THE UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Tuesday, October 20, 2009

The public hearing convened in the Mineral Room at the Hyatt Regency Denver at Colorado Convention Center, 650 - 15th Street, Denver, Colorado, at 8:38 a.m., the Hon. Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

Acting Chair: Judge Ricardo H. Hinojosa

Vice Chair: William B. Carr, Jr.
Judge Ruben Castillo
Judge William K. Sessions III

Commissioners: Dabney Friedrich
Beryl A. Howell
Jonathan J. Wroblewski

STAFF PRESENT:

Judith W. Sheon, Staff Director

Brent Newton, Deputy Staff Director

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ACTING CHAIR HINOJOSA: Good morning. This is a very special honor for me on behalf of the United States Sentencing Commission to welcome you to this public hearing, which is really the fifth in a series of regional hearings that the Commission is holding across the country on the 25th anniversary of the passage of the Sentencing Reform Act of 1984.

These hearings have been conducted much in the same way as the initial Commission conducted their hearings across the country as they were trying to set up the initial set of guidelines.

I do want to thank, on behalf of the Commission, all those individuals who have agreed to serve on panels throughout the next -- today and tomorrow, for taking time out from their busy schedules. We know each one of you has something else that you need to be doing, but we appreciate the fact that you have taken time out from your schedules to be here with us today and to share your thoughts on the important work of the Commission and on the federal sentencing in general.

As I just indicated, this is, obviously, the 25th anniversary of the passage of the Sentencing Reform Act of 1984. And when I refer to the Sentencing

Reform Act, I have often used the adjective in front of it of bipartisan Sentencing Reform Act of 1984. I know that sometimes today that's a hard thing to put in front of legislation, a bipartisan piece of legislation, but the Sentencing Reform Act of 1984 truly was. It was obviously debated in Congress for about ten years. When it was finally passed in 1984, it had the support and the hard work behind it of Senator Kennedy, Senator Thurmond, Senator Hatch, Senator Biden, and, actually, the support and it was the result of the work of many individuals across the country who felt that this system needed reform, this federal sentencing system was in need of reform.

Having been a judge at the time of the passage of the Sentencing Reform Act, I have to say that I felt the same way with regards to the system that we had at the time; and after 25 years, I have to say that I do feel that the system we have in place today is much better than the system we had before the passage of the Act.

It is clear that one of the things that the Act actually did was create the bipartisan United States Sentencing Commission, which, through the years, has promulgated guidelines, amended guidelines, and has not only worked just on the guidelines themselves, but

actually worked very hard with regards to the other responsibilities and duties that the Act sets for it. We have worked with regards to the collection of information, reports to Congress, training programs and all the other matters that the Commission does with regards to trying to fulfill its mission under the statutes.

One of the things that we have witnessed during the past 25 years is the changes that have occurred with regards to federal sentencing in general since 1987, not only with regards to the system itself that was put in place by the Sentencing Reform Act, but certainly with regards to the size of the federal docket, criminal docket itself. When it comes to felony sentences -- and, actually, we don't actually see the number of misdemeanor cases being reported by many, but, for example, in the Southern District of Texas alone, there were 11,000 misdemeanor cases that were handled last year.

The felony docket has doubled since 1987. The makeup of the defendants has changed dramatically since we had the passage of the Sentencing Reform Act. It is still true that 80 percent of the docket continues to be drugs, firearms, fraud, and immigration cases; however, the latest statistics for

the fiscal year of 2009 indicate that immigration cases have overtaken the drug cases as the number one number of felony cases being sentenced by about one or two percent, which is the first time that drug cases have ever become the second number of cases that are being sentenced on the felony side.

The ethnic and racial background of the defendants has changed. The fiscal year -- in fiscal year 2008, 42 percent of the defendants were Hispanic. So far this fiscal year that number is about 45 percent. The non-citizens for fiscal year 2008 was about 40 percent. That has grown to about 42 or 43 percent this fiscal year. This is a very big change from what it was during the passage of the Sentencing Reform Act of 1984.

Some things have not changed. Obviously drug traffic and immigration continue to be a sizeable part of the docket. Men continue to represent the great majority of the defendants. The age makeup has not changed. The vast -- more than half of the federal defendants are between the ages of 21 and 35.

And I also want to indicate that part of the work of the Commission is to work on amendments, as well as new guidelines. The new guidelines obviously are in response to new congressional statutes as well

as directives from Congress. And I also, with regards to the -- both the amending of the guidelines and creation of new guidelines, it is hard to appreciate how the Commission goes about its work with regards to complying with all of the factors that we as district judges in the courtroom have to comply with every time that we sentence somebody.

