging practices, is looking at the structure of sentencing, is looking at alternatives to incarceration, all of this -- the one thing that I actually found very -- just put myself at ease a little bit -- was the commonality of values that are at the core of what we are doing and I think are at the core of what you are talking about.

So for example -- because we started out the process by looking at what are

the core values we want to have as we go about this process of examination?

We want a sentencing system free of racial and ethnic disparities. We heard that.

The judicious use of imprisonment, equal justice under law.

I heard from all of you similar people similarly; not every person who commits a crime is exactly the same, but equal justice under law; greater consideration of offender characteristics; sentencing that promotes public safety and is consistent with law enforcement priorities.

So at that level there is great commonality, and I think it is comforting, at least to me, but I do want to ask, because part of the process -- we are examining this for the Commission at its 25 year point, and this new administration at the very beginning of its work -- part of this is what should be the Justice Department policies given the law that we have now which includes mandatory minimums, we have the Ashcroft memo. I recognize there is criticism of that.

We have very little in terms of regulation of prosecutorial use of 5K1.1 motions.

What do you think should be the right policies regulating or charging in a 5K1.1 practice?

MR. NACHMANOFF: I don't want to --

ACTING CHAIR HINOJOSA: Although this is a Sentencing Commission hearing, I will let you have this discussion with him about the Justice Department.

MR. NACHMANOFF: I appreciate that.

COMMISSIONER WROBLEWSKI: I think it is at the core of sentencing. That is what you are telling us. You are telling us the core of the problem is the Justice Department in sentencing so let's try to solve the problem.

MR. NACHMANOFF: Let me start by making two points in response to your question and your comment.

First of all, fundamentally, I do appreciate the opportunity, but obviously it is not our job to set the Department of Justice

policy. You are not suggesting we have that power.

With that caveat, let me make two brief points.

Earlier today you brought up the issue of mandatory minimums and offender characteristics, and I think Judge Woodcock talked about the fact that the court system really fails in many ways to address people who have severe mental illness in appropriate ways.

You made the comment, I think, if I heard it correctly, that, "What about a system in which a mentally ill person is charged with mandatory minimum?" And now we have more flexibility with regard to *Booker* for a judge to take those factors into account. If there is no mandatory minimum, how is that fair?

To bring us back to your question about charging policies and changing them, I think the answer to that is that if a prosecutor sees that someone has committed a crime, maybe even a serious crime that carries a mandatory minimum, but they are laboring under a severe mental illness, well maybe the right charging decision is to charge something that doesn't

have a mandatory minimum so that the court can have the flexibility to impose a sentence that everyone believes is fair and appropriate.

Judge Woodcocks is exactly right. Insanity, there are very few cases in which the defendant can meet the burden of proving insanity, but there are many cases where mental illness plays a significant, a critical role in the decision to commit crime or how the crime is committed, and that is not taking into consideration mandatory minimums policy. So that is one area the Department of Justice could immediately address that.

Prosecutors should have the ability to tailor the charge and the ultimate result in a way that takes into account those kinds of factors.

Secondly, we were really delighted when the Assistant Attorney General testified before the Senate acknowledging the wonderful work the Commission has done with regard to the crack/powder disparity in advocating for a change that addressed that problem.

Unless I am mistaken, I believe at that sentencing hearing when asked by Senator

Feinstein, he categorically answered that he believed the ratio should be one-to-one.

I realize there is an open question as to whether or not that one-to-one ratio means reducing the crack and powder to an equal level, or somehow raising powder.

I would urge strongly the Department of Justice, the Commission and anyone else listening that we don't need to raise penalties for powder. I believe the Commission has come out strongly making that point, and my point about incarceration underscores that issue, but nonetheless.

I made a suggestion to our U.S. Attorney, and I understand that he is required to follow Main Justice policy, and they have done so in the Eastern District of Virginia, but one thing the Department of Justice could think about is taking a position now, before Congress acts, as a pilot program -- or perhaps in a region, maybe in the region where we have the number one practice for crack cases in the country, Eastern District of Virginia -- to make a charging decision in order to correct this disparity, this over-incarceration we see now

with regard to crack cases. The Department of Justice has the power to do that.

I know [Lanny Breuer] and I know Main Justice came out saying until Congress acts, we must adhere to existing law. Of course, we all must adhere to existing law: defense attorneys, prosecutors, judges.

There is no law that requires the Department of Justice to charge people with mandatory minimums of five years for five grams of crack, ten years for 50 grams of crack.

They could charge based on powder and give judges freedom to impose a sentence based on a one-to-one ratio, or some ratio.

In the Eastern District of Virginia, and I believe in many parts of the country, I believe, the mandatory minimums are still being charged. That injustice is being perpetuated right now, and it [is injustice], over and over again, and that could be fixed.

Now, it doesn't require anything other than a change to the Ashcroft Memorandum, and perhaps that is something to be considered.

MR. BUNIN: I am all for reviewing your policies and changing them, but I think the

real check on prosecutors is to give power back to the court. When you do that, you get rid of the mandatory minimums and let the judges use their discretion.

That is the only way you can get rid of them. You can have as enlightened policies as you want, you are still not going to be able to control every office in this country.

I am not saying disparity among prosecutors is a bad thing. Those examples I gave, except maybe the one about the cooperation agreement, those are facts, and you can't force uniformity on a system that already has disparity built in. That is all I am saying.

I think the real change has to be give power back to judges, but I am all for enlightened policies at DOJ.

MR. MANN: The mandatory minimums and the things like mandatory minimums, the 851s, things like that, I don't see why we can't get rid of them and give power back to the judges, and the judge can sentence for a long period of time if the case requires.

COMMISSIONER HOWELL: I just have one question, Mr. Nachmanoff. You, in your

written statement -- I read all 27, or a lot of pages of it -- you urged the Commission to give fuller explanations for its amendments and policy statements, and I have to agree with you, and we could and should do a better job of that.

But one of the comments that you make in your written statement that I wanted to explore a little bit, which this sort of puzzled me, about the whole defender empirical analysis argument, where you say a part of the reason that the Commission should give better explanations and talk about specifically saying whether or not the guidelines should be based only on congressional record or on mandatory minimum statute, the reason you say the Commission should make that explicit is because this would improve the ability of judges to decide on a reasoned basis whether or not to follow the guideline in a particular case, and to explain their sentences, and it would give the courts of appeal a rationale for reviewing the reasonableness of the sentence.

What I understand from that comment is -- correct me if I am wrong -- if there is a guideline or amendment to a guideline

that is based in direct response to a congressional directive, for example, that in some ways that should be given less weight than other guidelines. Am I understanding that correctly?

MR. NACHMANOFF: Well, if I understand your question, we believe that the more explanation there is, the better off everyone is, the better off defendants are for understanding what is happening to them, the better off the lawyers are for understanding what has failed or succeeded in their arguments, and the better off the appeals court is if there should be an appeal.

Judge Tjoflat, I believe, having read the transcript from the Atlanta hearings, he made a similar point, which is that the appellate courts would like to see greater information from the Commission about how the Commission came up with the particular numbers they have come up with, and to the extent the Commission can provide information about why a particular guideline is tied to the purposes of sentencing and how it was arrived at, and if empirical evidence, basis, was used for it, like

the Commission has done with regard to graft or with regard to recidivism, the 15 years review, then the appeals court is going to be in a better position to evaluate the judge's decision to impose the sentence, whether it falls inside the guideline or above it or below it.

COMMISSIONER HOWELL: But if there is a guideline that says that for a particular act there is an increase, because that is in direct response to congressional directive, so Congress is particularly -- its own policy judgment about what the appropriate sentence is, and we have incorporated that directly into the guideline as we are required by law to do, to my mind, that directive in some way should be given almost more weight than any other policy statement, because Congress, who embodied that, has the power to direct sentencing; has specifically said so.

I take it from your position that you sort of view it in reverse, and I want to make sure I understood what your point was about explaining whether or not a directive was the prompt for a guideline or an SOC.

MR. NACHMANOFF: Let me answer

that in two ways if I can. One is that, of course, the variance argument was made and accepted by many people in *Kimbrough*, where Congress decided what the penalty should be for crack, and who are we to disagree, and of course the disagreement was projected that instead, the Commission, like in *Neal*, was free to determine exactly what the punishment should be.

Mandatory minimums don't tell the Commission anything other than what the floor and ceiling is, and the Commission has an independent obligation to determine how the guidelines should operate.

I know I had a second point, but now I have lost my train of thought.

COMMISSIONER HOWELL: If you think of it, you can tell me.

ACTING CHAIR HINOJOSA: I have a question, and then Commissioner Friedrich can have the last question.

Just listening to all three of you talk about doing away with mandatory minimums, and guidelines should be advisory and no mandatory guidelines, and give the power back to the judges, you heard Judge Kavanaugh this

morning mention where that leads us is judges, although we all sort of follow the law, would be left in a situation where our own personal opinions with regard to certain crimes -- and I have to tell you that in the five years, four-and-a-half years I did sentencing without the guidelines -- that factored into a lot of our sentencings, how we viewed drug trafficking as to how harmful that was to society, and some of us had different views than others.

Do you all have any concern that this will affect individual defendants and society if there is nothing that provides some kind of guidance here that puts you within a certain -- and you are left totally to your own personal viewpoint?

Because if there is no law or nothing, then you are left with this is a personal decision that I have to make, and it is a tough personal decision that I have to make, and then you bring in all of your personal viewpoints into what is going on here.

How do we deal with that?

You heard his suggestion. Do you have a suggestion as to how we deal with that?

MR. BUNIN: I don't think there is any way we are going back to where it was before the guideline[s]. We have judges basically raised on the guidelines. They look to them, they see them as guidance.

Judges, typically, if you give them an explanation as to why this is appropriate, they will follow it. They are not looking for a way to avoid these guidelines, whether you call them advisory or not. They take them into account; they are required to take them into account.

I listened to Judge Kavanaugh this morning and I was thinking I can see he is very sincere about that, but I noticed he didn't give an example of --

ACTING CHAIR HINOJOSA: Should we be concerned at all that in one circuit we can have a 9 percent departure variance rate, in another you can have a 30 percent departure variance rate, and it does matter whether you get charged in a certain part of Texas versus another part of Texas; that this would be a certain part of the country versus another part of the country with regard to the same crime,

same amount of drugs, and that it does matter where you get caught, and whether prosecutors will then try to bring it in in a certain place, as you say used to happen in Texas? It is a big state, and people look at things differently both from county to county and federal to state.

MR. BUNIN: Those disparities are not one[s] you can fix.

Imposing a uniform mandatory system on top of that does not fix that. Those are inherent, and those are created by prosecutorial decisions, regional culture, whatever, and we have to leave room for judges to take those things into account and be fair to all defendants, and that is all we are asking for, and that is why I am not worried, because I think judges will do that.

ACTING CHAIR HINOJOSA: Even though some defendants will be treated differently wherever they may be caught?

MR. BUNIN: The issue is fairness, not uniformity. I don't think there is anything in the Sentencing Reform Act that uses the term "uniformity." What we are trying to get is justice for everybody. It may be a little

different --

ACTING CHAIR HINOJOSA: I guess the term is "unwarranted disparity."

MR. BUNIN: Unwarranted disparity, yes. We are trying to avoid that, and I agree that is not what we want, but you have to leave room so that individual judges, you can trust them to do that. I don't think it is wrong.

COMMISSIONER FRIEDRICH: Mr. Nachmanoff, you made the point in your written testimony as well as your oral testimony that over time and, in your view, substantive review is a lot more meaningful. That is really not what we are seeing or what we are hearing. What we are seeing and what we are hearing is that substantive review, there is very little teeth, no meaningful review. What we are seeing is that decisions are affirmed no matter how high or how low they are, and judges can disagree.

As a result of *Kimbrough*, sentences are being affirmed based on policy disagreements as well as judges' fairness to the guidelines based on the individual circumstances of a case.

I am just interested in your

perspective on why it is that you see over time the level of substance of review will become more meaningful? I just don't see it.

MR. NACHMANOFF: Let me answer that and then come back to my second point that I remembered.

Substantive, reasonableness, of course, is something that we live with as a result of the Supreme Court. It is constitutionally required, and what the Supreme Court did in addressing the Sixth Amendment issues that were created by the mandatory guideline system was exercise those provisions that required judges to impose sentence under 3553(b), and to exercise the *de novo* review by the appellate courts.

The constitutional solution was to keep an appellate process, but to fundamentally change that appellate process.

I don't think the question to be asked, really, is how can the appellate process become more like it was before, or how can it have more teeth?

The Supreme Court has made clear that in setting standard that it is the district

courts that are in the best position to determine sentences; that they must follow the procedural requirements that are set out in the Supreme Court cases, and they must correctly calculate the guidelines, and I think we are seeing the courts are doing a good job of following that mandate; that the appellate courts are carefully making sure the judges are adequately explaining the reasons for their sentences.

There has been some case law developed, and I cite one case from the Ninth Circuit in which a case was reversed for being substantively unreasonable, despite the fact that it was in the guideline range, and I think that reflects that the circuit courts are taking that responsibility seriously.

Let me just finish by coming back to the point that I had forgotten briefly, which is to the extent Congress gives directions to the Commission to say "ratchet up the penalty," it is important that the Commission explain that and provide that so that the appeals courts can see whether or not there is any rational reason for it other than simply what Congress decided.

We know, sadly, that with regard to crack, the way the penalties were decided was by a bidding war after the death of Len Bias; that there had to be grossly higher penalties for crack than powder based on a number of things that now have been debunked.

It wasn't based on empirical evidence, it wasn't based on any notion that people who sold crack should go to jail for ten or 20 years. It was based on raw politics of the worst kind. Perhaps with the best of intentions, but the result was disastrous.

When Congress says "increase the penalty" and doesn't explain why, it is important that the Commission make that clear so that the appellate courts can see, and the district courts can see, that there is a good reason for it, or there is no reason at all, and then they can choose whether or not that is something that they want to follow or not follow.

Congress always has the power to keep judges from giving a particular sentence. They can just create mandatory minimum. We don't want them too.

In fact, we want the Commission to send out a report asking the mandatory minimums be revealed for all the reasons we said.

But this process, I think, helps create more transparency about why we are sending people to jail when they are being sent to jail.

COMMISSIONER HOWELL: If Congress sees that when the guidance -- that courts are accepting the communication to disregard guidelines, because they are based on personal directive, don't you think that their reaction is going to be, "Well, if this is the only way we can have them pay attention to our policy decision, to get rid of mandatory minimums, they are going to pay attention to that?"

MR. NACHMANOFF: I think that we should do, all of us, as advocates in court, as judges on the bench and the Commission doing its job, is try and achieve fairness and justice, and one of the ways the Commission can do it is to exercise its independent, neutral, apolitical views on how punishment should be imposed, on how sentences should be imposed.

If Congress wants to take that

advice, then we will end up with a better system. If Congress reacts by saying, "Judges are ignoring us" or "The Commission is, you know, off its rocker for suggesting that penalties are too high," well, you know, I suppose that could happen, but I think we should all have the courage to be willing to say what we think is right and what we think is fair.

If we see that there are punishments that are too high and they have been too high for too long, those of us who do these cases should be willing to say it out loud and ask Congress to repeal mandatory minimums.

ACTING CHAIR HINOJOSA: Thank you all. We will take a short break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: Next we have a “View from the Executive Branch.”

We have Mr. Dana J. Boente, who was named Acting United States Attorney in October 2008, and then the Interim U.S. Attorney in June of this year for the Eastern District of Virginia. Before serving as the U.S. Attorney, Mr. Boente prosecuted fraud cases as an AUSA and was selected as the first assistant U.S. attorney

in June of 2007. He has previously served as the principal deputy assistant attorney general and as a trial attorney for the U.S. Department of Justice's Tax Division. He is a graduate of the St. Louis University School of Law, and did clerk for a district judge prior to entering his practice as a federal district judge.

Mr. Benton Campbell was named Interim U.S. Attorney for the Eastern District of New York in October of 2007. Prior to that he served on detail to the Department of Justice as acting counselor to the assistant attorney general of the Criminal Division. He also served as an acting deputy assistant attorney general, and then as the acting chief of staff and principal deputy assistant attorney general for the Criminal Division, and he has also served as an ex officio member of the U.S. Sentencing Commission from October 2006 to June of 2007. He received his bachelors degree from Yale and his law degree from the University of Chicago.

Which one of you is going to go first?

MR. CAMBELL: Good afternoon, Chairman Hinojosa, Vice Chairmen Sessions, Castillo and Carr, Commissioners Howell and Friedrich, and Commissioner Wroblewski. It is a pleasure to be with you all again, and it is a pleasure to be back before the Commission. I had the honor to work with all of you except Vice Chairman Carr back in 2006, 2007.

I have the distinct pleasure of saying that was a very rewarding experience, and talking an awful lot about the sentencing process. It gave me a very profound respect for the process; the commitment [and] professionalism [] with which the Commission and its staff approach their important tasks.

Their approach is methodical, and it is a highly detailed process that takes you through the guidelines. In policy statement there is a lot of empirical research that goes into that, a lot of policy discussions.

I remember in many of our discussions about a number of issues, the rapport and great sense of how the Commission approaches a problem.

As you know, this is a time of

significant change in the sentencing arena, and my experience has given me a profound sense of the importance the Sentencing Commission has contributed.

I am very appreciative of the opportunity to come talk to you about this 25th anniversary year of the Sentencing Reform Act, and then you had *Booker*.

Before I get into that, I thought I would give you a little quick tour of the Eastern District of New York. For some of you, like Commissioner Howell, who actually served in our office, it will be familiar territory. For some of you it will be a little bit of an opportunity to take you to the outer boroughs on the other side of the Brooklyn Bridge. You are welcome to come view it at any time.

The Eastern District of New York covers the counties of Kings County, Queens and Richmond County, which are three of the five boroughs of New York; Brooklyn, Queens and Staten Island. We also cover all of Long Island, Nassau and Suffolk County. That is home to 8 million people. We are the fifth most populous district in the country.

Brooklyn, as you can well imagine, is incredibly diverse, and the Eastern District is incredibly diverse, both geographically and in terms of its population. If you take a walk down almost any street in Brooklyn or Queens on any given day, you will hear several different languages being spoken and have the chance to sample the food and culture of many different nations. You will have an opportunity to meet people from any part of the world. It is really an incredibly diverse population.

As a side line, my own experience in the office -- I have been with the office for 15 years -- my first three trials, only one of them was in English, and the others were in a variety of languages.

In fact, we have such a diverse practice that we are at the point where if we are doing Spanish language, we are well equipped to deal with translating that. It is a fabulous place to work and live.

Let me tell you a little bit about some of the issues we confront in our district. Of course, it is no surprise, terrorism is the top priority in our department and has been for

some time. It has been in our district for over 30 years.

Unfortunately, New York is becoming very accustomed to dealing with and familiar with the specter of terrorism.

In that area, we have a couple of cases that highlight the examples of some of the cases we do in our office. We recently secured the conviction of eight leaders of the Liberation Tigers of Tamil, a foreign terrorist organization from Sri Lanka, which recently resolved. We secured eight defendants in two separate cases for, among other things, conspiring to purchase SA 18 surface-to-air missiles, and for both fundraising activities and for contracting to purchase significant quantities of firearms and explosives. We also prosecuted and convicted two defendants for conspiring to place explosives at the 34th Street subway station.

Also, given the geographic proximity we have to Wall Street, we share with our colleagues in the Southern District of New York corporate securities cases, and these cases are very complicated. They involve hundreds of

millions, if not billions, of dollars in losses and thousands of victims and investors. Our work in this area has been particularly acute given the recent economic downturn. We have ongoing investigations and prosecutions in a wide variety of areas such as Ponzi schemes and securities fraud.

We also have a Mortgage Fraud Task Force. We created this about a year-and-a-half ago, and we work very closely with a number of state and local partners. The statistics bear this out, that this is not only a problem in our district, it is a burden, it is a significant expanded problem nationwide.

We have developed a number of investigations in that area to deal with things like both financial institutions involved in mortgage fraud activities as well as fraud in the secondary market as well as vertically integrated mortgage fraud conspiracies.

Organized crime force is a top priority in our district. We saw the prosecution and conviction of John Gotti. We have prosecuted dozens of leaders and members of organized crime from all five families in the

Eastern District of New York.

It is safe to say even though there are many folks that take the view organized crime is a shell of former self, in New York City it is alive and well, and there are a lot of activities they do in this city.

Another critically important component of our office's activity is gangs. This is an important component of our district, because it is state enforcement also. In many ways the state is not particularly well-equipped to deal with the sophisticated gangs so we have stepped into that void. It was created by my predecessor, Zach Carter, 15 years ago, even before I came into the office, to address this problem in our district.

Let me give you a couple of examples of cases we have worked on in this area. It focused on, among other things, very, very sophisticated gangs that operate nationwide: MS-13, the Bloods, the Latin Kings. Some of them also involve distribution of crack cocaine, which is a popular retail narcotic that is sold in the Eastern District of New York as well as the Southern District of New York.

There is a case we did in the Gowanus Housing Projects, which is located in Brooklyn between Park Slope and Brooklyn Heights.

This was a two-phase operation. The first phase was mainly narcotics distribution activities, persons who were distributing crack cocaine, and then we prosecuted multiple individuals. Several individuals agreed to cooperate, and when they did it they made clear the gang has been operating in this area for some time, almost a decade, and had distributed multiple kilogram quantities of crack cocaine (inaudible) to get into the historical information which allows us then to bring more sophisticated prosecution against the individuals who participated in these crimes.

The Gowanus Housing Projects for a period of time, from 1992 to 2003, saw a total of 38 murders and 46 fatal shootings. In the 18 months after the take-down, there were only two shootings and no homicides, which was the longest stretch in that project's history without a murder.

We did a similar investigation and yielded a similar result in the Wyckoff Houses. From January 2000 to our take-down in March 2006, in that one block area of Wyckoff Houses there were six murders and eight shootings. In the three years since the take-down, we only had three non-fatal shootings and one murder.

Anecdotally, the sentencing judge lived in the housing project for some time, and she said much of the time while she lived there, she would hear shots fired every night, and there was a playground right outside her apartment.

Since the take-down, she has heard no shots fired.

That gives you a little flavor of some of the neighborhood impact of some of our enforcement activity.

Some of our other priorities, our office prosecutes public corruption, civil rights violations cases, and wholesale narcotics trafficking and distribution.

Corruption is a priority for us along with the FBI, and then we also do a fair

amount of narcotics work. Narcotics is importation and distribution, and there is shipments of different types of narcotics.

Interestingly, narcotics prosecution in our district is for heroin, cocaine and crack cocaine. We have not seen a lot of methamphetamine, almost no methamphetamine in our district, which is somewhat unusual, because that has been a problem nationwide.

This was background. We turn now to the issue of sentencing and the impact of the Supreme Court's decisions in *Booker*, *Gall* and *Kimbrough*.

Please note I focus my testimony exclusively on the Eastern District of New York so what I say may not be representative of the Department as a whole or nation as a whole.

I think as I indicated in my written testimony, it is probably no surprise to any of you that prosecutors in our office like guidelines, although you may be surprised as to why they like the guidelines. The reason is not, as is commonly ascribed, because our prosecutors reflexively believe that the

guidelines result in lengthy sentences. Rather, it is because the guidelines provide a significant degree of predictability and certainty.

A common vocabulary and a common set of procedures that everyone involved understands, that has in my experience elevated the discussion so at sentencing so that all parties involved are aware walking into the courtroom what the possible outcome may be. In some way it also sets the expectations for the government and defense counsel and defendants, and promotes an understanding of the transparency to the process, so at the end of the day the parties are more accepting of the end result. That is not to say that everybody walks out the door happy, but it is anticipated you do have a sense of how the procedure should work and understand what are the issues that are going to be addressed at sentencing.

It has also made very clear the value of cooperation for reasons that I highlighted a few minutes ago. Cooperation is something we use in these corporate cases and the organized crime and gang context, as well as

cooperation is very important in white collar context, because it is essential in those cases to show the defendants the rewards of cooperation.

Now under the current post-*Booker* environment, cooperation is not as clear as it was before, given the fact there are a number of issues, a number of methods that are available for defense counsel to use prior to sentencing. That is not to say cooperation is not something that is valued. It is. Cooperation is something sought out by both the government and by the defense. It is used as a valuable aspect of the sentencing discussion, but guidelines certainly give a certain clarity.

In many ways within our district, *Booker* only accelerated trends that were preexisting, and our district has had among the lowest percentage of guidelines within -- sentences within the calculated guidelines range.

Historically it ranged from 1995 until *Booker* was decided, with the exception of 1996, which for some reason is a little bit of an outlier -- and I don't know exactly why --

our compliance ranged between 43 and 45 percent which is well below the national average.

Since *Booker* it is trending downward further, 41.6 percent in fiscal year 2007, 38.6 percent in fiscal year 2008, and for the first half of this year, about 34 percent.

Similarly, as you would expect, our variance departure rate has been relatively higher. From '95 through *Booker*, it is about anywhere from 20 to 30 percent. Since *Booker* it has climbed from about 30 percent in 2007 to about 32.1 percent this year.

At sentencing, one of our judges said -- a little bit of a sense of tongue in cheek -- the rest of the country is starting to catch up to New York, where variance and guidelines has been relatively modest.

There are a couple of non-statistical anecdotal observations that I have. We haven't done any statistical analysis, so this analysis doesn't necessarily bear out, but there are two things that I would note in that regard. Our sense is that the size of variances is increasing. When you think about it, that probably makes sense because the

Congress has told the Supreme Court to put more issues in front of the district court judges in terms of making a decision, but it is our sense that the size of variances is beginning to increase.

Additionally, we also have a sense that there are differences between judges in our courthouse, and remembering it is the 25th year of the Sentencing Reform Act, part of the objective of that Act was to eliminate unwarranted disparities between defendants sentenced in the same courthouse.

The greatest area of change has been in the procedural aspect of sentencing. Sentencing today looks much different than before we had *Booker*. They are much more robust. The parties have a wider variety of range starting with the guidelines calculations: enhancement, reductions, role in the events, loss calculation, departures, variances, and then on into the 3553(a) factors; and now after *Kimbrough*, the Second Circuit, further questions about policy disagreements the court may have with the guidelines and how they were framed.

I think that also it indicates

that the sentencing discussion and the sentencing debate, as I said, is more robust. In many ways more arguments are being presented to the district court, more fact finding is going on. Prosecutors have a much higher incentive and do spend a great deal of time doing more of an investigation of the facts of the case, of the background of the defendants, and are becoming more familiar with those issues than they did before.

Previously, say in 1998, '99, when I was doing a lot of sentencings myself, those procedures were relatively formulaic. That is not the case now.

In addition, I also get the sense that the victim's roles are increasing, particularly in white collar cases. I think this is due to a variety of factors. One of the reasons is the prosecutors are seeking out victims more often to come in and testify at sentencing, but I also say there are other factors that are external to that.

Number one is there is increasing representation [on] the victim’s part. Now more victims are represented by an elaborate set of

attorneys who are specialists in this area.

Second, we are also dealing with victims that are often financial institutions. They are represented by very sophisticated counsel in their own right.

We are also seeing some changes in the law; for example, passage of the Crime Victims' Rights Act, which have made those changes become much more prevalent in sentencing proceedings; in fact, in all aspects of the criminal prosecution.

I want to touch for a second on charging disparity in Queens. In this area I want to say there have not been substantial changes in our policy. It has always been our practice to charge defenses that match with the conduct of the defendant based on the law and facts so we have not done anything, for example increasing the minimums that we charge. Our charging policies look pretty much like they did before.

The greatest change, I think, aside from the procedural aspects, would be in the area of appellate litigation. I think you had a lot of testimony already today so I won't

belabor this point. Abuse of discretion standard, standard of review now, has really changed the appellate dynamic. Appellate courts used to play a much more elaborate role in reviewing district court sentences under the rubric of guidance was mandatory. That is not the case now.

The standard of review is much more deferential, and the amount of appellate review in this area is not what it was before.

I did want to talk about *Cavera* for a second, because it highlights an interesting issue that came out of our district.

The issue that *Cavera* highlighted, which was a rare en banc opinion by the Second Circuit -- the Second Circuit rarely grants en banc review, but in this case it did because the law shifted when the case came up on appeal, and then immediately afterwards the Supreme Court decided *Kimbrough*.

The issue presented by *Cavera* is whether or not the policy disagreement with the guidelines was an appropriate basis for departure. In this case an appropriate departure wasn't one the government sought, and

the court -- the case involved Mr. Cavera, a septuagenarian army veteran, who conspired to sell 16 handguns. Unfortunately, the co-conspirator sold those handguns to an undercover officer, and Mr. Cavera was convicted.

He was facing a guidelines sentence of 12 to 18 months. The district court upped it to 24 months, and it did so mainly because it had a policy disagreement with the way the guidelines treated firearms, particularly in urban areas.

On the first go-round on the appeal of the sentence, the government actually agreed that the departure was inappropriate and unreasonable because it was a policy disagreement.

The Second Circuit reversed the case on the first go-round, reversed the sentence and sent it back.

Then the Supreme Court decided *Kimbrough*, and the Second Circuit granted en banc.

In the interim, the court, upon review, shifted its position based upon

*Kimbrough*, and indicated that policy disagreements under guidelines were an appropriate basis for departure.

On review in the en banc opinion, Second Circuit agreed. The case was affirmed and sentence was affirmed.

*Cavera* serves as a guidepost for sentencing practices in our circuit. The district courts are now given much more deference in crafting the appropriate sentence, provided, of course, that they adhere to the procedural requirements as laid out by the Supreme Court and the Second Circuit.

Those sentence can be based not only on the particularized facts pertaining to the individual defendant, such as background or criminal history, but also on the broader concepts such as general deterrence or policy disagreements with the guidelines. District courts are required to state their reasons and to support their positions with facts and analysis. But as long as they do, chances are very high that their decisions will be affirmed on review.

As I said, there is little doubt

that these are interesting times in the sentencing arena. The last few years have seen many changes, and I suspect that we have not seen the last of those evolutions.

In the Eastern District of New York, we continue to successfully prosecute hundreds of cases involving over a thousand defendants per year in virtually every area of federal criminal law. Many of those cases are among the most sophisticated criminal case prosecutions in the country, involving extremely serious defendants who have committed egregious crimes.

In cases involving the most violent repeat offenders, we are obtaining lengthy sentences. But no matter what sentencing structure is in place, we remain committed to serving the citizens of the Eastern District of New York by prosecuting the most significant federal offenders in a wide spectrum of areas, many of which I have outlined: counter-terrorism, corporate and securities fraud, mortgage fraud, violent crime, racketeering, homicide, organized crime, gangs, civil rights, public corruption.

In doing so, we will continue to turn to the guidelines to frame the sentencing debate, and we are deeply appreciative of the work that the Commission and its staff continues to do in this important area.

To that end, we look forward to the Commission's continuing efforts to provide the statistical research and history that underlies the sentencing discussion, and, in particular, the policy analysis and data that support its advised guidelines ranges. Such analysis is an effective tool to persuade the courts that they should heed the advice that the guidelines provide.

Thank you for the opportunity to testify today.

I am happy to answer any questions you may have.

ACTING CHAIR HINOJOSA: Thank you, Mr. Campbell.

Mr. Boente?

MR. BOENTE: Thank you, Mr. Chairman, distinguished Commissioners. Thank you for inviting me here today to speak with you about *Booker* and its effect on our

district.

As many of you know, the District of Virginia was one of the original thirteen judicial districts created by the Judiciary Act of 1789. In 1871, Virginia was divided into two districts. The Eastern District has four offices: Alexandria, Newport News, Norfolk and Richmond.

As I was listening to Mr. Bunin, he talked about his personal background and how it affects what he has observed in sentencing, and I am going to tell you a little bit about mine and what I thought, anecdotally.

I have tried cases in ten different districts, and taken pleas and had sentencings in another five so that is 15 separate districts.

Unlike my friend Michael Nachmanoff, I, unfortunately, am old enough to have practiced law in the pre-guideline days.

I believe that sometimes some forget that there was a reason for the creation of the guidelines, and that is disparate sentences. There is no reason to believe human nature has changed since that time.

By these comments I don't mean to impugn the integrity of any judges. We have two judges here. I was a law clerk. I have seen the sentencing process. It is the most difficult thing that judges do, and they all work on it with intensity, from what I have seen, but there is a fact that most ignore, or maybe are unwilling to state, and that is for a huge portion of the judiciary -- again, we could anecdotally talk about what that percentage is; 75, 80, 85 percent. The guidelines may not be necessary, but there is also a statistically relevant portion that need guidelines with more teeth, and every prosecutor and every defense attorney knows that; that occasionally on the draw, you know that you have on one side or the other an uphill battle.

According to your statistics, we are one of the busiest districts in the Eastern District of Virginia, with more than 2,000 cases. We double the next busiest docket in our circuit. We also are more than twice as likely to go to trial. Drug cases make up one-third of our docket, followed by violent crime, white collar, and an increasing number of immigration

cases.

I might note that last week we had five trials proceeding at the same time.

Prior to *Booker*, 93 percent of our sentences were within the guideline range. Following *Booker*, that has dropped to approximately 77 percent, and we remain in that area.

I should note that one reason for our higher percentage may be the fact that we very rarely have 5Ks, and that is mandated by the courts, who want to move things along so we almost use a -- engage in cooperation using Rule 35.

As with every district, although we do have a high percentage of sentencing within the guidelines, we have exceptions, and I believe that those exceptions are sometimes masked by the statistics, because the majority of the courts do follow the guidelines.

The inconsistencies on both sides posed by these variances, above or below, can be viewed as unfair to the majority of defendants who are sentenced within the advisory guidelines. While we fully appreciate the need

for variances to meet unique circumstances, Congress sought to create the guidelines so that the least culpable would fit within a certain range.

As I noted, our largest caseload is drug trafficking. We have had a relatively large number of below variances in the months after *Booker*, but since then it has remained at or near the national level.

Our district, as you know, also has a very large number of crack cocaine cases. In fiscal 2008, nearly 54 percent of our drug cases involved crack, compared with 24 percent nationally.

In the crack cases, we use the stiff guidelines along with the gun penalties to attack violent crime.

In Richmond, we have been very successful with a nationally recognized program using this to target dangerous individuals, violent areas of that city, and remove them from the streets. We are also targeting individuals with previous drug histories who are caught selling drugs again.

These programs have seen

impressive results. Homicides in Richmond have decreased from 86 in 2005 to 32 in 2008. Aggravated assaults have also shown a decrease of almost one-third.

We have seen similar results in our Newport News division, and I could explain those to you, if you would like.

Our strategy with respect to crack cocaine cases has resulted in downward variances.

In one case, we had a sentencing range following the guidelines of 262 to 327 months, and the court sentenced to the mandatory minimum of 120 months.

We appealed to the Fourth Circuit, and on remand, the sentence was reversed, because it failed -- the court had failed to give an adequate explanation for the degree of variance.

The court reimposed the same sentence without further explanation.

While that is an egregious example, in more recent cases, there were also convictions with below guidelines variances.

A defendant convicted of

trafficking 500 grams of cocaine and using a firearm during his drug trade is a typical offense that would have generated a sentence of 121 months at the low end of the guideline, or a mandatory minimum of 60 months.

The judge in the case gave a sentence of 60 months for the drug conspiracy, largely because the handguns were used as part of the drug trade.

For practical purposes, we have chosen to investigate and bring cases that qualify for the mandatory minimums to avoid downward sentencing variances.

For example, as I outlined, we prosecuted a heroin ring in Northern Virginia that resulted in four deaths from overdoses of heroin. Three of the defendants in that operation were sentenced to the minimum mandatory of 20 years in prison for distributing heroin and the resultant death.

I might add there were also a dozen non-fatal overdoses. I don't believe any of the victims were over 25. That was a terribly heart-breaking case.

In fraud cases, the below

guidelines variances in the district tend to track national averages. I believe that our broader guidelines are only sentenced within 65 percent of the cases. That is largely, I believe, because minimum mandatory sentences are very rarely available in fraud cases.

A compelling example comes from a case we tried in Connecticut that involved AIG and General Reinsurance, who promoted a scheme to manipulate the AIG revenues resulting in a $544 million loss.

The defendant, the lead defendant, Ferguson, was convicted of securities fraud, making false statements to regulators and mail fraud.

The court sentenced him to two years in prison, and the others in prison from four years to twelve months and a day. That dramatic departure was mainly attributed to the fact they did not have direct financial gain.

When you compare that to the Eastern District cases we tried, where the loss was $9.7 million, and the defendant ended up with 108 months in prison, the vast discrepancy in those two sentences is difficult to reconcile

and understand.

Both involved manipulating financial documents to mask troubling revenues, but the amount lost and the applicable guideline ranges clearly showed two schemes in different scope, yet the sentences brought about opposite results.

I also outlined an example of where we had agreed in the Home Owners Association case -- it is a $3 million loss -- that there was 250 victims, but the court found there was only one victim.

The court said because all the money went into the defendant's escrow account, and that was his management company, that there was only one victim; not the 400 associations, but those 400 homeowners associations may very well need additional assessments to pay for taxes, upkeep that money was for.

If I can address the minimum mandatory sentence issue just very briefly, I would like to note that the prior panel, however, said that the mandatory -- minimum mandatory sentences, the guidelines and what I believe was good, aggressive law enforcement,

compelled cooperation.

Somehow there was a sense -- at least I get a sense. I don't want to mischaracterize the testimony -- that was a bad thing.

I would submit that was a very positive result of those cases.

It was also released an implication that because of the mandatory minimums, excellent defenses are not going to trial. That certainly has not been my experience in our district.

I would like to note, just again anecdotally, there has been some criticism of the 924(c) cases. We recently had a defendant who was arrested with 13 grams of crack, $1,500 in a car, and a loaded .45 caliber handgun. He also had a seven-month old and a six-year old in the car with him. His home had another 123 grams of crack and another loaded .45.

I am not hesitant to say that we charged him under 924(c).

As far as the appellate practice, the abuse of discretion standard to review the reasonableness of the sentence really doesn't

give us many options, and we have been -- I think I have one sentencing appeal now. It really has nothing to do with the guidelines. It is more, as I explained earlier, a case where the court refused to apply the 2008 book thinking it was an *ex post facto* problem, and he applied the 2004 book so I have no sympathy with appeals.

I just have a hard time believing that there is much value to the appellate standard we have right now.

In conclusion, I want to thank you for allowing me to speak today. I appreciate what you have done to help promote the uniform system, and I hope my comments along with my colleagues have been helpful, and I would be pleased to answer any questions.

ACTING CHAIR HINOJOSA: Thank you, Mr. Boente.

VICE CHAIR CARR: I think you said the lack of 5Ks and the use of Rule 35 is judge-driven. Occasionally -- not usually -- we have some judges in our court who just want to get a case off their docket. Is that what you --

MR. BOENTE: Yes. That is the speed at which the docket runs. They are going to schedule the sentencing, and you cannot -- a defendant will not have a chance to complete his cooperation within that time so it is just not possible to do it with 5Ks.

VICE CHAIR CARR: In terms of the impact of the cooperation of those defendants and the trials in which they testify or the ultimate sentences they get, do you see either an upside or downside to the fact the court --

MR. BOENTE: I don't. Maybe it is the culture I lived with for so long, but I just don't understand those systems.

COMMISSIONER FRIEDRICH: Mr. Campbell, I am just wondering whether the practice with regard to appeals has changed in your district as well. What we have heard at lunches and prior testimony, Mr. Boente said, is that U.S. attorney offices just aren't appealing many cases, if any, because with respect to substantive review, and with respect to even procedural review, what U.S. attorneys are finding is that the cases are coming back and the same sentence is being imposed so many are simply

not pursuing those cases. Is that a fair statement for your office as well?

MR. CAMPBELL: That is a very accurate assessment. We have had many two-sentence appeals. One involved a situation where we had a rubric of a new trial motion that a judge granted *sua sponte* after he polled the jury after the case was over, and told the jury there were mandatory minimums applied and asked them whether or not that would change their vote on guilt or innocence, and we took that case up, and we managed to get that overturned.

But then about -- that has nothing to do, as Dana said -- nothing to do with the guidelines or the substantive or procedural practice that the court brought.