The Commission does this at a national level, and the appreciation that I've acquired for the Commission's work is much different than it might have been before I became a member of the Commission, because as I have seen the processes and works during this nine-month cycle that the Commission engages in with regards to the creation of new guidelines and/or promulgating amendments -- promulgation of guidelines and passage of amendments to the guidelines, in many ways mirrors exactly what I do -- what we do as district judges every time that we sentence someone. It requires input from prosecutors, defenders, the public, obviously the executive branch speaks through the prosecutors. At the same time, obviously, the legislative branch has a lot to say with regards to either the passage of legislation itself or directives to the Commission.

And then after all this is done, then

the Commission decides what the appropriate guidelines should be, considering all of the Title 18 § 3553(a) factors taken as a whole.

I think the appreciation also has come from judges across the country after the *Booker* decision. I think judges have -- and I hear this as I travel, as we all hear it as we travel with Sentencing Commission work, that sometimes you hear judges indicate that they didn't know how much they appreciated the guidelines until they became advisory, and they have then realized the purpose of the guidelines and how to proceed with regards to considering the guidelines.

Part of the reason that we're having these hearings is to hear from judges and practitioners what their views are with regards to the present status of the federal sentencing system, not just about the guidelines but the system itself; and we look forward to hearing from all of you who represent different segments of the criminal justice community and certainly will provide insight to the Commission that is so important with regards to how we proceed.

It is safe to say that I -- that the last three or four years have brought a lot of change in federal sentencing, and I want to indicate that my

work on this Commission has been a wonderful experience because of the members of this Commission. You could not find a harder working group of individuals who are more dedicated to fairness in the federal criminal justice system than the members of this Commission, whom I've had the pleasure of working with, and I would like to introduce them at this point.

To my right is Chief Judge William Sessions. He serves as vice chair of the Commission and has been on since 1999. He has been nominated as the next chair and is awaiting senate confirmation. He serves as a U.S. district judge for a border court in the District of Vermont.

VICE CHAIR SESSIONS: You finally acknowledged that.

ACTING CHAIR HINOJOSA: I finally have said it. After all these years, he's finally gotten me to admit that he works on a border court, a part of the border that is not as heavy with criminal cases as another part of our border. He has served there since 1995 and is presently, as I indicated, the chief judge. He has served as a professor at the Vermont Law School, and he received his BA degree from Middlebury College and his JD from the George Washington School of Law.

To my left is Judge Ruben Castillo, who

is a U.S. district judge in Chicago. He has served as vice chair of the Commission since 1999 and has been on the district bench since 1994. From 1991 to '94, he was a partner with Kirkland & Ellis, and he has served in the past as regional counsel for the Mexican American Legal Defense and Educational Fund, which he did from 1988 to '91. He also has served as an assistant U.S. attorney in his district, and he holds a BA degree from Loyola and a JD degree from Northwestern.

Also to my left is Vice Chair William Carr, who is one of the quietest members of the Commission, and I say that, and I think he appreciates my saying that. He is the most recent member of the Commission, coming on the Commission in the year 2008. I've indicated in the past, and I will do so again today, that every time that I run into somebody from Pennsylvania, they want to know how Will Carr is doing and talk about his great work as an assistant U.S. attorney in the Eastern District of Pennsylvania, which gives him a lot of knowledge with regards to the working of the federal sentencing process.

He served as an assistant U.S. attorney from 1981 until his retirement in 2004, and in 1987 he was actually designated as a Justice Department contact

person for the U.S. Attorney's Office sentencing guidelines training program.

Commissioner Beryl Howell, who is also to my left, has been a member of the Commission since the year 2004. She was an executive managing editor and general counsel to the Washington, D.C. offices of Stroz Friedberg. Prior to that, she was the general counsel for the Senate Committee on the Judiciary, serving under and working with Senator Patrick Leahy. She has also served as an assistant U.S. attorney in the Eastern District of New York, and she's a graduate of Bryn Mawr and Columbia Law School.

Commissioner Dabney Friedrich to my right here, has been a member of the Commission since the year 2006. She has previously served as an associate counsel at the White House counsel's office and she has been a counsel to Chairman Hatch on the Senate Committee on the Judiciary, and she has also served as an assistant U.S. attorney for the Southern District of California and the Eastern District of Virginia. She's a graduate of Trinity University, as well as Yale Law School.

Also to my right is the *ex-officio* member of the Commission, representing the Attorney General, Commissioner Jonathan Wroblewski, who was

recently designated as an *ex-officio* member of the Commission. He represents the Attorney General, obviously, on the Commission, and he serves as the director of the Office of Policy and Legislation in the Criminal Division of the Department, and he received his JD degree from Stanford Law School.