As a practical matter, we almost never take any of those sentencing appeals.

COMMISSIONER FRIEDRICH: In light of the *Cavera* decision in your circuit and similar decisions across the country relating to variances based on policy disagreements with the guidelines, do you see any limits to the extension of *Kimbrough*? Does it apply across the board to all the guidelines?

MR. CAMBELL: I see some limits, but very few. What I see is *Cavera* did draw a distinction about disagreements with the Sentencing Commission and guidelines as opposed to policy decision with Congress. I don't think we addressed the question about policy decision with Congress that Commissioner Howell raised with a previous panel. I don't know the answer. I don't know how that is going to come out.

ACTING CHAIR HINOJOSA: We thank you all very much and appreciate your time and your patience.

(Whereupon, the above-entitled matter went off the record at 5:18 p.m. and resumed at 9:10 a.m. on July 10, 2009.)

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Friday, July 10, 2009

The public hearing convened in the United States Court of International Trade, One Federal Plaza, New York, New York, at 9:10 a.m., Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

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

STAFF PRESENT:

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

INDEX

JULY 10, 2009

ACTING CHAIR HINOJOSA: Welcome, everyone, to the second day of the public hearing of the United States Sentencing Commission on the anniversary of the passage of the Sentencing Reform Act of 1984 we are having here in New York.

Again, thank you to Judge Restani and all the members of the Court of International Trade as well as staff, as well as the judges who have made this possible, Judge Loretta Preska and Judge Kimba Wood. Both are present and helped with the logistics and the location, and we appreciate all their help.

I also want to thank all the members of the panel who have appeared before us. Every single member of the panel has something else to be doing today, not necessarily to be in front of us, but they did take the time to be in front of us and share their thoughts with us with regards to their view of the Sentencing Reform Act.

We have a distinguished panel with a "View from the District Court Bench." It is the second panel that we had. We had one yesterday and now today. Federal district judges are the

judges who actually impose the sentences, and their side is always helpful for the Commission.

We have starting on my left the Honorable Donetta Ambrose, who has been chief judge for the U.S. District Court, Western District of Pennsylvania, since the year 2002, and she has been on the bench since 1993. She was engaged in private law practice, but also served as an assistant district attorney in the Westmoreland County District Attorney's Office. She was a state judge in the Court of Common Pleas in Westmoreland County in Pennsylvania.

Chief Judge Ambrose received her bachelor's degrees from Duquesne University and her law degree from Duquesne University School of Law.

She has some very interesting comments about her first year of law school, but I wouldn't repeat them on the record.

Next we have the Honorable Raymond Dearie, who has been chief judge of the U.S. District Court for the Eastern District of New York since the year 2007. He has served on the court since 1986. Prior to that he was engaged in the private practice of law in New York, and

he also served in the U.S. Attorney's Office, having several positions in the Eastern District of New York, including as chief of the Appeals Division, chief of the General Crimes Section, and chief of the Criminal Division. He was an executive assistant to the U.S. Attorney, and then actually became the U.S. Attorney for the Eastern District of New York, and he received a bachelors degree from Fairfield University and his law degree from St. Johns University School of Law.

Next we have the one that receives a claim for the furthest award, the Honorable Gustavo Gelpi, who has been a judge on the United States District [Court] for the District of Puerto Rico since the year 2006.

Prior to that he was a U.S. magistrate judge in the District of Puerto Rico from 2001 to 2006. He also served as an assistant federal public defender, actually had a stint at the Commission as an assistant public defender, and he was legal counsel to the Puerto Rico Department of Justice, having served as its solicitor general for the Commonwealth of Puerto Rico. He received his bachelor’s degree from

Brandeis and his law degree from Suffolk University Law School.

Next we have the Honorable Nancy Gertner, who has been a judge for the U.S. District Court for the District of Massachusetts since 1994. She did clerk for a judge on the Seventh Circuit and was engaged in the private practice of law in Boston, '72 through '94, as well as an instructor at Brandeis University School of Law, and she has been a visiting professor at the Harvard Law School. She received her bachelor's degree from Barnard College, and her master's from Yale and her law degree from Yale.

Yale has been overrepresented in the last two days, but, nevertheless, we have heard good comments from all the participants.

We do thank you for taking your time to be here. We realize you have busy trial dockets and busy schedules on the court, but it is extremely helpful for us to hear from U.S. district judges.

Judge Ambrose, Judge Dearie, which one of you is going to go first?

Judge Ambrose?

JUDGE AMBROSE: One thing I have learned is you don't want to follow Nancy. I don't want to follow Nancy.

While I am sure Yale has been overrepresented in the last two days, I am going to bet that Duquesne University in Pittsburgh has not so I want to thank you and the entire Commission for the opportunity to appear today, and to speak about the most important and the most difficult function a trial judge performs, and that is sentencing.

As Judge Hinojosa mentioned, I became a federal judge in 1993, so my entire federal sentencing experience prior to *Booker* was under the mandatory United States Sentencing guidelines.

Coming to federal court from my position as a state trial judge in the Commonwealth of Pennsylvania, where I had served for 12 years in that capacity, I was familiar with sentencing guidelines, but state sentencing guidelines under the law of Pennsylvania were very different from and bore little resemblance to the federal sentencing guidelines.

In fact, it was very difficult at first to believe that defendants would enter guilty pleas without knowing exactly what their sentences were going to be.

I was amazed to discover that more than 90 percent of all individuals facing federal criminal charges entered guilty pleas without fully understanding what their actual sentence is going to be.

Unlike some of my colleagues, I never felt completely hamstrung by the guidelines. I believe that the Sentencing Commission in implementing the guidelines had made great strides in achieving predictability, consistency and transparency in sentencing outcomes.

Quite frankly, the guidelines for the most part created a more just system yielding fairness along with consistency.

Furthermore, as the United States sentencing guidelines became exceeding[ly] detailed and complex, I believed that I still had a crucial role: making findings on disputed issues pertaining to important sentencing factors and applying the guideline provisions to

those facts.

Nevertheless, the rigidity of the sentencing guidelines did result in the imposition of some sentences that were too harsh and perceived as unfair and unjust, because they were based on a formulaic procedure that would sometimes result in sentences disproportionately severe to the harms suffered by society.

Fairness and consistency are often competing factors.

Post-*Booker*, the guidelines are now advisory. A judge's sentence is no longer driven and controlled by the rigidity of the sentencing guidelines; rather, a judge must now impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing set forth in federal law. This provision directs the judge to consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or

vocational training, medical care or other correctional treatment in the most effective manner.

A judge must also consider the nature and consequences of the offense, the history and characteristics of the defendant, the kinds of sentences available, the sentence recommended by the advisory guidelines, the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims of the offense.

We now know after *Gall* that extraordinary circumstances are no longer required to justify a sentence outside the guideline range, as long as the record demonstrates that the judge consider the 3553(a) factors in support of the sentence by facts of record applied to those factors.

In most ways, sentencing is now a more difficult task for a judge, because he must now exercise his own judgment to fulfill the ultimate responsibility for imposing a sentence sufficient but not greater than necessary to achieve the sentencing objectives.

As I sentence defendants post-*Booker*, I consistently engage in a framework of a three-step sentencing process.

Without exception, I begin with the consideration of the applicable advisory guidelines sentencing range, ruling on every objection to the probation officer's determination of what the advisory guideline range is filed by either the government and by the defendant, citing to the record evidence for my rulings.

I then move to request for departures under the guidelines, rule on those, and finally consider requests for variances which generally are based on arguments that the case is outside of the heartland, that the specific offense and/or the particular defendant's history and characteristics warrant a sentence different from that recommended by the guidelines, or that the guideline range is not based on any sound data or scientific research.

After determining the advisory guideline range that I find applies to the case, I hear evidence and argument on the sentence

which is appropriate and sufficient, but not greater than necessary, to satisfy the 3553(a) factors.

This is where the real work begins. If judges blindly follow the sentencing guidelines, or give them the presumption of reasonableness, and only sentence outside the guidelines in extraordinary cases, the judge is not doing her job.

In many important ways, the guidelines conflict with the directive of 3553(a).

For example, 3553(a) instructs judges to consider the history and characteristics of the defendant.

The guidelines instruct judges not to consider the defendant's age, educational and vocational skills, his mental and emotional condition, his physical condition including drug and alcohol dependence, his employment record, his family ties and responsibilities, his socio-economic status, his civic and military contributions, and his lack of guidance as a youth.

These prohibitions in the

guidelines conflict with 3553(a)'s requirement to consider the history and characteristics of the defendant.

The Supreme Court in *Gall* has resolved this conflict where the court upheld a non-guideline sentence of probation, which the judge imposed based in part on characteristics of the defendant, which the guidelines prohibited or deemed "ordinarily not relevant."

All of my colleagues on the District Court for the Western District of Pennsylvania believe that sentencing post-*Booker* is working well by providing a framework of advisory guidelines that acknowledges the goals of uniformity, transparency and predictability, but also by giving judges another framework that acknowledges sentencing as an individual exercise.

Former United States District Judge John Martin of the Southern District of New York, who was my colleague on the Criminal Law Committee for several years, wisely said that guidelines gave judges the means to sentence similar defendants similarly, but took away the opportunity to sentence different

defendants differently.

We now have that opportunity. In many situations, the guidelines represent sound sentencing policy. In others they do not.

Many judges, including myself, believe unquestionably that offense and offender characteristics should be taken into account in sentencing. We must look at the whole story of the offense and the whole story of the offender.

There are many facts concerned with the offender's history and characteristics that should instruct the judge on what sentence is sufficient but not greater than necessary to deter this defendant, to protect the public from this defendant, and to rehabilitate this defendant.

Even though defendants may commit similar crimes, considerations of individual factors may result in disparities, but disparities that are warranted.

All of my colleagues agree that a certain amount of discretion exercised by federal judges in the sentencing process is necessary to a just process.

Sentencing cannot and should not

be reduced to numbers predetermined by charging decisions made by prosecutors, mandatory guidelines, and calculations made by probation officers.

Post-*Booker* sentencing gives judges the right and the opportunity to impose sentences that are not only consistent but, more importantly, fair.

My colleagues have asked me to inform you about certain issues that they perceive as unfair and arbitrary. Number one is, of course, the crack/powder disparity.

While no empirical or scientific data supports this disparity, we do now know that it does negatively impact the poor and the African American population.

While Amendment 706 has alleviated this disparity to a degree, it has not solved the problem, as sentences for crack are still two to five times higher than those for powder.

The unfairness of this disparity is not lost on the community, and it affects those willing to serve on juries and those willing to testify in criminal cases.

The community will not support a

system which it believes supports one of the greatest sources of injustice in our criminal justice system.

The United States Sentencing Commission must continue to press Congress to adopt a one-to-one ratio. Five year penalties should be imposed on serious drug traffickers, and ten year sentences should be imposed on major drug traffickers.

We have all experienced low-level offenders who failed to pay for their addiction and who suffered the consequences of a sentence that will not be reduced because they do not have enough information to give to the prosecutor. This injustice must and should be corrected.

Number two concerns the implication of career offender status. A defendant can and often does face a sentence three times longer than he would normally face because he comes under the career offender provision.

One is designated a career offender if he was at least 18 years old at the time he committed the instant offense of

conviction, if the instant offense is a felony that is either a crime of violence or a controlled substance abuse offense, and the offender has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The guidelines instruct that a prior felony conviction is, in part, a state or federal conviction for an offense punishable by imprisonment for a term exceeding one year. Because judges are instructed to look to the elements of the offense which resulted in the prior conviction rather than in the facts of that conviction, some defendants have been sentenced as repeat violent offenders when, in fact, they are not.

The Commission should narrow the statutory definition of crime of violence. For example, the Commission's definition includes in my state, in Pennsylvania, a state simple assault misdemeanor. The definition of career offender should be applied to a narrower class of offenders.

Thirdly, many judges in my district are concerned with sentencing in cases

involving possession and distribution, but not production of child pornography. These cases constitute the fastest growing segment of our docket in Western Pennsylvania.

Despite the fact that judges increasingly grant requests for downward departure and variance in these cases, the advisory guideline sentence range has continued to increase hundreds of percentages in the last decade.

The reason for the longer and more severe sentencing ranges is clear. There is a great deal of pressure put on the legislative branch to throw away the key for child pornography offenders.

None of us support the possession of child pornography, and while the judiciary as a whole I believe does not consider this to be a victimless crime, I do believe that we recognize our responsibility to act as a necessary check on political pressure concerning such a hot button topic.

Many of us have concluded that in many cases, especially those where the defendant has not been involved in production, and where

the defendant has never solicited or touched a child, and who frequently have no prior criminal record, strict application of the Sentencing guidelines would create an injustice.

The sentencing guidelines tend to treat even first time offenders with no history of abusing or exploiting children the same as they treat child molesters.

Furthermore, the enhancements in the guidelines, the imposition of two [levels] for use of a computer, which is probably the only way these crimes are committed, up to 5-level enhancements for the number of images, when we all know these images can be reproduced in the hundreds in minutes, distribution in exchange for a thing of value which involves bartering, exchanging the images, can quickly ratchet the sentence up to the statutory maximum of 20 years.

Now, these are things that I think the Commission has to turn their attention to.

This is not to say, however, that we, as federal judges, do not recognize the extreme physical, mental and emotional damage caused by child pornography, and by the market for the exploitation of children. Punishment is

due, but the extent of the increase in punishment is often unwarranted in these cases.

Finally, as to changes to the Federal Rules of Criminal Procedures, I and many of my colleagues are frequently faced with issues relating to the disclosure of Brady material, and we know that happened in Washington D.C. just recently. Judge Sullivan has been talking about that.

I support those who have proposed amendments to the Federal Rules of Criminal Procedure 11 and 16 that would codify the rule propounded in *Brady*, clarify the nature and scope of favorable information, require the government attorney to exercise due diligence in locating favorable information, and establish deadlines for disclosure of Brady material which provides sufficient time for the defendant to receive due process.

With respect to Rule 11 amendments, 90 percent of federal criminal cases are resolved by guilty pleas. Timely disclosure of information favorable to the defendant is vital to fair and open plea negotiations, and crucial to a fair sentencing process, because

information that diminishes the defendant's culpability can really affect the punishment, as we all know.

I want to thank you again for this opportunity. While we as trial judges understand the importance to the public of consistency and uniformity in sentencing, we must never lose sight of our ultimate goals: fairness and justice.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Ambrose.

Judge Dearie?

JUDGE DEARIE: Judge Hinojosa, Judge Sessions, members of the Commission, I appreciate the opportunity to offer these brief remarks to the members and staff of the Commission.

I speak for myself, of course, but although my remarks have not been vetted, much less cleared by my colleagues in the Eastern District, I can tell you with confidence the sentiments and inevitable frustrations expressed are shared by most and most likely all of my district court colleagues.

I will not devote my limited time to recitation of the usual gripes and criticisms you have heard so often: loss calculations, relevant conduct, offense characteristics, drug equivalency tables. The other seemingly endless litany of complaints and observations are not on my agenda this morning.

To be fair, in many respects the Commission has reacted over the years to many critical observations in a sensitive and measured way.

I come here as a former United States Attorney and assistant United States attorney, in all about almost 12 years as a federal prosecutor.

I came to the bench in the pre-guidelines era. Nothing was more daunting, more emotionally difficult to a young judge, or any judge at that time, than having to decide a particular sentence.

That was when we were all counseled by higher authorities that sentencing was to be an individualized judgment.

In the Eastern District, judges were guided in their sentencing judgments by

sentencing panels consisting of at least two randomly selected colleagues, who would review the relevant materials and confer with the sentencing judge in aid of his or her decision, in the most profound exercise of judicial power.

In this post-*Booker* year, we had begun to reinstate sentencing panels in the district.

Pre-guideline sentencing was in many ways more challenging, far more difficult.

Those who contend that guidelines critics want to return to the good old days of unbridled sentencing, like we have never imposed a sentence, are at least strangely misinformed.

With the guidelines, of course, came homogenized sentencing. In the sense X's and O's led the way under the banner of the truth in sentencing disparities warranted were not, were now hidden under the cloak of prosecutorial discretion.

The high stakes brought an unfortunate and precipitous increase in sentencing advocacy, fueled by the competitive juices of young prosecutors and the avalanche of issues triggered by the guidelines.

The profound act of passing judgment became a game of "gotcha."

Sadly, the guidelines very significantly undermined the role and mission of the Probation Department as they too were unavoidably swept into the role of third party advocate.

That said, I am in favor of guidelines, as was once so well-intended, but with wide, sensible ranges that truly reflect sentencing practices. Informed sentencing cannot be reduced to six months slivers. Informed sentencing cannot be driven by a litany of so-called offense characteristics, the resolution of which frustrate and belittle the process.

I am also in favor of limited appellate review of sentences that fall outside an informed empirically-based advisory range.

Let the sentencing judge explain his or her sentence, and let three or more appellate judges pass on the question of reasonableness in those relatively few cases that might make their way to the circuits.

The post-*Booker* era presents a

magnificent opportunity for the Commission and the Congress.

Criticisms alone serve little purpose except perhaps to vent the frustrations of judges who have imposed sentences constrained by the guidelines and rule of the law, sentences that tug and tear at our conscience in judgment long after the day of imposition.

Lessons have been learned. We must put them to good use.

We urge the Commission to take the lead on the many issues of genuine sentencing reform.

We have created, all of us, a culture of incarceration. We incarcerate more people for longer periods than any country in the world, civilized or not.

Almost two-and-a-half million people are in jail in this country at a price tag of over 50 billion dollars annually.

One out of nine black men between the ages of 20 and 34 in this land of the free is in jail.

In the mid-70s, Judge Frankel said, "We in this country send far too many people to

prison for terms that are far too long."

Since that time, the rate of incarceration has more than tripled. It takes your breath away.

There are other ways to address this problem, better ways.

It is not, I respectfully suggest, a time to cheer. We are not better off today than we were in 1987 despite the best efforts of the Commission.

I agree with Judge Newman and others, it is time for fundamental reform.

We have not achieved truth in sentencing. The irrational harsh impact of mandatory minimums as reflected in the guidelines must be rethought.

I do not agree that the Commission is powerless to do anything about mandatory sentencing, but, for certain, you are in a position to propose and aggregate empirically-based guidelines. The Commission's own view is expressed in the 2004 annual report. The decision to dovetail guidelines to the mandatory minimums was a mistake -- quoting -- "because no other decision has had such a

profound impact on the federal prison population."

Indeed, the number of drug offenders in prison since 1980 has increased by 1100 percent. The vast majority of them are non-violent, small time drug offenders.

It is time to correct that mistake. Simplify the guidelines. Any number of sensible, if not compelling, suggestions are before you. Give us broad empirically-based ranges with limited review if a sentence falls outside. Eliminate most offense characteristics that are often bought and sold under the table in the plea bargaining process and otherwise spawn endless litigation.

Find a way, or at least propose split sentences that address legitimate sentencing goals and yet provides strong incentives to offenders to address the issues that prompted their behavior in the first place.

Yes, I know Congress works. I am no Pollyanna, but we have a new Congress, a new administration, and an attorney general who, in my presence, told the chief district judges of this country, "I am no fan of the guidelines."

Informed people have begun to take note of alternatives to incarceration, which with modest resources have proven remarkably successful.

Give us more tools to fashion sentences that work for everyone.

No two first offenders are exactly alike. That is the realty.

If necessary, as Judge Newman put it, start all over.

So the opportunity presents itself: Inspired and determined leadership in keeping with the original concept of the prestigious Sentencing Commission, and as reflected in the experience and stature for each one of you.

The truth is, you may be our only hope for substantial progress. Please don't tinker. Get out and get under. Raise your voice or voices. I am not a belt waving kind of guy, but I do appreciate your difficult and delicate role; but you have a higher calling, and we must rely on each of you to think outside the box, to press for meaningful and lasting reform.

We thank all of you for your

efforts in that direction.

ACTING CHAIR HINOJOSA: Thank you, Judge Dearie.

Judge Gelpi?

JUDGE GELPI: Good morning, Judge Hinojosa, members of the Commission. I am honored to be here this morning.

Let me begin by noting that I have provided a written statement. That statement is my own, but I note that my colleagues in Puerto Rico have provided valuable input and review, and I have adopted some of their comments as part of my statement.

I agree with all my colleagues that sentencing is the hardest part of our jobs, district judges. I am a post-*Booker* judicial appointee. I have never sentenced under the mandatory guidelines system, but I do have experience with the pre-*Booker* system. I was an assistant federal public defender. For seven years I represented various clients under the mandatory sentencing regime, and also five years as a magistrate judge, I took hundreds of pre-*Booker* pleas so I am very familiar with the pre-*Booker* system.

From my perspective as a district judge, particularly to Puerto Rico, today's sentencing is much more fair in cases that make up a substantial part of the docket in my court.

For example, as I have noted in my statement, those are cases involving reentry of aliens, and in particular drug cases where there is minor or little participance. That is the bulk of our sentencing. Sentencing is much more fair today.

I have to highlight in this respect that my district does follow statistically the guidelines, 75.3 percent of all cases, at least last fiscal year, and if we were to include any substantial assistance and fast track occurred departures, that would raise the following the guidelines to 83 percent.

I also note that my colleagues and myself have a very high criminal caseload. It is not uncommon to see some of my colleagues -- I myself have sentenced over 100 defendants in drug and firearm cases.

Post-*Booker*, I have noted that sentencing guideline plea negotiations, particularly conspiracy cases we have in Puerto

Rico, I have noted that post-*Booker*, the sentencing guideline plea negotiations are much fairer than in my practice.

When I practiced, the guidelines were like a sword in the hands of the prosecutor. I believe now the scales are more evenly tipped, and the recommended sentence that we receive is that these plea agreements are much lower than those as a defense attorney I ever saw.

Again, in our district the guidelines statistically are followed most of the time. I believe this is the result of plea practice and the fact that we have these multi-defendant cases which are sort of unique to my district and also other districts.

This is not to say that *Booker* is not used in Puerto Rico in the district.

We use *Booker*. I think the statistics don't show how often it is used, because it is swallowed by larger -- we have hundred defendant cases. Perhaps *Booker* is used in two, three of these defendants, but statistically it is not going to show up, but, in fact, it is used when necessary.

District judges and at least myself don't shy away from invoking *Booker* whenever necessary.

One example that I have seen that *Booker* is used in these plea-negotiated cases, and I think it is very fair, is usually when there is a plea agreement and you have 100 defendants, and you see some of these defendants, the ones higher up in the echelon, will receive a stiff sentence, and then you start going down the ladder.

Sometimes you see somebody who is way at the bottom of the ladder, but, unfortunately, under the guidelines, that person ends up being a career offender, and at the time of the plea agreement, nobody expected that was going to be the case.

The guidelines are correct. Under the old regime there was nothing one could do.

In these cases, at least in my experience, the parties have negotiated the plea, and then using *Booker*, if it is a meritorious case, I have sentenced under *Booker*, and I have been able to follow the plea agreement.

Sometimes we have to keep in mind that pleas are not only reached because of the guidelines, but other times what the government has may not be the best evidence and there would be the risk of going to trial, or the government wants to conclude the case, and I think *Booker* has been very helpful in those cases, because I do recall I had clients that turned out to be guidelines career offenders, and it is a big drastic difference when someone is a guideline career offender. I think *Booker* in that respect has been very useful.

Again, I note that myself and I believe my colleagues -- and I have talked about that when preparing my statements -- we do not hesitate to invoke *Booker* when necessary.

Again, *Booker* is not the norm, but it is always there, and we use *Booker* when it has to be called upon.

I want to note also in regards to the appellate review of sentences in my district, there is not too much appellate case law, particularly after *Gall*. There is one recent case which I know the Commission is aware of, and that involved an upward variance which

doubled-and-a-half the sentence, and that is the only instance I have of any reversal by the circuit. I don't have any downward variances; at least in my court I haven't seen any.

Before *Gall* I believe there was some case law from the circuit involving one of Judge Gertner's cases. That is no longer the law after *Gall*.

Regarding any possible recommendations to Congress, I join most of my colleagues that minor -- mandatory minimums, at least for minor participants, should be reviewed, and my suggestion is perhaps like a safety valve. Even if Congress doesn't want to end the mandatory minimums, perhaps for certain minor minimum participants, they could be available if they meet certain requirements.

I also agree -- I have not thought about it, but I do have to agree with Judge Ambrose regarding possible recommendations regarding Rule 16, the Brady material.

In my district, it has happened a few times. Judge Gertner happens to be here, and she has had that scenario sitting in Puerto Rico by designation, and I have had it.

We have had cases where Brady is not provided to the defense, and the only reason the defense realizes Brady exists is because the federal defender has been extremely diligent and comes up with the Brady violation and brings up the evidence.

No longer is there a Brady violation because the defense obtains the Brady material, but it is very uncomfortable that sometimes that happens. It is not the norm, but it does happen sometimes.

I think perhaps that is a very good suggestion, and I second Judge Ambrose that Congress should look at it and the Commission should look at it.

Finally, I do have one other suggestion regarding the post-*Booker* era, and that is I think following *Booker*, there is going to be more instances, or more programs in district courts regarding offender reentry for drug court programs. I am not sure that those statistics are being kept nationwide at this time, because usually -- we are going to start a program in my court. I am going to be the one handling it, but I suppose if somebody is on

probation or supervised release and enjoys the benefit of this program and graduates, that is not going to appear in any sentencing statistic, because I am not going to revoke his supervised release for probation.

I would suggest that the Commission perhaps should start tracking these drug court offender reentry statistics, because at some point the Commission might be called before Congress to provide data.

Thank you for allowing me to testify here this morning. I am open to questions afterwards.

ACTING CHAIR HINOJOSA: Thank you, Judge Gelpi.

Judge Gertner?

JUDGE GERTNER: Chairman Hinojosa, Judge Sessions, Commissioners, and most importantly the Commission staff, who I have worked with for a long time, I want to thank you for the opportunity to speak today. I also will submit written remarks afterwards, because it is impossible for me to control myself to ten minutes so I will do my best to do that, but I will submit written remarks that will

undoubtedly be too long.

Let me say that I have great faith in the Commission and in a revised and revamped guidelines -- advisory guidelines system.

I have unquestionably been a critic, but, not withstanding that, I recognize the contribution the Commission and the staff has made to sentencing over the years.

My criticisms stem from my heartfelt desire to maximize that work, and to make it more relevant to what I do as a judge and to what I teach.

By the way, Judge Hinojosa, at Yale, not Harvard. This is a very important distinction.

ACTING CHAIR HINOJOSA: That is what I thought, but for some reason someone wrote Harvard for me. Maybe you have been promoted.

Just kidding.

JUDGE GERTNER: I want to make three general points, first a point about judging in the post-*Booker* era, then a point about the Commission, and then about Congress.

First about judges, I want to

address the fear which I have seen at the sentencing conference I attended in New Orleans a month ago and at presentations of commissioners that I have witnessed.

The fear is that with the guidelines being advisory, we will see an immediate return to the kinds of sentencing disparity that existed before the Sentencing Reform Act.

That fear in many of these presentations seems to define how the Commission sees its role, and to a degree how it anticipates Congress' response to post-*Booker* sentencing. I saw it, as I said, in New Orleans.

The panels were not about how to address this extraordinarily creative moment in sentencing; they were mainly about sounding the alarm that unless judicial discretion was controlled, all hell would break loose.

The fears of a return to pre-SRA sentencing are vastly, vastly overstated. There is every reason to believe that judicial discretion in the post-*Booker* era will be very different than discretion exercised before the

guidelines.

In fact, in my judgment, the greatest danger is not that judges will exercise their new discretion, but they will not when they should.

There are four reasons why I don't think the stories of the return to pre-SRA sentencing makes sense.

First is the existence of the guideline framework. Guidelines frame the sentencing debate, they gave us a common vocabulary about which to talk about sentencing.

Judges had not been trained in sentencing before the SRA, and then after the SRA they are only trained in guidelines so *Booker* or no *Booker*, guidelines are part of this discussion. Your work will always be part of this discussion.

The second reason we will not see a return to pre-*Booker* discretion is the data that the Sentencing Commission maintains. That had not existed pre-SRA.

With this tool, you can monitor trends and identify geographical or racial differences in sentencing in the same way a

police department uses racial profiling statistics to inform what they do.

If problematic patterns appear in regions or across the nation, they can be dealt with in ways other than mandatory guidelines.

Three, another reason why we will not see the same kind of willy-nilly discretion is that there is a growing body of literature, evidence-based practices, of what works. The challenge is how to make that body of work available to judges, defense attorneys and probation officers who can use it in individual cases.

Finally, unlike the period before the SRA, there is appellate review of sentencing, which is in a transition stage now, but I think will sort out; appellate review of sentencing that can deal with sentences at the margin, that deals with procedural reasonableness and substantive reasonableness.

I think that it doesn't advance this discussion for Commissioners to constantly be sounding the alarm about what will happen if the guidelines really become advisory. It will not be a return to pre-SRA patterns.

As a judge, what I do now, and to some degree I have actually always done this, a certain amount of satisfaction looking at the post-*Booker* era. First off I ask if the guidelines apply, but part of that analysis I think is traditional judicial critique of the guidelines that is essentially like an administrative procedure critique. What is the purpose the guidelines are fulfilling, what is the data on which it is based? Are these guidelines which in the language of *Kimbrough* were promulgated consistent with the Commission's characteristic institutional role? Were these guidelines set without a meaningful analysis of their relationship to the purposes of sentencing without empirical review?

Then if the guidelines don't apply, I ask the question, what should I do? What alternative frameworks, non-guideline frameworks about reentry, drug addiction, recidivism, that I should apply. What alternative framework should I apply, and what are the source of those standards?

If it is clear that punishment is the only alternative, that retribution trumps

all other purposes, then I will try to find out what sentencing links have been imposed by judges in like situations.

One more point about judicial discretion, and I think that this has framed our discussion for 20 years. It is time to recognize that judicial discretion in sentencing is not a spigot to be turned on or off. The alternatives are not binary; total discretion or none at all.

Again, like racial profil[ing] in arrests, the idea here is to monitor patterns, seek to identify the cause, to train officers, to minimize or eliminate.

Our goal here should be to help federal judges make better discretionary decisions, decisions that are more reasoned, more transparent, more persuasive, more effective and more just, and that's where the Commission, I think, comes in post-*Booker*.

Let me first say what the Commission shouldn't do, and this is reiterating this point. Hold a conference about sentencing guidelines and barely mention *Booker* except by reassuring judges that everyone is really

complying with the guidelines, not withstanding the Supreme Court's admonitions; constantly recite how lawless judges were before the guidelines and imply that the same thing will happen again. Stop seeing the Commission's role as the guideline police only monitoring judicial compliance.

I agree with those who have spoken before that this is a time of creativity and fundamental change, and here is what I would propose: Obviously there should be better guidelines. The Commission should focus on why judges have departed. We all know the stories: career offender, pornography, drugs, fraud, so this is a time to look at what judges are saying to you about the guidelines.

Two, better promulgated guidelines. Again, there is an emerging critique of the work of the Commission, not unlike any other administrative agency, which forces the Commission to justify what it has done, provide a more elaborate legislative history to judges, to provide data on which you are making a decision.

The time is passed when the

legitimacy of the guidelines is assumed. Judges will not follow that unless we know why.

Three, there ought to be non-guideline frameworks. The post-*Booker* area demands more than passive data collection. The Commission should actively participate in the search for alternative sentencing frameworks.

By that I mean studies on how best to deal with drug addicts or gang members or child pornographers.

If *Spears*, *Kimbrough* and *Nelson* have meaning, the guidelines cannot be the only sentencing framework the judges have, and if the Commission is really worried about the reemergence of unwarranted disparities, it will be no good to simply ignore the fact that judges are looking beyond the guidelines.

I want the Commission to give us help about the other places to look.

The Commission could use its website to cull reports that could inform about judicial discretion. It could function as a clearing house on a wide variety of topics like the effect of particular sentences on recidivism rates and reentry, on racial and gender

disparities in sentencing. It could give us the best information on evidence-based sentencing.

Although the Commission has not taken such an active role in the past, it has extraordinary experience and resources as a moderator on the debate on sentencing issues, just as it did in the conference on alternatives to incarceration.

You can capture this discretion by being the very best source of information on sentencing.

Four, the Commission should give us better information about sentencing practices and sentencing lengths. As I said, if there are no meaningful alternatives to incarceration, and I recognize there are times when the crime trumps everything, then give us help to determine what ranges are appropriate when the guideline ranges are not.

One judge described it as, "Give us a website. Put in the kind of case, the criminal record, guideline facts, see if other judges have departed in like cases and on what grounds, see what the ranges are so that we can then situate what we are doing in that range."

Probation in the District of Massachusetts has done something like that, and I use it all the time.

Give us better information about what other judges are doing.

There is a common law sentencing that is evolving now that is reflected in the opinions of the judges. The First Circuit has a First Circuit Sentencing Guide which now includes the district court. It didn't always include the district court, but if the district court is where the action is, we need to have access to each other's decisions in order to search, in order to enable me to follow what Judge Gelpi is doing in Puerto Rico, or Judge Ambrose, or Judge Dearie is doing; across the country.

Again, the way to shape what I do is to make what other judges have done readily accessible.

Again, with respect to the guidelines, I don't want to reiterate what others have said, but, again, I see a much more creative role for the Commission. I have been to conferences all around the world where

commissions talk about what you do with offenders, not compliance with the guidelines; how you effect -- how you do what works, how you effect meaningful change.

Specifically, in addition to what other judges have said, I think the Commission should take a look again at the acquitted conducts guideline.

There really was over and over again, in the past twenty years, the Commission has made decisions to eliminate judicial discretion when there was no need to. In other words, the decisions the Commission made narrowed judicial discretion without the courts having to say so.

I had a student who did a wonderful paper on acquitted conduct. I will make it available to the Commission.

Acquitted conduct had not been a regular part of sentencing before the guidelines. It was something considered on a case-by-case basis.

When the statutes change[d] in 1970, it was part of the racketeering statute, and there was suddenly a concern that there were

acquittals that were taking place because evidence had been suppressed. I mean, these were acquittals that were problematic to the sentencing judge because they were about a particular piece of evidence being suppressed, and that led to the Commission amending 1B1.3 to suggest that acquitted conduct had to be considered.

The practice before the guidelines was a sort of "it depends" practice. You considered it when it bore on the sentencing. You did not when it didn't so this changed in the acquitted conduct perspective to mechanistic rules, and it was really a product of a very different statute and a very different concern.

The Commission should look at first offender provisions. The Sentencing Reform Act directed the Commission to deal with first offenders, to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense.

The Commission changed the

definition of serious offense so as to sweep within the imprisonment range more and more first offenders. The result was a profound increase in the imprisonment rate; part of the reason that Judge Dearie was talking about.

We know from work that this Commission has done that real first offenders in fact have a different recidivism rate than others, and yet the guidelines sweep broader than they need to sweep.

Aberrant conduct, again, the Commission weighed in to narrow what had been a judge-carved out departure for aberrant conduct. The First Circuit had had a totality of circumstances approach, others have had a more narrow approach. The Commission tried to do something in between, but there is no need to do anything in between. There was an evolving body, a common law of aberrant conduct which judges were carving out.

Obviously the quantity guidelines need to be changed, the guidelines that privilege quantity above role. Judges and the public can understand the difference between someone dealing drugs out of their car and someone dealing the

same quantity of drugs out of a McMansion.

Judges and the public understand between someone who is contributing to the school that they teach in in after-school programs and the Enron executive who is buying his way out of jail by contributing to the symptom.

We can make those distinctions if the quantity guidelines and the role guidelines enable us to.

With respect to Congress, which was my third point, I want the Commission to be a real expert vis-a-vis Congress. In other words, you are the people who knew what you were talking about.

Candidly, in some of the statutes we have been obliged to follow, Congress did not.

Again, it is more than just the mandatory minimums. I concur with my colleagues who talk about the safety valve has to be changed; to just sentence someone to a mandatory minimum of ten years because of a driving under offense in which he failed to pay the fine, and for a variety of reasons he wound up a criminal history II, makes absolutely no sense.

Congress should change the safety

valve, or the Commission should change the definition of criminal history I.

Substantial assistance departures enables someone to go below the mandatory minimum. The case law in the First Circuit and elsewhere suggests that a judge can only go below the mandatory minimum to the extent of substantial assistance.

I can say it here. This is a completely incoherent standard. It essentially means that I say to the prosecutor, "What do you think? I will do whatever you can do." I can't evaluate a substantial assistance if that frames how far I can depart. It is, as I said, incoherent and largely ceding my function as a judge.

The armed career criminal statute needs to change. The definition of violent felony is way too broadly enforced.

The First Circuit has dealt with, and I think the Supreme Court is going to deal with, one of my cases, a question of whether resisting arrest is a violent felony.

Let me go back to my first point. This is really a time of maximum creativity. The

period is created because the Supreme Court, by declaring the guidelines advisory, has unleashed a broad discussion of that since, what works, what is fair, what makes a difference in terms of crime control, what is cost effective.

Mandatory guidelines, aside from everything else, drowned out all other voices in the sentencing debate. They focused only on one purpose of sentencing, which was disparity -- two purposes: disparity and retribution to the exclusion of everything else. It is as if, as one judge told me, all that matters is we are doing the same thing even if nothing that we were doing makes any sense.

In retrospect, many of our sentences, the sentences for crack cocaine, did not make sense.

The Supreme Court has made it clear in as many ways as it can that it really meant it when it said the sentencing guidelines were advisory, and unless the Commission and the courts work to create sentencing frameworks -- drug studies, addiction studies, recidivism studies -- drug frameworks apart from the guidelines, there will be no meaningful change in

federal sentencing practicing. Judges will intone *Booker*, "Guidelines are advisory," but, in fact, apply them.

So the question is not about compliance with flawed guidelines, but more about being the sentencing police. It is about what the Commission can do, as I said before, to have federal judges make better discretionary decisions; decisions that are more reasoned, more transparent, more persuasive, more effective and ultimately more just.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Gertner.

Any questions?

COMMISSIONER WROBLEWSKI: Thank you, Judge. Thank you for all coming. I am Jonathan Wroblewski for the Justice Department in Washington.

First of all, let me say to Judge Gertner, let me say that I am free, and I enjoyed your article.

I have two questions. First of all, I am very intrigued by, Judge Gertner, your vision of information sharing, information

sharing about -- among the judges, monitoring what is going on in the federal system. Right now I, and I think we at the Justice Department, am a little frustrated because we don't really have the information that we would like about what is going on in the system.

I wonder if you support the kind of open information sharing that includes identifying what individual judges are doing in specific cases, if you support information about what individual offenders are doing after their release, whether particular programs that have been used in prison or alternatives to incarceration that have been handed out have been effective or not effective in really having five or ten years of let's get all the information out, all of it, and let's honestly and clearly look at what is working and be prepared to say when something is not working? So that is one question.

Also, to Judge Dearie, you talked about -- and Judge Newman talked yesterday -- about the possibility of fundamental reform, something very large.

In the discussion we had

yesterday, it seemed to me there were five fundamental issues that were out there. One is whether the guidelines should be advisory or mandatory; what the degree of precision of those guidelines should be, severity levels, whether those guidelines should take into account offense characteristics or offense and defender characteristics, and also whether there should be incentives to promote effective reentry.

I think there is a way for all of the parties, including Congress, to get together. We have been spending the last 25 years, it seems to me, sort of fighting with one another and not really talking to one another, and the Justice Department has been as big an offender as anyone, and the PROTECT Act was one particular example, where there was no discussion amongst all the parties.

Is there a way to get all the parties together, with everyone actually willing to compromise a little bit, that it won't be exactly the way anybody wants? How do we go about doing that?

JUDGE GERTNER: I will start.

Per judge data on sentencing is

available in Massachusetts. Statements of reasons, not through the Commission -- I don't know if there are statements of reasons for the public, and there is at least one scholar who has evaluated the statements of reasons and determined individual judge's patterns.

Actually, I stand alone on this, from what I understand. I think it is a good thing, because I think if we can't justify what we do to the public, then we should re-examine it.

Of course, the concern that the conference had was that the Department of Justice was less than responsible in the way it dealt with that data, that there were judges that were pilloried for reasons that were not appropriate, but I think it should be open, but that may be a tall order. As I say, it is available in Massachusetts.

I do agree with the data about recidivism, what defendants do after release is terribly important. That data teaches us stuff. That is the most significant -- one of the most significant contributions of the Commission, is that there was no data before the SRA. We do

have the ability now to actually figure out what we are doing, not just in terms of who is complying or not complying with the guidelines, but what is happening to offenders.

I might add that reentry programs and drug programs on revocation were all we could do given the mandatory guidelines system. There is no question that those programs should now be pushed up at the front of sentencing, and there ought to be more diversion programs, and we should monitor a person. If it doesn't work, we stop and do something different, but to pick numbers out of the air doesn't make any sense.

JUDGE DEARIE: First of all, I am very encouraged to hear your optimistic tone, and the suggestion that, in effect, why can't we all get along, which I think is really very much needed in this debate.

I certainly think that there is room for compromise.

As I said before, as critical as I have been of the guidelines, and despite my prosecutorial stripe, having sentenced under the pre-guideline system, I appreciate the availability of guidance, if you will. I don't

think it should be so precise as to point me in a specific direction, because the variables with respect to each sentence and each defendant and each crime, are so seemingly infinite that one has to be open to an imaginative, creative, just sentence.

Being too precise in the guidelines somehow undermines that effort.

Severity I think is a question of who you ask, but certainly the statistics would suggest we have taken a serious turn towards too severe.

In my early guidelines days, before the -- departure jurisprudence developed, I don't know that a sentencing day would go by where I didn't feel that I imposed a sentence that was far too severe.

The sentence -- advising a client about a sentence, a plea of five years or possible trial exposure of ten years may have some significance in that context, but beyond that, I would have to be sold as a former prosecutor that in terms of the legitimate goals of sentencing, the difference between five years and ten years -- I choose those numbers

arbitrarily -- means anything.

Swift, certain punishment, I think, is far more effective.

Offense characteristics, I didn't by my remarks suggest to you that we should eliminate them entirely, but as Judge Gertner said, we are big boys and girls. Some obvious characteristics that would make a given offense more serious, we get that, but to use this long litany of offense characteristics -- they are used as bargaining chips essentially by the United States attorneys, and they try to use them for pleas. We don't know anything about that if you want to talk about transparency, and it has spawned all sorts of litigation through no real end, and I think it is a mistake.

There is a perfect avenue for simplification; for us obvious factors that would weigh, in a way so obvious they really don't need to be enumerated, but I am not suggesting all sentencing offense characteristics should be eliminated, particularly in the advisory system.

The question of whether it is advisory or mandatory, I think we have heard

from the high court on that.

I would welcome serious, serious debate on these questions.

I go home some days, and I think I speak for every judge in the country, wondering was I too severe, was I too lenient? I welcome the view.

Sentencing panels in the district, there is no reason why as a vehicle in the Sentencing Commission we couldn't create the same sentencing panels nationally.

Dearie to Gertner or Dearie to X judge, you pick them randomly. "This is what I've got. This is the case. This is the nature of the sort of milquetoast watered down 5K1. What do you think? This is a first offender. This is a technical first offender but clearly no first offender. What do you think?"

I get feedback all the time.

I have a sentence this afternoon. I have heard from three of the judges on my court.

What an opportunity through the Commission to share that sort of information.

It was the hardest thing,

pre-guidelines sentencing.

That's why I always laugh when people say, "Oh, I want the good old days." The good old days were hard. You suffered through them. You suffered emotionally from them.

VICE CHAIR SESSIONS: I would like to follow up with Judge Dearie and ask you -- for me it is very personal. I know all four of you personally and respect you all, and we are faced with a unique period.

As Commissioner Wroblewski said, there are discussions going on among the various branches of government regarding the sentencing policy, and we, the Commissioners, decided to take a very broad view of what we should be doing at this point.

In fact, we are viewing many things, including policy involving mandatory minimums as well as the guidelines itself.

There are discussions going on, and I appreciate greatly that you don't think that you are a Beltway kind of guy, but I think you should probably anticipate that in response to *Booker*, if by chance the statistics begin to change and the level of departures begin to

increase dramatically, you can expect those things to increase.

The question is whether the Commission takes a proactive role involved in these discussions or does not.

We have taken a very strong view that mandatory minimums are to be discouraged or, in fact, eliminated in the past. We have reports from 1991.

I happen to think the mandatory minimums are perhaps the most difficult things for judges to follow.

When you start talking about putting things on the table, there are various things that have to be put on the table. Just one of the things that we talked about with Judge Newman was perhaps going down the line of compromising mandatory minimums as opposed to broad-based, wide-range, mandatory guidelines.

Putting that on the table, what I heard from all four of you is should they be off the table?

The question is whether we as a commission, and I am asking for advice -- we as a commission, do we go down that road, we start

entering into discussions, because of course once you start walking down the road and Congress is involved, and the Justice Department is involved, it is sort of difficult to turn around and say, "I don't like this, and I am going to walk out."

Does the Commission take a proactive role in all branches of government in discussing the broad-based issues, or do we basically not get involved in that and essentially rely upon the system that we have at this point?

JUDGE DEARIE: With the greatest respect, if not the Commission, who?

I mean, the idea was, back in the 70s, put a prestigious group of people together who have no axe to grind, who know what they are talking about; lawyers, judges, members of the community, offenders, penologists, scientists. Put them all together. Give them a mandate, and let's be guided by their product.

I am ready to sign on. I don't think we have had that, with the greatest respect; I don't think we have had that.

And who else to lead that

discussion?

JUDGE GERTNER: Let me second what Judge Dearie said. I believe what the Sentencing Reform Act said about the Commission, it really would be an expert body, as you described.

I am skeptical of a deal, a discussion that says no mandatory minimums in exchange for broad-based guidelines, broad-based mandatory guidelines, only because the culture that I have described will mean broad-based mandatory guidelines will wind up with guideline adherence as we have had in the past.

The reason is, we have had 20 years of this culture so once you put "mandatory" before "guidelines," I really worry that judges are going to wind up going back to where we were.

I think the Commission should use its voice as I said commissions around the world have about mandatory minimums and focus only on mandatory minimums, and not try to bargain with -- in other words, the guidelines system is evolving now in an interesting, creative way. I worry that you stop that by putting that on the

table in exchange for the withdrawal of mandatory minimums.

And I think that there is enough of a movement about mandatory minimums now wholly independent of guidelines that we can do something about it.

JUDGE DEARIE: If I said anything that seemed at odds with what Judge Gertner said, I endorse 1,000 percent what she just said.

VICE CHAIR CARR: Judge Gertner, can you describe, you mentioned that when you want to know what other judges in your district have done on a similar basis, that the Probation Department somehow has information for you. What do they have and what do they provide?

JUDGE GERTNER: It is not a very good system, but they have a thing called -- I forget what it is called exactly, but there is a chart, and it would say nature of the offense, departure up or down, criminal history; a very, very rough measure. I would indicate what it is I have, and I would get a list of cases, child pornography cases, for example, where judges have departed, and then I have to take steps to

try to get access to present to the courts that are involved or the statements of reasons that are on the docket, as I said, so I can find out from the statement of reasons so I can get a sense of what the universe is.

It is a very gross measure, but it is enormously helpful.

VICE CHAIR CARR: Are they all within your district?

JUDGE GERTNER: All within my district, right. It gives me an opportunity to frame the discussion that I am having with my staff.

You know, Judge Woodlock had this kind of case; he did this. Judge Young had this kind of case.

I may think they are both wrong, but I also understand that I have to justify that within a single district.

What happens is, frankly, it drives my sentences higher because I am different, and if I am going to pay attention to what they are doing, it drives my sentences higher.

COMMISSIONER HOWELL: I want to

follow up on something you said in your remarks.

You talked about what happens if we continue five years down the road with the same advisory system we have now, Congress hasn't acted, so for whatever reason we are still under the same system we have now.

You know, we are seeing widening disparities between districts, as you know, from our presentations and the standard table lunch sheet where we are trying to have a baseline of statistics of what is going on nationally.

You made the comment, and I was very intrigued by it, that if disparities continue to be reflected in the statistics, they can be dealt with without mandatory guidelines.

I am interested in, you know, what your ideas are for how those -- not just those within-circuit -- disparities are brought to the attention of sentencing judges, and I think the District of Massachusetts has the system you described, which was very interesting just to inform judges about what is going on, to help not ameliorate any disparities within judges, within-district disparities, but I guess somewhat to help guide judges as to what the

ranges are.

Now we are talking about on a national level where it gets a lot more cumbersome, although that is what the guidelines make an effort to provide judges on a national basis, what the guideline ranges should be, but what are some of your ideas for how those kinds of national disparities would be dealt with about mandatory guidelines? The little statement that you made, that is what we are struggling with. That is the question.

JUDGE GERTNER: I think the statistics you have are starting points. For example, when Judge Cassell was speaking before Congress many years ago, there was a difference between departure rates, a judicial departure rate in Massachusetts and the judicial departure rate in a similar-sized city, which was Buffalo.

You know, we were all concerned, why was that so?

We began to analyze it, and you have the ability to analyze it so it is a great starting point for discussion. What is different about Buffalo and Boston that made sentencing disparities?

Well, one was the charging practices of the prosecutor. Substantial assistance departures were by far much more substantial in Buffalo; judicial departures were more narrow. In Boston we had a U.S. attorney who did not believe in bargaining except in very small numbers of cases so judges were, to some degree, making up for his rigidity in the departures.

We can discuss whether that was appropriate or inappropriate, but what I was trying to say is that in other areas where there is discretion, prosecutorial discretion, police discretion, you bring to us what the issues are. We talk about why, and in this national conversation we then try to say, "Well, these distinctions make a difference. Are there prosecutorial patterns that determine that, are there -- is our docket different, are there different kinds of cases? What is the reason for it?"

It may be that we will say, "Well, maybe we are doing something wrong."

I think that is the step as opposed to saying everybody has to do the same

thing.

COMMISSIONER HOWELL: I think we do. We distinguish between which circuits have fast tracks, which don't, what the immigration offense types that make up, may explain some of the differences. We do all that.

I mean, you know, once you get beyond those situations, what prompted the Sentencing Reform Act were a number of studies, some done by the federal judicial circuit, some done by the Second Circuit, that showed exactly identical cases being sentenced with vast differences between circuits and also within circuits.

Once we get beyond all that analysis that we already do in terms of trying to explain some of the disparities, both between prosecutorial practices like the Eastern District of Virginia, which doesn't rely on 5K1.1 but Rule 35 so that -- you know, there are all these differences that we are all very well aware of, and take account of.

There are still, given the vast significant and growing differences in guideline sentences between regions, there are still

clearly cases that are very similarly situated defendants, very similar crimes where they are getting different sentences in different districts. What do we do about that kind of disparity? And should we be concerned about it?

JUDGE GERTNER: I suppose to a degree yes, and particularly if it is race-based if there is any concern about that, but the Criminal Law Committee has a sentencing institute. I would love to see a presentation of the hypothetical case from the Eastern District of Virginia and from Massachusetts that you are describing, take it from a real case file, don't tell us what the case name is, and talk it out as a court, talk it out as a body, and highlight that, and the Commission can then talk about the differences.

You know, what is amazing about the culture of the judiciary over the past two decades is it has really come together on sentencing because of the guidelines, and now we take the guidelines away, that culture is still there. Nobody wants to be an outlier, but I think these conversations make a difference.

ACTING CHAIR HINOJOSA: Judge

Gertner, what do you base that on? I mean, that is almost common knowledge in the judiciary as a whole, that somehow Judge Dearie's statement -- I am also someone that stands for the guidelines, and I echo what he says; that feeling that one has before mandatory guidelines or after mandatory guidelines isn't the same for us as judges, and somehow we just grab a guideline manual and don't individually pay attention to every single case no matter what the system is.

JUDGE GERTNER: I don't have a national perspective, except my course, we try to bring in my course people from different parts of the country and often from different sentencing perspectives.

Judge Cassell, for example, is a participant in the EL sentencing court. You talk about a case. By the end of the day, I would be saying, "Well, boy, that is an interesting point. I hadn't considered that."

A student would be saying, "That is an interesting point."

It is not an assurance here, but that is how we come together as judges in the

rest of what we do.

You know, there are differences in negligence cases and patent cases, and the way we address it is talk about it and try to persuade the other person their approach is wrong.

That is the judicial way of doing it as opposed to sentencing where there have been paradigms imposed on high.

In any event, I think that this is the time to at least try that before we consider a return to a mandatory system of any kind.

ACTING CHAIR HINOJOSA: The point is, the implication is left that people, judges who sentence within the Guidelines don't give this the same kind of thought as somebody who doesn't.

JUDGE GERTNER: You said that last night, and I appreciate that comment.

The issue sometimes is not that they don't know the guidelines are advisory. The issue is what alternatives they have been presented with and what alternatives they know about.

ACTING CHAIR HINOJOSA: I think

most judges have read *Booker*, and most judges have good defenders and good prosecutors in front of them to make their arguments, it seems like to me, at least in my courtroom.

The other point you mentioned was the acquitted conduct guideline. Which is the acquitted conduct guideline?

JUDGE GERTNER: 1B1.3 says acquitted conduct has to be considered.

ACTING CHAIR HINOJOSA: Is there a particular application of it you are talking about?

JUDGE GERTNER: Yes. And it is the case law that also --

ACTING CHAIR HINOJOSA: Case law, but I just wonder where in the manual it would mention under 1B1.3? Is there a commentary someplace you see that, other than a reference to the case?

JUDGE GERTNER: I can provide it, Judge.

ACTING CHAIR HINOJOSA: That would be helpful, because that is something people have raised, acquitted conduct. I am not familiar with the guideline.

We are all familiar with Watts and the Supreme Court saying you can consider acquitted conduct. I am just not familiar with what you referred to on the acquitted conduct guideline.

The other issue I have for all the judges is just an issue that recently has come to me about what to do with data, for example.

This year there were 1,300 judges who sentenced individuals across the country, and we have statement of reasons from 1,300 different judges.

Then you dig further into it, and there are 30 judges that do almost 25 percent of caseload.

If you were to dig deep into it even more, from my personal standpoint, there are two judges on the calendar that do about 2 percent of all the federal sentences we have statistics for, and we represent less than .0001 or 2 of all the percent of judges that sentence people.

What do we do with data that is brought in where a small number of judges represent a very large number of the data that

we collect?

JUDGE AMBROSE: I am not sure what your question is.

ACTING CHAIR HINOJOSA: The question is, if you are a statistician, you have a representative sample of judges when a small portion of the judges are doing a large portion of the sentencing.

JUDGE GELPI: Just for the record, I mentioned it when I was speaking, for example we are the type of district that because we have so many multi defenders --

ACTING CHAIR HINOJOSA: I am not saying there is a particular answer.

JUDGE GELPI: In a district like ours, for example I mentioned to you, we use *Booker*, but the statistics sometimes will escape the general statistics because of the number of cases.

I think that perhaps the way to do it is perhaps to have surveys, send surveys to particular districts or, you know, at conferences or hearings like this, because if it is information from statistics, you are not going to be able to get it.

You just came up with another example in your district. I guess you sentence conservatively, and I guess Arizona or San Diego, those areas, it is a big bulk of sentencing, and sometimes the statistics can swallow what is actually going on.

As I said, in my district, I think the statistics don't reflect that *Booker* is actually used that much because of all the plea bargaining, but perhaps in your district as well you have a lot of plea bargaining, for example for illegal reentry cases, and that would be --

ACTING CHAIR HINOJOSA: Fast track.

JUDGE GELPI: I mean fast track, yes.

JUDGE DEARIE: I was an English literature major, and I am not even going to attempt to comment on the point.

JUDGE AMBROSE: I am not sure what you do with the few judges that have this disproportionate, you know, effect on statistics.

I want to go back for a minute to what Commissioner Howell was talking about. I

know there is this great fear we are going to have this disparity because judges are now going to follow their own idealogical agendas, particularly post-*Kimbrough*, but I really don't think that that is going to happen.

I know it is happening to a slight extent, but I believe it is leveling off, and I believe history will take care of that.

The very fact that most of us do start with the framework of the advisory guidelines, that is our first consideration for a lot of us. We look at them. We see whether or not they are the appropriate way to sentence. We rule on departures, we rule on variances, and then we do what we are supposed to do. We look at the factors and we see what the appropriate sentence should be in the case.

I think all of that is different from what happened before mandatory guidelines, and I think that history, even for new people, that history is there.

I will tell you, the most interesting thing I heard today is Judge Dearie's discussion of sentencing panels, which is not something we do in the Western District

of Pennsylvania, but I am certainly going to bring it up the next time we convene. I think it is a great sounding board.

Again, I agree with Judge Gertner. It doesn't mean I am going to agree with someone.

That is why it is so important, I believe, to have such an explicit record on sentencing.

I work on this now more than ever, and I hope that my colleagues do too, because I really believe that when your reasons are out there in the light of day, if they are sound, if they represent sound sentencing policy, people will understand.

Maybe I have too much faith, but I really do believe people will understand if you are really diligent about plugging in the facts that you find to the factors that you have considered.

COMMISSIONER HOWELL: Let me just respond, because I really appreciate your comments.

One of the things that I think is really exciting for the Commission right now, as

Judge Dearie said, we view this as an incredible opportunity, which is why we are doing these hearings, and we are keeping track of our Table 1 statistics. We, in some way, use those also as a starting point.

To us, that is part of our statutory mandate; to keep track of what is going on across the country with sentencings, and for us it is a starting point, and we dig down in these statistics all the time when we are seeing, you know, big differences between government-sponsored motions, between within guideline sentences, outside guideline sentences, upper departures, downward departures.

What exactly is going on to explain what we are seeing in those statistics?

At the same time, very important, our mandate is to develop guidelines, sentencing policies, that produce unwarranted disparities so part of our starting point in Table 1 is to see are those disparities warranted or unwarranted? So we always ask that question.

Now, it may come across to Judge Gertner in some of our panel discussions that we

are the sentencing police. I don't think that is our intention, and perhaps -- I have been on panels where I am given five minutes so I am not able to elaborate on some of the digging drill-down in the statute, the statistics we have done, so we may appear to be sentencing police because I am just able to touch the tip of the iceberg, but part of what we are doing now at these regional hearings is trying to simultaneously, parallel with all the work that we are doing, drilling down in these statutes, figuring out what is going on, and things are changing, and why -- you know, what -- why there are apparent differences in some of these statistics that we are seeing, both within districts and across -- with regional differences.

We are also taking a broad open-minded look at the guidelines to see how we can best elaborate on certain factors that some judges and some districts are using for either variances or departures. We are really trying to take a look at how the guidelines can best accommodate and provide this new guidance to the judges that they need.

It is very helpful to hear what judges would find helpful if there is a new system.

That is part of what we are doing also, is hearing what would be most helpful to judges also if there was a new system.

I guess my bottom line is we are not statistic-driven. We use the statistics as a tool, and we haven't completed and continued to do analysis on what those statistics are telling us about what is going on.

We may find that there is disparity that is maybe unwarranted. We haven't reached any conclusions yet about whether the statistics are telling us that the disparities we are seeing are warranted or unwarranted, and I hope that at the end of these regional hearings, part of our report is going to have a statistical part that all of our reports do, because that is an important part of what people depend on in reports, that empirical review, empirical analysis.

Part of what we are going to hear from the judges is, "What are you doing about unwarranted disparity?" We are trying to make

those evaluations and drill down.

There is no question, it is just part of the conversation we are having.

JUDGE GERTNER: One other question is whether or not -- how sophisticated your statistics are. For example, there may be an urban-rural problem. There may be more sentencing alternatives for incarceration programs in Boston than there [are] in the middle of the country.

So if I have alternative frameworks, it is because I am in a different place, and if that is the reason, then that is a warranted disparity so maybe you need some more sophistication to try to get to the bottom of it but I do think that that is part of the legitimacy of the system.

Thank you.

ACTING CHAIR HINOJOSA: Thank you all very much.

We will take a short break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: We will start with our next panel. We appreciate your presence here.

We have Rachel Barkow, who is a professor of law and director of the Center on the Administration of Criminal Law at NYU Law School. Her scholarship focused on administrative and criminal law issues. She was a visiting professor at Harvard and Georgetown Law Center, and she served as a clerk to Judge Silberman on the D.C. Circuit Court, as well as Judge Scalia on the Supreme Court. Her BA is from Northwestern University, and her JD from Harvard Law School.

We also have Christopher Stone, who is a Daniel and Florence Guggenheim Professor of the Practice of Criminal Justice at the JFK School of Criminal Justice at Harvard, and he is the director of the Hauser Center, a Nonprofit Organization Program in Criminal Justice Policy and Management. He also serves as the founding chair of Altus, an alliance of nongovernmental organizations and academic centers in Russia, India, Nigeria, Chile, Brazil and the United States that are jointly pursuing justice sector reform, and he received his bachelor's degree from Harvard, and his law degree from Yale and master's degree in

criminology from the University of Cambridge.

We also have Professor James Byrne, who is a professor of criminal justice and criminology in the Department of Criminal Justice at the University of Massachusetts, Lowell. He has taught at the University of Massachusetts since 1984. His primary concentration is in the area of evidence-based corrections practice with a particular focus on community corrections and offender reentry.

Dr. Byrne received his bachelor's degree from the University of Massachusetts at Amherst and his master's and doctoral degrees in criminal justice from Rutgers in New Jersey.

We do appreciate you taking your time to be here today.

Professor Barkow, we will start with you.

PROFESSOR BARKOW: Thank you, Judge Hinojosa and members of the Commission. Thank you so much for inviting me [to] share my thoughts with you today.

I would like to start with what I think is the most fundamental question facing the Commission after *Booker*, and that's whether

the Commission should endorse the current advisory guideline regime or endorse reform and seek a return of the guidelines to something more like a pre-*Booker* mandatory status.

After *Blakely* was decided in 2004, I testified before the Senate Judiciary Committee that I thought the guidelines were unconstitutional, and at the time I thought voluntary guidelines, advisory guidelines, were likely only an interim solution, because I was worried they would lead to too much unwarranted disparity so for the longer term, I told Congress that I thought Congress should direct the Sentencing Commission to help it to identify those guideline factors that were sufficiently important that they should trigger as a matter of federal law a sentence enhancement, and that those factors should be treated as elements of the offense, and that they should go to the jury.

I didn't think that if the Sentencing Commission did that, that they would single out very many factors for this purpose, because I don't think, frankly, that many guideline factors are sufficiently important

that they would be offense elements, and it would be unmanageable if you apply those factors in that way, because trials would be too cumbersome.

So what I had expected with that proposal was that the Commission would identify some small number of fundamental areas that could be left to judicial discretion in a way they would be under an advisory guidelines scheme, and the jury would just treat those as an offense element, and everything else would be part of an advisory guideline scheme.

I find that was the right way to balance the control of unwarranted disparity and leaving room for individual decision.

When I testified, I reserved as a possibility it might not be necessary if it turned out that advisory guidelines had a high enough rate of compliance, but I confess at that point I was skeptical.

Five years later, I think the Commission's data is proving me wrong, and I think that judges are continuing to comply with the guidelines in most cases, or to depart with a government-sponsored motion in numbers that

are comparable to guidelines compliance rates in states that have mandatory advisory guidelines throughout the country.

These are just the numbers you see pretty much everywhere and probably most likely just reflect variations in human behavior.

I know some representatives from the administration have highlighted for you that compliance with the guidelines has fallen since *Booker* was decided, but often what is not highlighted so much is that the overwhelming driver of these below-guideline sentences are government-sponsored motions for substantial assistance, and the government's fast track policy are the main reasons why the guidelines aren't followed, and we know that departure in that context is often significant.

Judges on their own are accounting for very little outside the guideline sentences.

I am not saying it is not happening, but I think the numbers are reasonable, and where departures and variances are current without government motion, in the overwhelming number of cases that I am reading coming out of the course, it seems to be

happening in situations where the guidelines themselves are in need of reform, because the punishments that they are dictating seem to be disproportionate to the offense.

That coupled with appellate oversight to keep judges from going too far in one direction or another, and the Commission keeping track of any area that might need reform, I think this system is actually striking the right balance between proportionality and uniformity.

I don't think there is sufficient evidence to change the regime at this point. I think the Commission should continue to monitor this closely. If compliance rates start to diverge dramatically from the rates in other systems, if there is evidence of racial or other inappropriate disparities entering into judicial decisions, if you are finding there is a problem with deterrence and crime rates as a result, then I think you need to reconsider the current framework and maybe something along the lines of what I had thought was appropriate in 2004 might make sense.

But even if that were to happen,

and you were to start thinking about fundamental reform along those lines, I think you couldn't do anything until you conducted a wholesale review of how prosecutors are making their departure motion decisions in each district, and how those decisions affect everything else that is happening.

I think the discretion of prosecutors and judges is intertwined in a way that you just can't separate. If you try to just fix the judicial part of the puzzle without understanding what prosecutors are doing, I think there is a potential to create a system that might be unwise.

So if you were thinking of fundamental reform, I think it would be a necessary precursor to get the data from the Department of Justice about what is going on in each district.

I recognize saying that is a lot easier than getting the data, but I think that is a necessary step.

In that regard, I would point out even when we had mandatory guidelines, we had stark disparities based on factors like

substantial assistance and fast track.

Those disparities just weren't garnering the same kind of political attention because the Justice Department wasn't complaining about them, and no one in Congress seemed to mind those as much as they were minding the judicial departures.

From a policy perspective, from the Sentencing Commission's perspective on what is an unwarranted disparity and what isn't, I think those disparities are just as questionable and require immediate review as any other.

Frankly, perhaps more so because they are based often on just administrative needs and not the culpability of the offender.

Just to kind of sum up my thoughts on this first main point, I think at this point it is best to keep the advisory guidelines in place, to keep monitoring them, and then at the same time take a close look at the relationship between what is happening with judges, but also what is happening with prosecutors.

Now, I think that is the most fundamental question, but I would also like to just briefly highlight four other areas of

discussion for today.

First, as I know others have, I would like to urge the Commission to reconsider the use of acquitted conduct to increase sentences, and I appreciate the question of where does the Commission say that's okay. I think what needs to be done is the Commission just needs to say it is not okay. I think that would be the best way to deal with the fact that I think judges are under the impression it is okay, and I think some actually think they are required to do it if they are to be true to the guidelines treatment on relevant conduct.

In this regard, even though I think it is important to know Congress never required it, and what happened was the Commission just made a decision at the outset that the guidelines sentences would be increased on the basis of relevant conduct, and didn't discuss whether it mattered, whether it was charged or whether it was charged and somebody was acquitted. I think clarity is what is important here.

Every other jurisdiction that has adopted sentencing guidelines since the birth of

the federal guidelines has looked at this approach to acquitted conduct and rejected it outright.

I think this uniform rejection happens a lot, and I think it has been for good reason. I think increasing sentences on the basis of acquitted conduct disrespects the jury system and transfers undue power to prosecutors, and it undermines faith in the criminal justice system.

I don't think if it is looked at closely you can find any justification for using it, and I think it has, frankly, an unnecessarily dark shadow on the overall guidelines regime and what people think about it so if the Commission is taking a fresh look at things, I put this on the list of things to consider and look at closely.

Second, I think the Commission should reevaluate the decision to set drug trafficking guideline ranges around the mandatory minimums set by Congress.

This is one of those areas where there are a fair number of departures and variances, and from judges I would like to just

note from across the etiological spectrum.

The Commission in its 15 year report cited a survey, and it is almost 74 percent of district court judges, 83 percent of circuit court judges think that these drug punishments are greater than appropriate to reflect the seriousness of offense.

This is from a diverse bench, that, if anything, frankly, is more heavily-weighted toward Republican appointees so I think those numbers are saying a lot about the wisdom of these sentences, and I can hear the feedback from judges reflects a flaw with the guidelines and not with the judges themselves.

Just to talk about that briefly, I think -- I can understand why the Commission would set the guidelines to mandatory minimums to avoid cliffs in sentencing, but I think that you can't do that without conflicting with the goals of sentencing set out in 3553.

There is no evidence Congress thought that all sentences would be keyed to that, that there would be anything other than the mandatory minimum quantities that Congress specified under statute, and Congress did

consider it, but it obviously didn't consider the Commission's empirical evidence or expertise.

If the Commission then uses that to set sentences for everything else, that means that none of those will be set on the basis of the Commission's expertise or empirical evidence.

As a result of that, I think there is a significant risk that they are disproportionate and an inefficient use of our prison resources.

I would say the best advice is in the absence of a congressional directive to you that the guidelines should be built around mandatory minimums, I think the Commission should reconsider those sentences and look to see whether empirical evidence supports them.

I am pretty confident if Congress disagrees with that, they will let you know they will put things back to the way they were before, but I think it is not the Commission's responsibility to try to read the tea leaves of the mandatory minimums that way, because I don't actually think that was the intent of those

acts.

My third point is not about the guidelines in and of themselves, but actually about the Commission's function, and here I would just ask as the Commission moves forward, I think that it is important for the Commission to prioritize empirical research and data analysis.

The Commission's research reports and data analysis are the finest in the country of any sentencing commission, and now, I would argue, is the time for the Commission to take that research to the next level and start to provide Congress, courts, other interested actors, with additional information other than the kinds of things you compile right now about sentencing conformance rate.

I talk about this in the written statement, and I want to keep things relatively brief.

So the three things that I think the Commission should pay a bit more attention to would be the fiscal and racial impact of any proposed sentencing launching by either the Commission or Congress, to evidence-based

research about what works and what doesn't in fighting crime and curbing recidivism so judges can consider that in looking at alternatives to incarceration.

Finally, again, to this idea of what prosecutors are doing. I know the data is hard to get, but I would make as much of an effort as possible to get it.

I am not saying the Commission hasn't looked at these issues, because it has, but I think it needs to become a central priority, and at the end of the day I think this is what is your most powerful persuasive tool to Congress.

I think this has been true for state sentencing commissions with their state legislatures, and I think Congress is likely to find at least some of this information valuable as well.

I think that is absent from the debates over loss of sentencing policies at the federal level, and I think the Commission is really well placed to put it front and center.

Fourth and my last point, I just want to respond to the Commission's request to

provide statutory changes to recommend to Congress, and here I just want to agree with the work the Commission has already done, and that is to recommend, as the commissioners said, and as just about every sentencing expert you talk to would say, that Congress should eliminate mandatory minimums and allow the Commission to set sentencing on the basis of what it finds in the empirical evidence support.

Second, and again, to eliminate the disparity between crack and powder cocaine.

I would imagine it is frustrating for the Commission to keep making these recommendations and not having them be acted on immediately, but I know the idea is gaining traction now, and whenever anybody discusses them, the first place people point to is the Commission's research on it so it has been hugely valuable, and I think it is a battle that is worth fighting continuously, and I think ultimately the soundness of the arguments will prevail.

So thank you very much for inviting me to participate in this discussion. I applaud the Commission for holding these

hearings, and it is a real honor to be part of them.

So thanks, and I am happy to answer any questions.

ACTING CHAIR HINOJOSA: Thanks, Professor Barkow.

Professor Stone.

PROFESSOR STONE: Thanks very much, Judge Hinojosa and members of the Commission. It is a pleasure to be here with you today.

I really would like to use these ten minutes just to talk about one thing, and that is the racial disparities in incarceration in our country, including in the federal system, and in particular the effect of criminal arrests, minor offenses, on those.

The Commission through some of its recent work on the impact of minor offenses on sentencing has actually put its toe in these waters in a really important way. This work and research and understanding of these trends is happening. It is beginning to happen both in state systems and the federal system, and my one point, if I am going to encourage that work of

the Commission, encourage you to do that jointly with research going on in the states and think broadly about the intersection of the sentencing system in the federal courts with state and local practice.

This is an area where by confining ourselves to the judicial system, the federal judicial system, we miss a lot of the action.

Through the impact of prior offense record, you are bringing in all the policy and actions of state and local law enforcement every day in the federal system so when local law enforcement decides to double the number of minor offenses, the people arrested for a ten-year period, that has a huge impact on the number of prior records that are showing up in your sentencing.

The same guidelines applied when the guideline system was adopted and today will produce very different sentences because of the huge increase in the use of arrests as a law enforcement technique in minor offending.

What I want to focus on is very, very -- what I call trivial offenses, very minor offenses. I will confine the quick statistics I

want to share with you to disorderly conduct; about as trivial as you can get.

There are more disorderly conduct arrests every year in the United States than there are for all violent offenses combined.

The United States in general has about 90 percent of the arrests in this country are for, essentially, non -- not only non-part 1, non-part 1, non-drug, non-weapon; very, very minor offenses.

It is what distinguishes the use of the arrest power in the United States from almost every other country.

The arrest rates, for example, overall arrest rates in this country versus Britain are about twice what they are in Britain, and yet for any offense you mention, they are actually a little higher in Britain so the arrest rate for burglary, arrest rate for robbery, arrest rate for almost anything is higher in England, but the overall arrest rate here is about twice as high, and all of that difference is in three offenses: It is driving under the influence, possession of marijuana, and disorderly conduct.

So these minor offenses are both the distinguishing feature of the American system of justice and have a disproportionate impact on the records that offenders bring with them when they appear for sentencing, and they have huge racial biases in them.

Just to very quickly take you through the five charts that I passed out, this is a reminder of what you already know, but we can see it particularly vividly in the state systems.

The first two charts are exactly the same data. This is the rate of white incarceration and rate of black incarceration in the United States in different state systems.

Now, the point here is simply that the incarceration rate for whites and blacks is hugely different.

More importantly, it doesn't follow the same pattern. That is states with high white incarceration rates are not the states with high black incarceration rates, and if you thought the rate of incarceration in different states was varying because of the severity of the sentencing scheme, you would

think these things would at least vary together, but they don't vary at all together, and the first two charts show that.

The first one also just reminds us that the whole world -- the incarceration rate for every other country -- over 200 countries in the world where we have data fall below that horizontal line, it is a reminder of how extraordinary the rates of black and white incarceration are.

Professor Barkow's paper talks about [what] some of the statistics are. You may have seen in the *New York Times* I think just a week ago, for the birth cohort in 1990 now in the United States for white children born in 1990, 3.6 percent of white children born in 1990 had a father go to prison in the first 14 years of their life; 25 percent of black children born in 1990 had a father go to prison in the first 14 years of their life.

You can cut these statistics any [] number of ways. Professor Barkow does also in her written presentation.

This is, in my view, the glaring injustice in sentencing in the United States.

The whole world knows this is the issue, and I think given the breadth of your review of the framework, this is an important issue to take a little time on, particularly because I think you have something you can do about it.

Let me just go through this very quickly.

These rates of black/white incarceration can be stated ratio. The third chart here just describes those ratios and takes advantage of the fact we have a huge variance -- this is what statisticians like. You can't do anything without variance, and we have a lot of variance in the ratios of black to white incarceration rate by state. It is all pretty high.

Except for Idaho, every state has at least twice the incarceration rate for blacks that it does for whites, but you see way up at the top, New Jersey, New Mexico, Wisconsin, Iowa, not necessarily the states you would guess would have the widest disparity rates in black/white incarceration rates in the country.

Why is this?

This is really what I want to get

to. The next chart, the final chart, is a way of trying to get at that.

When you do individual racial disparity studies of sentencing decisions in the federal system or in the state systems, almost all of the disparity goes away as explained through legitimate factors, and it is the hypothesis of this research we are conducting now at my program in Harvard is a lot of the reason the racial disparity disappears is because it is buried in prior record; that because a lot of those prior records begin with very minor offenses, and because very minor offenses are largely distributed not based on conduct but based on police deployment decisions and arrest decisions, that the disparities in those minor offenses translate in to differences in records.

So while the guidelines say you are supposed to be treating like with like by treating people with the same prior records the same, in fact a black person with a prior record and a white person with a prior record are not the same, because the patterns of enforcement, the patterns of arrest in their respective communities, on average, are so different.

But, again, here the variety across the United States gives us a handle on that.

The racial disparity in these trivial arrest also varies tremendously by state to state.

What is interesting is that the variance in these trivial arrests explains more than a quarter of the variance in the racial disparities in sentencing.

Nobody is going to prison for these trivial arrests. It is not that. It is not that differences in arrests are explaining what people go to prison for. It is changing the imprisonment decision when they get accumulated in prior records.

We can talk more about that in the discussion.

I have been -- I am a long standing interested observer in the federal guidelines.

For the 17 years that I was Deputy Director and then Director of the Bureau of Institute of Justice, it was my pleasure to act as midwife to the birth of the *Federal Sentencing*

*Reporter* and to serve as occasional editor for some of the most important scholarship on sentencing that came out. I am a huge fan of that.

I am not an expert in that.

I study policing systems, I study state and national systems of justice both in this country and others, but this issue of racial disparity seems to me to be one in which the work of the Commission not only can -- the review you are doing now cannot only make corrections to what is currently happening in the system, but you can play a leadership role nationally in the better understanding of how prior record arrest patterns affect sentencing and affect sentencing disparities we see.

As I said, your early work on that is important and has already broken ground, and I hope we can pursue some of that work together.

ACTING CHAIR HINOJOSA: Thank you, Professor Stone.

Professor Byrne?

PROFESSOR BYRNE: Judge Hinojosa, members of the Commission, thanks for asking me to come.

My background is very different from the other two people you heard here. I have done a lot of the work in the area of violation research, and that is what I will focus on, particularly in the area of alternative sanctions.

In my written testimony I have gone through the various types of alternative sanctions that are available in the federal system, but also looked at the existing empirical research and the evidence-based reviews of various types of alternative sanctions you might want to consider as the Commission moves along.

What I would like to do in my ten minutes of fame here is to summarize the written testimony, focusing specifically on alternative sanctions, and within that group, focusing specifically on the U.S. citizens subgroup that the federal sentencing commission probably can do the most for.

That doesn't mean I don't think non-citizens in this system are important; it is just some of the recommendations I will make go beyond anything you can do as a Commission with

that group of non-citizens, at least at this point. I could be wrong.

Let me begin by just talking about the various types of alternative sanctions that are available and trying to make some sense of why they are underutilized today, and then make some recommendations, three specific recommendations for some reforms in that area.

It is pretty clear as I review it, review your own report, Sentencing Commission reports, that alternative sentences are being underutilized, sanctions are being underutilized for federal offenders who fall into the zones A, B and C of the sentencing guidelines tables grid.

That is pretty clear, and the trend has been a decrease in utilization between 1997 and 2007. You see a decreased use of alternatives going down from 24 percent in '97 to 14 percent in 2007. That is at least partially attributed in your own reports to the increased proportion of non-citizens in particular being held for immigration violations in the system. That is certainly part of it.

However, when you break out the

subgroup of U.S. citizens, you still see that pattern there.

Looking specifically at what is happening in terms of sentencing within each zone, what you see is that prison is still the sanction of choice within each of these zones overall: 48 percent of zone A offenders receive a prison sentence, 58 percent of zone B offenders, 66 percent of zone C, and 94 percent of zone D offenders. Clearly we don't see much disparity at the other end, 94 percent in zone D. We are seeing a lot of variation across A, B and C.

Within that variation, looking specifically at U.S. citizens, you see 18 percent of U.S. citizens that are sentenced receive -- if they are zone A receive prison sentences, 32 percent of U.S. citizens are receiving prison sentences, and 37 percent of zone Cs are receiving prison sentences.

Clearly there is a subgroup of U.S. citizens that are still not receiving alternative sanctions, and again the question is why?

Ninety-two percent of U.S. citizens fall

into zone C, we are sentencing them to prison.

My view is, and my conclusion from looking at the data is that alternative sanctions can be expanded to include current zone A, B and C offenders that are receiving prison terms, without undermining the original intent of the sentencing guidelines. Specifically, I think it will increase uniformity in sentencing, because that was your recommended sentence, presumptive sentence for offenders in each of those zones so that should be an improvement.

In terms of public safety, there is no evidence from the evidence-based reviews I have seen that you get an improvement in public safety, a specific deterrent effect, by incarcerating this group of people in zone A, B or C.

In that instance I think it is a very specific example for subgroup offenders in zone A, B, C, the U.S. citizen offenders. Clearly there is something to be done.

Now, the third point I will make is that when you look at the sentencing guideline grid, specifically when you look at

the many, many categories, the 43 categories of offense seriousness levels across the six categories of criminal history -- I think Chris Stone's points about criminal history certainly come to bear here -- there are too many cells, and when you look at the cells where somebody is -- can be considered for at least alternative sanctions, there are too few of those.

One thing you can say, and other people have told this to this Commission -- I know I have read that testimony -- keep it simple. Reduce the number of criminal history categories and reduce the number of offense seriousness levels.

Certainly the rule of thumb ten, I don't know why everybody picks ten. Ten makes sense. Going across, you can have six, you can certainly go down to five no problem, truncating the top two, but certainly Chris' comments make you wonder if you should expand that first level as well, so talking about going from six to three or six to four in criminal history, I think that is something that should be considered with the purpose of increasing the zone that would be the alternative sanction

zone. I would say, my recommendation would be between 20 to 40 percent so I would like to see a doubling of the zone myself, and, again, I think that is something that could be done, and I think research that directly compares prison, longer and shorter terms, and directly compares prison to alternative sanctions suggests you can do that without any threat to public safety.

So then what comes back to the commissioners is would we have more proportionate punishments as a result of this new system, and that is something, again, I think certainly the Commission should consider.

I think you can do that, again, without affecting public safety.

Utilizing existing alternative sanctions, now, you could improve public safety, however -- and this is my fourth point -- by looking closely at the alternative sanctions you currently allow judges to choose from and improving those alternative sanctions.

Specifically, the types of alternative sanctions we have in the system now still rely on, at least the top tier for zone C, a period of incarceration followed by a period

of home confinement or placement in a residential treatment center or halfway house.

We have zone B offenders getting probation plus home confinement, and you have zone A offenders, at least the presumptive term, would be about 39 months of federal probation.

In each of those cases, in particular for the zone B presumptive and zone C presumptive, we are utilizing sanctions that I think emphasize too much the surveillance control components of alternative sanctioning and not enough offender treatment to change the component of that, and I think if you look at the evidence-based research reviews that have been done over the last 10, 15 years, they are very consistent on saying one thing: Surveillance-oriented alternative sanctions do not work in the sense that they do not provide any improvement in public safety.

That doesn't mean that those alternative sanctions are not advantageous over prison, even in their current form, but if you are looking for a specific deterrent effect you, won't find it in the current alternative sanctions we have, at least looking at the

research as I did.

One of the frustrations I had to writing this testimony up was realizing that there is very little out there in terms of independent external evaluations of federal probation, of probation plus confinement or of split sentencing.

You would think that if we have had these for 25 years in place, that there would be a subgroup of evaluations that I would be able to look at.

We have moved much quicker in the area of hot spots, policing, evaluations in that area than we have here, so we have 25 years of alternative sanctions in place, but we don't have a body of research that I can review and summarize to you and say, "This is what the evidence shows." That is frustrating from my perspective.

That means when you read my testimony, the reviews you are reading are based on state level programs, state-level initiatives so that is important to keep in mind.

With that, still with that I would say we need to expand utilization of alternative

sanctions, and I think there's a justification for doing that, but within that I think we need to look more closely at perhaps expanding the array of sanctions available.

Let me be specific in terms of what I think the evidence shows, which is that a combination of surveillance and treatment or a balance between the two needs to be in these programs.

Intensive supervision programs, if you read the evidence-based reviews, for example, they say the early 90s programs that were developed didn't work, didn't reduce recidivism.

In fact, if you look closely at those evaluations in the subgroup, what I would call quality evaluations, they did show that intensive supervision, this notion of intensely getting into a case and having an impact, can make a difference if what you are focusing on is not tail them, nail them and jail them, but what you are focusing on is trying to change behavior, lifestyle change, which is treatment.

That is certainly one type of alternative sanction that I think we need to

consider.

The second point I would make is that we moved away from boot camps in the early 90s because we said the research didn't work. But you know what? Take a close look at the boot camp research. What you will see is this notion that we can replace longer sentences with shorter sentences, and if we could provide some type of intensive program for offenders, that is something to consider, but maybe what the intensive program should be is not marching in place or work programs, but maybe it should be intensive treatment.

If you think of the boot camp model, the new boot camp model being intensive residential treatment for six months, you know what? That might have an impact on public safety that you wouldn't have seen in a boot camp.

Third would be split sentencing. This is something certainly I think is worthy of further research, and that is right now when offenders come out from their average nine-month prison term and go into a community program, nine out of ten times -- I'm sorry -- three out

of four times, they are going into home confinement. Maybe we should be considering moving them into -- from intensive treatment within a prison setting to intensive treatment in either an out-patient or residential setting, and somehow doing that prison to community transition that everybody talks about with reentry within that subgroup of offenders.

The point is maybe you need to rethink split sentencing and not focusing on when they come out the confinement aspect of it or the control monitoring aspect of it, but really the offender change part.

Now, that said, three basic recommendations that I make: First recommendation, and I will try to put some numbers to it to see what impact it has, and I go into more detail about it in my presentation, the first recommendation would simply be to think about restructuring federal sentencing guidelines, and here a mandatory component might not be a bad idea for this subgroup; to limit the use of prison-only sentences for zone A, B and C offenders. I think you could do that without any impact on public safety, and I think the research

demonstrates that.

If you just did that for U.S. citizens, you would see about a three percent decrease in the 2007 prison population so about three percent drop. Not big, but a drop.

Again, you are going to be able to do that with no change and effect on public safety, as I read the research there.

Second point that I would make is redesigning existing alternative sanctions, and there specifically I am talking about the zone B presumptives and zone C presumptive sanctions based on a review of what works with specific subgroups of federal offenders, and there we are talking about white collar offenders, drug defenders, sex offenders, et cetera.

These new generation sanctions, like the ones I described, I think you will find more reduced recidivism. If you believe the evidence-based reviews, the recidivism reduction effects you should expect are modest, about a 10 percent overall reduction in recidivism among these groups, even utilizing these new strategies.

Again, rate of return to prison

would go down among these federal offenders.

Again, just focusing on the U.S. citizens that you would put in these programs, I think you would see on the order of another 3 percent decrease in the federal prison population. That is a modest recommendation and I think a very modest estimate.

Others have made statements that suggest a 50 percent reduction with these programs. I just don't think it is supported by looking at the subgroup that I am here.

The third point and probably the most controversial to this group is to look specifically at the offenders in offense levels 12 to 14 currently, because when you break out the offense levels in the most current data that I looked at in those groups, you have a lot of offenders falling in those three offense level categories.

I think you need to truncate the 43 down to 10, but I think you need to look specifically at the impact on the number of offenders falling in those categories.

You have about 5,400 U.S. citizens eligible for alternative sanctions that would

fall in that zone if you moved that zone into an alternative sanction zone, and that would reduce the overall federal prison population by about 8.5 percent; again, with no impact on public safety, moving them to that area, as I see it, at least as I review the research.

This overall suggests that without doing anything fancy here, utilizing existing sanctions with some improvements in the area of the alternative sanctions in terms of emphasizing treatment as well as surveillance control, you could reduce the federal prison population by about 15 percent, again extrapolating from 2007 numbers. That is a start, and that is what I would recommend the Sentencing Commission consider beginning in terms of reforming in the area of alternative sanctions.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Dr. Byrne.

Questions?

VICE CHAIR CARR: First of all, I would like to compliment you on being one of the fastest talking trilogies of panels we have had.

Professor Stone, your research is

enlightening and disturbing. I am curious to know what you would have us do with it. Obviously if we were to reduce the number of criminal history categories and expand within each one the number of criminal history points, it might do something to ameliorate the impact on federal criminal history categories, of what you described as the disparate, unwarranted and perhaps prejudicial nature of arrest records around the country. What would you suggest?

PROFESSOR STONE: I think -- as a first matter, I think there are certain prior offenses that should simply be taken out of the calculation. I think that is in some sense the most dramatic, and that is what would make the biggest difference.

I don't think you would be acting alone. I think what this body of research and the patterns of arrests and convictions that we are seeing for these minor offenses is going -- this is alarming to police officials, this is alarming to state legistlators, this is alarming to many people.

I think what we are going to see in the next ten years is a more understanding

treatment of what these minor arrests and convictions actually indicate.

I am not an advocate that the police should, when they see a disorderly group on the street, drive on by and not get involved with that, but their involvement leads to arrests and conviction of minor offenses in some neighborhoods and not in others.

We are not going to change all of that overnight, but we can change how it is treated.

In Massachusetts, where I am currently working and living, there is a lot of focus on criminal offender -- criminal history used by employers and their records.

One set of recommendations around that kind of thing is, "We will seal them earlier." That doesn't help.

On the other hand, taking the most minor offenses completely out of those criminal records that employers see can make a big difference in employment and reentry patterns.

So I think we are going to see in a number of policy areas in the justice system, I hope, in an effort to try and ameliorate some

of the racial disparities that are caused here, the stopping using these most minor convictions and arrests in the way we do now, and I think you could take more steps in that direction, both on the research side and how you direct judges to use these prior records.

VICE CHAIR SESSIONS: Professor Stone, your concern, we just dealt with minor offenses just over the past couple of years. What we based our decision upon was not necessarily racial impact, the studies you relied upon or engaged in, but we relied upon the impact in terms of recidivism so I am reminded particularly about driving without a license, or suspended license offenses, and there seemed to be based upon our recidivism studies some consistency, that there is some increased recidivism rates as a result of persons who were convicted of those particular offenses, and therefore when you are talking about criminal history, you are basically talking about black people who reoffended. As a result, that was kept in.

I am interested to know whether you know of any recidivism studies out there,

not in the federal system because I don't think we have any, regarding disorderly conduct offenses. That was my first question.

Dr. Byrne, I have another question. You cite statistics about incarceration rates. One of the difficulties in our statistics is, frankly, that we do not delineate sentences which are time served; that is, persons that spent one day or less in prison, and then we use supervised release as opposed to probation.

Frankly, I will tell you in Vermont, the federal court in Vermont, that is exactly what I do. I impose time served, despite the fact the time was five minutes, and I think that is fairly consistently done in various parts of the country.

My question is, would that, would a study be helpful to delineate what percentage of those people who go to prison in fact are in prison for time served, if they are really probationary sentences, so those are the two questions I have.

I have an opportunity to ask questions so that is why I asked them both at

the same time.

Professor Stone?

PROFESSOR STONE: Under the second question, the answer is yes, and good sentencing analysis, at least at the state level, does distinguish precisely the kinds of sentences you were talking about.

There is a lot of gross statistics. You could take very broad statistics of sentencing decisions or incarceration rates, but the data I am using here, and increasingly the data people study on these matters, would distinguish the circumstances that you are describing, and I think it is important to do so.

The more important point here from my point of view, from the first point, the offenses that we are talking about here -- and I used disorderly conduct because it is the common one across the country. It is the third most common offense category, you know, arrest across the country -- it is not about conduct. We call it conduct, but you can't study its recidivism, because what triggers an arrest for disorderly conduct is much more about a deployment of a

police officer, an engagement between a police officer and a civilian, and that is going to happen. It is going to result in arrests by neighborhood and by the kind of conduct over and over again.

Studies of this -- for example, my colleague in the sociology department, Rob Sampson at Harvard, has done films of disorderly youth, white and black. He shows the same film, same conduct. Depending on the race of the person, people describe what they see in the film as disorderly more so when the same conduct is being engaged in by African Americans. This is true for both black and white observers.

VICE CHAIR SESSIONS: I appreciate that distinction, but maybe we have a difference in the term "recidivism." My understanding of recidivism is that people who have disorderly conduct convictions are more likely to reoffend into the future, not in regard to disorderly conduct, but in other offenses, and as a result, when you see someone with a disorderly conduct on their record, you know that they are more likely, theoretically, to reoffend than a person who doesn't have a disorderly conduct, and I

wonder if that kind of study has been done.

PROFESSOR STONE: Those studies have been done in the state and local systems. They are not completely consistent, but, by and large, in terms of trying to predict from minor offenses to more serious offending, it doesn't play out.

These are essentially studies of what is known as "broken window hypothesis."

That is different than policing those things can reduce the major offenses. There is evidence that you can do that.

So police departments that increase their use of minor arrests do in some cases see successes at reducing major offending in those areas, but that is different than saying the people we arrest for the disorderly are more likely to then themselves commit the later offenses. That there is very little, if any, empirical support for.

PROFESSOR BYRNE: I think you are right about the research problems in some of the state level research and how they factor in time served, but within the federal system, 70 percent of your offenders at some point are

going to do pretrial time in institutions. I had to write a piece on the federal pretrial system for the 25th anniversary of the Federal Pretrial Services Act last year, and that's one thing that I certainly noticed, is the increased use of pretrial incarceration. It probably ties into this disproportionate minority confinement issue as well.

Certainly that has to be factored into any research that you do looking at these sanctions so from my perspective, I would still like to see the research done, and we have to figure out how to deal with the time served aspect of it in terms of the zone B and C offenders that I assume you were talking about.

COMMISSIONER HOWELL: Just a follow-up, and I also have a question for Professor Barkow, but to follow up on some of the questions my colleagues have asked Professor Stone.

We didn't just look at criminal history; and we also looked specifically at disorderly conduct, because we were also concerned about these racial impact issues.

Disorderly conduct is only counted

as a prior if your incarceration results for more than three days.

Part of what I am interested in is, have you been able to look at incarceration rates and look at how this is affected by -- I would like to see this chart for how many people are arrested for, say, disorderly conduct and are sentenced to more than 30 days, so how much is that affecting -- because if it is just disorderly conduct arrests, that is also not counted under the sentencing guidelines in our criminal history calculations.

Also, for driving under the influence, that was also a debate that we had within the Commission about how to deal with that, and similarly, in order for that to even be -- it is careless or reckless driving, you have to be sentenced for more than 30 days, and ultimately, that is something that basically is a statistic.

I would sort of like to see these charts broken down. I don't know whether that is possible or whether you could give us a citation to where this is broken down by disorderly conduct, by DWI and also by pot

possession so that we can -- and also by length of incarceration so we can see really how much this is affecting sort of the peculiarities of our criminal history guidelines. So that would be helpful and sort of more of a request, because I think this is something that we were very sensitive to when we rewrote -- amended the criminal history guidelines, and it may require additional attention from us with a little bit more statistical assistance from you, if that would be possible.

I hesitate to bring up acquitted conduct since we had a very lengthy discussion about acquitted conduct yesterday, and I know you were in the audience so you heard, but one of the issues of acquitted conduct, at the same time the judges want more discretion, including discretion to consider everything they have heard during a trial that might include acquitted conduct, and the concerns that you have articulated that I share about not completely barring consideration of acquitted conduct, I just wanted to get your reaction, and it may be unfair so ask your reaction right off the bat, but I am going to do it anyway, which

is to rather than having a complete bar, a complete restriction on the sentencing judge's discretion to consider acquitted conduct when that judge may consider it relevant to sentencing, but to cabin the weight given to acquitted conduct so that a judge could only consider acquitted conduct in determining where within an otherwise applicable guideline range a sentence should fall.

So rather than including it as part of the relevant conduct calculation for an adjusted offense level, using acquitted conduct to increase offense level, but just allowing judges to use acquitted conduct to decide where within a guideline, otherwise applicable guideline -- is that something that would sort of balance the ability of judges to exercise their discretion to consider it if they wanted to, but cabin it to an otherwise applicable guideline range?

PROFESSOR BARKOW: My own view on this may be something that others don't share, but I don't think it should be used at all. I recognize historically, though, that in some cases it was something that was on an

individualized basis of judges, and they could either talk about the fact they were doing it or not. We had no sentencing feedback prior to the [] guideline era so you wouldn't really know what they were doing, but I think once you bring something like that out into the open and judges are doing it -- I mean, at most I would say something like in extraordinary circumstance, because I just think it shows complete disregard for the fact that we have a jury system, because even if you only use it a little bit, however amount you use it for is still saying to the jury, "Thanks for your time, ladies and gentlemen of the jury. Because of your time I am just going to use it a little bit."

I just think it is fundamentally at odds -- I understand this desire to try and find a middle ground, and I am sympathetic to that, but I can't conceptually think of a way to do it in the open, making it transparent, that does anything other than disrespect the jury.

The prior system, the way that it could work without people knowing about it is [judges] didn't give any kind of reasons for

anything they were doing so it could be that, could be something else.

Once you have to make it explicit, I think it is just, frankly, an explicit rejection of what the jury spent all their time doing.

So my own answer to that would be I would just say it is not relevant conduct and leave it at that, and then, frankly, you could have a system where judges are still doing it, and the Commission itself has not condoned it, but let judges decide for themselves within the guideline range where they want to put somebody, and if that is one of the factors they can do it, and they don't have to say more about it.

ACTING CHAIR HINOJOSA: Professor Barkow, do you feel the same way about uncharged and dismissed conduct as opposed to acquitted conduct?

PROFESSOR BARKOW: I think the analysis there is different, actually. I am not a big fan of that either, but I understand why the Commission would include that, and I understand there was a rationale for that based on the way the federal code was written; that it

was very hard to create a guideline system because of the complexity of the federal code and the worry that prosecutors would not charge certain things and would take over the system.

I tend to think the solution to that would be more severity in one direction, more severity, so there is problems for that, but that one I think is more complicated because it is trying to check our prosecution practice, but there is no justification in the context of acquitted conduct, because there the prosecutor hasn't given anything. They put it out in the open, jurors decided it, and they rejected it.

I would say I think that in order to take the single approach to uncharged conduct, you would have to do some of the things that judges and others have urged you to do in terms of simplifying the guidelines so that would require a much more massive overhaul of the system, frankly. I think that is a stroke of a pen. I think that is actually easier, and because there is no justification for it, I think, you don't even have to have that much of a debate over it.

The uncharged conduct requirement

would fundamentally require you to rethink your grid, your table. Your approach to relevant conduct is at the heart of a lot of things in the guidelines and their complexity, so the uncharged part of the conduct, I think that is different so I don't think at this point down the road the Commission has gone down to require other fundamental changes too.

ACTING CHAIR HINOJOSA: One last question, Professor Stone. One of the things I noticed, some states will have a sentence where you either pay a fine or you serve 30 days. Are there studies that show people that don't have the financial means to [pay] end up spending the 30 days in custody as opposed to paying the fine and how that may affect charging?

PROFESSOR STONE: I don't know specifically the answer to that study on that particular issue.

Maybe Professor Byrne does, but I think it will go to the same point we were talking about a minute ago, which is the 30-day threshold.

I think that the minor offenses that result in 30 days incarceration or more,

again, is too low a threshold. These things multiply themselves. People end up with three, four, five disorderly conducts, they get 30 days. It doesn't mean anything more than it did when they got one, but I wish I had a more direct answer to your question. I am afraid I don't.

VICE CHAIR CASTILLO: I just want to add to Professor Barkow, I appreciate the testimony we received from Professor Stone and Professor Byrne. It is very helpful.

First of all, on acquitted conduct, I totally agree with you, but I have an issue here at the Commission. My problem with acquitted conduct is it leads to disparity, because even among the judges here, we would not agree as to when it would be used, when it would not be, and I am concerned about disparity, which gets me to my fundamental point with your testimony.

You say we should continue with the advisory system, and one of the things you pointed out is appellate oversight, yet yesterday we had a bunch of appellate court judges here, and if I had all the judges in my

circuit, they would all be tossing up their hands saying, "After the Supreme Court's jurisprudence, we are throwing up our hands on appellate oversight."

Literally, district court judges throughout the country are getting to the view that as long as they justify their sentence one way or the other, it is going to be upheld on appellate review.

Looking at all the case law, and really, every single sentencing opinion that comes down, either at the court of appeals level or the district court level, I cannot argue with them.

You said as long as the compliance rate doesn't vary dramatically, we are okay, so that kind of begs the question, what do you define as "very dramatically"?

Because I could tell you that even among the group of judges we had here right before you testified, there is varying rates within circuits, there is varying rates within my circuit. If you look at the Southern District of Illinois versus the Northern District of Illinois, there is a lot of

different things going on there, and I agree with Judge Gertner that we shouldn't just accept those facts and statistics generally and jump on them; I think we need to dig at them.

At what point would you as an academic throw out the red flag and say, "This is a compliance rate that varies very dramatically"? Is there a number you have in mind?

PROFESSOR BARKOW: It would require more sophisticated -- I think if we are talking chance, that is bad, and I would agree with you there.

I guess one thing I would say about the regional disparities, and this goes back to the point about the jury -- a big part of what prosecutors do in a district -- and what [it] does is operate against the shadow of a jury trial, and what a jury in a region might do.

I think it is normal and appropriate in a system that respects federalism that different districts are going to have different practices, because they should be operating, I think, in the shadow of their juries so I wouldn't want a Boston -- a Boston

jury is not going to think the same way as a Texas jury will, and everyone in that system is going to be operating against that baseline.

In a system of pleas and people trying to figure out what would happen if we went to trial, I think you are going to get disparities, but I don't think those are unwarranted. I think those are entirely warranted and, frankly, part of the United States' great commitment to federalism.

Part of it is just my view of the regional disparity not being as problematic.

I think within a district, judge disparities, that is much more alarming to me, because that would be a little -- then you couldn't just say we are operating in the shadow of a jury, but just judges departing from one another, and maybe the solution to that would be something like the judge panels or something that could deal with within a district.

So part of it is those numbers don't worry me because to the extent I think they are mostly already against their --

VICE CHAIR CASTILLO: What if we got to a national number, compliance number -- I

don't even like to call it a compliance number -- what if we got to a national number of within guideline sentences of less than 50 percent? Would that throw up a red flag to you?

PROFESSOR BARKOW: It depends on how much the government -- I view it as government motion. I put that in the same category of the guidelines, as I believe it has been --

VICE CHAIR CASTILLO: I agree with you.

PROFESSOR BARKOW -- so that number together within guidelines plus the government's monitored motions, I think if you got to the point where that starts to get to 50 percent, something is wrong.

The numbers of the states, it is right around 70 percent, which strikes me with the consistency is probably about right, but it requires much more sophistication than just throwing up a number. I do think you need to look at why that is.

I think if every single judge finds this one guideline to be the one they have

to depart, I just think the instinctive reaction shouldn't automatically be, "What is wrong with the judges; are there that many of them that are departing?" Let's look at the guideline.

Part of it depends on are you seeing consistency in terms of this one guideline problem, or is it actually not this one guideline; they are just starting to go crazy all over the place. That is where the system unravels to the point that you do have to act.

Part of it would just be is it regional versus within a district. The next would be is it consistent within a certain type of guideline that is leading to the departures.

Let's look closely at the guideline. If we have to do it because Congress told us we have to, that seems to be an ideal candidate to become mandatory in some way and go to the jury.

But if it is not and judges are not complying with it, then I view that as a fire alarm for the field that there is something wrong with the guideline.

ACTING CHAIR HINOJOSA: Thank you

all very much. We appreciate your patience and certainly appreciate all the information you have given us.

Rather than take a break before the next panel, we are going to go on.

We did have one other panelist who had an emergency and is not being able to here, and that is Commander Garry McCarthy from Newark, New Jersey, and he did call and say there was an emergency and he will not be able to be here.

We do appreciate your presence here, and we are honored that you are here and willing to share your thoughts.

This has a deep law enforcement community impact, any decisions involving sentencing practices.

Just like all the other panelists have given us insight into different components of the federal court justice system, we are happy to have Police Commissioner Raymond W. Kelly. He has been the Police Commissioner and has been so since 2002 in New York City.

He has previously served as the Commissioner of the U.S. Customs Service. He

has also served as Under Secretary for Enforcement at the U.S. Treasury Department where he supervised the Department's enforcement bureaus including the U.S. Customs Service, Secret Service, and the Bureau of Alcohol, Tobacco and Firearms and the Federal Law Enforcement Training Center, Financial Crimes Enforcement Network, and the Office of Foreign Assets Control. He has been spent 31 years in the New York City Police Department. He holds his bachelor's degree from Manhattan College, his JD from St. Johns, and his LLM from New York University, and an MPA from the Kennedy School of Government.

Are you still attending school, Commissioner Kelly?

COMMISSIONER KELLY: I wish I was.

ACTING CHAIR HINOJOSA: We are also very honored to have Susan Smith Howley, who has been with the National Center for Victims of Crime since 1991, and she presently serves as director of public policy where she manages and coordinates public policies and advocacy efforts of the NCVC. She provides assistance to legislators and advocacy groups

working at the federal and state legislation, [at] the federal and state levels, obviously, tracking legislative trends and providing analysis of loss relating to the rights and interest of crime victims. She has received a bachelor's in international affairs from Texas University and her law degree from Georgetown.

We will start with Commissioner Kelly.

COMMISSIONER KELLY: Chairman Hinojosa, members of the Commission. Thank you for your invitation to appear before you here today.

I want to begin by congratulating you on the 25th anniversary of the Commission, which I believe has significantly strengthened America's criminal justice system. It has done so by fostering transparency, predictability and fairness in federal sentencing across the nation. That is a legacy worth reflecting upon as we consider the future of sentencing guidelines and policy alternatives that could have the unintentional effect of halting the progress we have made to reduce violent crime in the United States.

I have been asked to discuss the

core policing strategies that have enabled New York City to drive crime rates down dramatically, while also helping to reduce the state's prison population.

First I would like to give you some historical perspective.

Since 1989, UCR index crime in New York City has fallen each and every year by 72 percent overall. This has taken place even as the city's current population has grown by 1 million since 1990 to 8.4 million.

That year, New York recorded an all time high of 2,245 murders.

In 2002, for the first time, the city experienced fewer than 600 homicides, something we have accomplished every year since.

In 2007, we had fewer than 500 murders. The actual number was 496.

It was the first time the murder rate fell below 500 since at least 1961, the earliest year to which valid comparisons can be made.

This year we are on track to break our record with homicides down 19 percent this year, by 11 percent from two years ago.

That is all the more significant given the fact that New York has about 5,000 fewer police officers today than we did in 2001 when staffing was at its peak.

Despite this decline in resources and the dedication of 1,000 police officers to the mission of counterterrorism, major felony crime is down by 36 percent from eight years ago.

We have been able to do more with less thanks largely to an initiative called Operation Impact.

Since 2003, we have taken at least two-thirds of every graduating police academy class, teamed them with experienced supervisors, and assigned them to areas of the city where we have registered an increase in serious crime. These areas can be as large as an entire precinct or as small as one city block.

To give you some idea, we have seen double-digit reductions in crime of up to 30 percent in impact zones throughout the life of the program.

This year, major felony crime is down by 24 percent in impact zones, rapes are

down 46 percent, robberies are down by 34 percent, and grand larcenies are down by 28 percent.

We have adopted a similar intensely targeted application of resources to other areas of our mission such as school safety. The NYPD is charged with the safety of more than 1 million public school students. Through our School Safety Division, we have assigned more than 5,300 sworn and unsworn personnel to New York City's public schools. Since 2001, major crime in that system is down 44 percent, and it shows the Police Department's Impact for Schools initiative.

We have also been extremely active in our enforcement of quality of life violations such as aggressive panhandling, illegal peddling, graffiti and many others. Since 2002 we have issued more than 635,000 summonses for quality of life violations. In 2007 and 2008, police officers issued more criminal summonses than any time in the Department's history.

We find again and again, when we go after low level offenses, when we write the summonses and make the arrests, we catch career

criminals, many of them with outstanding warrants. In this way, quality of life enforcement yields broader crime fighting benefits.

This approach is one of the reason subway crime is at an all time low in a system that is one of the world's largest; in fact, the world's second largest.

Nineteen years ago, an average of 48 crimes were committed in the subways each day. In 2000 that number was 12. Today it is down to five crimes a day, even as ridership is the highest it has been in 44 years at more than 5 million people a day.

It turns out that in some cases, the people jumping turnstiles and moving between cars are the same people committing armed robberies and dealing drugs.

Another way we have been able to realize greater efficiencies is through technology. Four years ago we opened our Real Time Crime Center, a state-of-the-art crime fighting computer facility. Its core is a massive database with billions of public and law enforcement records. Crime center detectives

take calls around the clock from investigators in the field looking to follow up on leads.

Our detectives conduct instant search using data-mining software that make it easier to identify criminal patterns and the relationships between those connected to a crime. This has dramatically reduced investigation times and led to faster arrests.

We have also benefited substantially from our close collaboration with federal law enforcement agencies. In the wake of September 11th, we placed an even greater emphasis on these relationships, which have yielded important gains for counterterrorism and crime fighting alike.

We work closely with our federal partners through a variety of task forces. These include the Joint Terrorism Task Force, the Joint Organized Crime Task Force, the Drug Enforcement Task force, the Joint Firearms Task Force, and the Joint Bank Robbery Task Force, among others.

Whether through these entities or in close cooperation with the various U.S. district attorneys, we seek to refer as many

cases as possible to the federal court system. That is especially true of our efforts to get illegal guns off the street.

We are active participants in Operation Triggerlock, in which we partner with the U.S. attorneys for the Eastern and Southern Districts of New York to obtain federal prosecutions of gun cases. We pay relentless attention to the details of post-arrest follow-up to ensure the best prosecutions available. We created a special Gun Enforcement Unit to improve the collection of evidence and intelligence.

We let anyone arrested for a gun crime know that if they have a prior felony conviction, we will do everything we can to have them tried in federal court, where the penalties are tougher.

For example, the federal mandatory minimum sentence for a first offense while carrying a firearm during a crime of violence or drug trafficking crime is five years, compared to three for the state. The prospect of a stricter sentence has convinced a number of suspects to give up information.

This illustrates the deterrent role of federal sentencing. Even though the vast majority of our cases are prosecuted in the state and city courts, we view it as an additional, powerful tool to support our 36,000 police officers.

Their outstanding work on every front has enabled New York City to drive crime down to historic lows, even in the face of diminishing resources and a persistent terrorist threat. And with far fewer city residents committing serious crimes, admissions from New York City into the state prison system have declined by 50 percent since 1990, proof that success in crime fighting can lead to smaller, not larger, prison populations.

It follows the best way to reduce the prison population is to reduce crime, not the length of sentences. That is why I would caution against new approaches that circumvent the well-defined guidelines already in place.

One such experiment taking place at the state level is New York's recent Drug Law Reform Bill, which repealed the so-called Rockefeller Laws. Our concern is that drug

traffickers will make unsupported claims for treatment to avoid sentencing and invite the kind of revolving door justice that produced so many victims of addiction and violent crime in the not too distant past.

Advocates of alternative sentencing often cite the rising costs of incarceration as evidence of the need for change, but what about the costs of policies that allow convicted criminals to evade jail time and increase their likelihood of committing more crimes against society?

We must refuse to go back to the past. Over the last two decades, New York City's economy has been transformed because of the enormous gains made in public safety. To provide just one perspective from the real estate market, from 1990 to 2007, as crime plummeted, the price of an average apartment, Manhattan apartment, skyrocketed by more than five times. You will find similar trends in home prices across the five boroughs.

There are many reasons people seek to live and own a residence in New York City. The most important one is that it is safe. We

intend to keep it that way. We'll ensure New York remains the safest big city in America with effective policing strategies backed by strong sentencing. We hope the Commission will continue to support this goal for many years to come.

Thank you again for the opportunity to testify.

ACTING CHAIR HINOJOSA: Thank you, Commissioner Kelly.

Ms. Howley?

MS. HOWLEY: Good afternoon. Let me start by saying we appreciate the invitation to appear before this panel, to offer our suggestions regarding changes to the federal sentencing system.

Our focus on the federal sentencing guidelines is most pertinent to work with the Sentencing Commission; however, some of our recommendations may be enhanced by or even require changes to the Federal Rules of Criminal Procedure or to statutes, and those are addressed in my written testimony.

We start by addressing the role of the federal sentencing guidelines in federal

sentencing.

From the perspective of the nation's crime victims, the federal sentencing guidelines are important for their ability to promote predictability and consistency in the sentencing process. In so doing, the guidelines help to instill public confidence in the fairness of the federal criminal justice system.

The guidelines also have the ability to further the implementation of the rights of crime victims to be informed, present and heard throughout the sentencing process; to receive restitution from the convicted offenders; and to be treated with fairness, dignity and respect.

Those rights have been adopted and expanded upon for more than two decades, through legislation such as the Victim and Witness Protection Act of 1982 up through the Crime Victims Rights Act of 2004, as well as numerous specific legislation addressing the rights of specific victims of crime such as child victims, victims of human trafficking, domestic violence victims, victims of sexual acts.

In order to more fully recognize

the legal rights of victims, we recommend certain changes to the sentencing guidelines.

We first encourage the Commission to consider changes to the federal sentencing guidelines that promote the ordering and collection of victim restitution to the fullest extent possible.

Restitution is an appropriate part of a sentence as it both provides direct recompense for the harm caused through the criminal act, and benefits the criminal justice system by holding the offender directly accountable for that harm.

One factor that currently limits the collection of federal restitution is the relatively short duration of probation or supervised release.

The payment of victim restitution is a mandatory condition of supervised release under guideline 5D1.3, and of probation under 5B1.3 -- []. Unfortunately, the term [of] supervised release as set up in guideline 5D1.2 or probation under [5B1.2] is often insufficient to permit the full payment of restitution; therefore, we recommend that those

guidelines be changed to permit courts to extend the term of supervised release or probation for the purpose of collecting restitution.

The payment of restitution is not only a condition designed to promote successful reintegration of defendants into society, but is an integral part of the criminal sentence; therefore, the courts should not relinquish authority over the defendant until that sentence has been fulfilled.

As the Sentencing Commission and others examine alternatives to incarceration, it is especially important to ensure that any sentence that includes the payment of restitution to the victim be meaningful.

We recognize this recommendation may require statutory change and urge the Commission to pursue such a change.

We also recommend the Commission extend its commentary to guideline 5E1.1 on restitution.

There remains confusion regarding when restitution is mandatory and when it is discretionary.

Victims, too, are often unclear

about whether restitution can be ordered and how they are to request restitution. The Sentencing Commission should extend the commentary to this section to promote the ordering of restitution.

Next, we urge the Sentencing Commission to consider changes relating to the victim's right to be heard at the entry of a plea agreement.

Guideline 6B1.1 regarding Plea Agreement Procedure and its commentary should be amended to specifically incorporate the victim's right to be heard. The Crime Victims' Rights Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving the victim's right to be meaningful, and it must be heard before the court has made a final decision whether to accept or reject the proposed plea agreement."

Victim input at this stage serves the interest of the court, as well as the interests of victims. A victim's statement of the harm caused by the criminal offense is clearly relevant to the court's decision whether to approve the agreement, and it may also be relevant to the extent to which the court may

rely on the parties' stipulation of facts under guideline 6B1.4. Similarly, the victim's opinion regarding the appropriateness of the agreement should be relevant to the court's consideration of whether the agreement serves the interests of justice. The statement of the victim may also include information regarding safety concerns on the need for restitution, both of which are important considerations for the court.

The guideline should also ensure that the victim's right to input is honored in each case. If the right is violated, the Crime Victims' Rights Act does provide for redress, stating that under limited circumstances a victim "may make a motion to reopen a plea or sentence" when the right to be heard was denied; however, [] preventing such a violation in the first place is far preferable than trying to create a remedy.

To prevent violation of the right to input, the guideline or commentary could require the court to explore whether the victim was informed of the proceeding and the nature of the plea agreement, whether the victim is

present and wishes to make a statement, or whether the victim has submitted a written or electronic statement. In the event the victim has not been afforded his or her rights to be informed, the court should reschedule the proceeding.

The commentary should also provide guidance regarding the form [that] victim input can take. In many federal cases, particularly those involving fraud or the use of technology, victims can be located at quite a physical difference from the court. Commentary should encourage flexibility in the form of victim input to allow the fullest opportunity for crime victims to exercise their right to be heard. This could include written input, oral in-person testimony, closed circuit testimony from a remote site, videotaped testimony, or other forms of input, and we recommend the Commission seek a similar change to Rule 11, Federal Rules of Criminal Procedure.

We next recommend that this Commission extend its commentary to guideline 6A1.5 regarding the rights of crime victims. This guideline includes a general statement that

"in any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. 3771, and in any other provision of federal law pertaining to the treatment of crime victims," but the commentary is more.

The Commission should expand the commentary of this provision to this provision to provide additional guidance regarding the implementation of the victim's rights.

It has been five years since the passage of the Crime Victims' Rights Act. We have five years of court experience with its implementation. The development of commentary guiding judges as they incorporate victims rights in the sentencing process would promote uniformity and adaptation of those rights and avoid violation of those rights.

Studies indicate that victim satisfaction with the criminal justice system is influenced more strongly by their sense that they were heard and treated fairly than by the sentence.

Finally, we encourage the

Commission to revisit the guidelines in their entirety to ensure that victims' rights are incorporated wherever appropriate and ensure that courts can consider any harm caused to victims, emotional physical or financial.

The National Center, again, commends the Commission for holding this series of hearings and for its desire to strengthen the sentencing guidelines.

We appreciate the opportunity to appear before you and stand ready to provide any additional assistance or answer any questions you may have of me here today.

ACTING CHAIR HINOJOSA: Thank you very much.

VICE CHAIR CARR: Commissioner Kelly, I think most of what you talked about in terms of the use you were making of harsher penalties had to do with firearms. With the change in the state drug laws, do you expect you will be looking to the federal government more in terms of drug prosecutions?

COMMISSIONER KELLY: It is very possible.

Again, the state is in unchartered water. We don't know what the ramifications of

the change in the law will mean. We have to do everything we can to protect the city, keep crime going down, and that may be an approach we will look to take.

VICE CHAIR CARR: I assume from a little bit of law enforcement perspective, in terms of your partnership with the federal government, you find the mandatory minimums that we have to be useful?

COMMISSIONER KELLY: Again, yes, sir.

COMMISSIONER WROBLEWSKI: Thank you both for coming in and testifying.

My name is Jonathan Wroblewski. I am the Attorney General's representative on the Commission.

Commissioner Kelly, your testimony laying out the dramatic crime reductions is stunning. The achievement that has taken place here in the city is phenomenal. What is most interesting to me is that in the last five to ten years when the national crime rates have not declined, the crime rates in this city have continued to decline.

As you mentioned also the fact you have been able to do it at the same time the

number of people in prison has actually gone down. It is an incredible, stunning achievement of government.

We have heard a lot of testimony about the federal criminal justice system over the last couple of days, and there are two really unique aspects to the federal sentencing system that we heard over and over again. One is certainty, and that comes in both mandatory minimum sentencing statutes, mandatory guidelines, and also severity, that the severity of sentences in the federal system tend to be very, very long.

In your mind, is the certainty the more important thing rather than the severity? Is the severity equally important?

For example, in what you talked about about gun crimes and people coming to the federal system, and I think you said you are trying to refer as many cases as possible to the federal system, if that system was somewhat different, say instead of five years mandatory minimum for use of a gun used in the commission of a violent crime, it is a three-year sentence, but it was just as certain by statute or

guideline, do you think that would have an appreciable impact on your enforcement?

COMMISSIONER KELLY: I think certainty and severity go hand in hand, but practical application of the fact that it may go to federal court helps us, as I said in my prepared remarks, to get information.

We kind of like both certainty and severity that has an impact, no question about it, on the day-to-day.

In terms of guns, we still have way too many guns on the streets of the city, and the Triggerlock Program is a good program.

The numbers of cases that we are able to take on Triggerlock is relatively small, but the fact that an individual may have to go into the federal system is clearly a motivator to cooperate.

COMMISSIONER WROBLEWSKI: Thank you very much.

VICE CHAIR CARR: I guess related to that, is there a perceived greater likelihood of conviction in federal court than your local courts? That would be true where I came from as well.

COMMISSIONER KELLY: Yes, sir.

VICE CHAIR CARR: So the certainty part of it also factors into the federal --

COMMISSIONER KELLY: Yes.

ACTING CHAIR HINOJOSA: We do appreciate your presence in the hearing, and Ms. Howley from the advisory group, and Commissioner Kelly, you have a very busy schedule like Ms. Howley does, and we appreciate you coming before the Commission and sharing your thoughts.

(Whereupon, the above-entitled matter went off the record at 12:25 p.m.)