At this point, I would again, on behalf of the Commission, thank all of you who are participating in the program and ask any commissioner if he or she would like to say anything before we proceed.

COMMISSIONER WROBLEWSKI: Very briefly, Judge. I want to first say how glad I am to be here and to be part of these hearings. And I want to also bring the greetings from the Attorney General, from Attorney General Holder, Assistant Attorney General Lanny Breuer and from the thousands of men and women across the country in U.S. Attorney's offices who prosecute cases every day.

I think it's very fair to say that the issues that we're going to discuss today and tomorrow are critical to the Attorney General, to the assistant attorney general, and to all the prosecutors around the country.

As you may know, we in the Department of

Justice have had a parallel set of hearings and inquiry into federal sentencing policy since the beginning of the new administration. We have learned a lot, we still have a lot to learn, and we have many challenges, and what we're going to discuss is going to, I think, help us in those challenges. Everything from emerging crime problems, violent and juvenile gangs, violence in Mexico along the southwest border, cyber crime, drug abuse, all of that is touched on by the issues we're going to talk about. So we thank you so much for being here and we look forward to the next couple of days. And thank you, Judge.

ACTING CHAIR HINOJOSA: Anyone else?

VICE CHAIR CARR: I would just like to point out that although Ricardo didn't mention it, like everyone else up here, I also went to college and law school.

VICE CHAIR SESSIONS: Can I just also say I really appreciate everyone's participation. I mean, the three of you have incredible caseloads, and it's just very -- well, it's just wonderful that you are willing to put aside all of those responsibilities and come and help us explore these issues.

Judge Tacha, my favorite moment at the Sentencing Commission is my first day, walking in and

seeing that I was at your desk, and to think 10 years later, here you are testifying. It's just great. Thanks.

ACTING CHAIR HINOJOSA: With that, we'll start with our first panel, which is a “View From the Appellate Bench.” We have three distinguished members of the appellate bench who are giving up their time to share their thoughts with us.

First, we have Judge James B. Loken, who has served on the Eighth Circuit Court of Appeals since his confirmation in 1990, and he has served as chief judge of that court since the year 2003. He was a law clerk to Justice Byron White, as well as Judge J. Edward Lumbard of the Second Circuit Court of Appeals, and he, like Will Carr, is a graduate of a college and a law school. He earned his BS degree from the University of Wisconsin and his LLB from Harvard Law School.

Judge Deanell Tacha has served on the Tenth Circuit Court of Appeals since her confirmation in 1985 and previously served as the chief judge of that court from 2001 to 2007. She actually, as Judge Sessions has pointed out, served as a member of the Sentencing Commission from 1994 to 1998. Before her appointment to the federal bench, she had involvement

at the University of Kansas School of Law, where she taught there from 1974 to 1985, as well as held other administrative posts at that university.

And we'll see you at the Texas/Kansas football and basketball games.

JUDGE TACHA: And perhaps at the final four.

ACTING CHAIR HINOJOSA: Yes. Judge Tacha received her bachelor of arts degree from the University of Kansas and her law degree from Michigan.

Judge Harris Hartz has served on the Tenth Circuit Court of Appeals since his confirmation in 2001. Prior to that he served as a judge on the New Mexico Court of Appeals from 1988 to '99. He also served on the New Mexico Governor's Organized Crime Prevention Commission in several positions from 1976 through '79. Prior to his work on the Commission, he served as an assistant U.S. attorney for the District of New Mexico from '72 through '75, and he earned both his undergraduate and law degrees at Harvard.

Judge Loken, did you want to be first?

JUDGE LOKEN: I think Judge Tacha is going to go first.

JUDGE TACHA: Seniority. Seniority is everything. First of all, I want to thank all of you

for the work that you're doing. Perhaps no one understands it as well as I do in this room, and I'm grateful for the time that you spend and the thoughtful consideration you give to these issues. So thank you.

And second, on behalf of Judge Hartz and myself, we welcome you to the Tenth Circuit. We've given you a couple of great days. We can't promise tomorrow. But in any case, we're glad to have you here.

I -- I don't know, I inherited the job of going first because I thought what I would do is do a brief retrospective because I think it informs where you are now, and so if you'll indulge me being what I think of myself as the matriarch of the tribe here.

A look back. As you heard, I was confirmed in 1985, so I grew up with the sentencing guidelines. I had not been a district judge, came directly to the court of appeals and began seeing sentencing at the very outset of the guidelines. Now, I could give you my personal views, which will become evident as I talk about those guidelines, but I want to tell you sort of how I see the organic whole and what I think brought us to this date, even following *Booker* and that line of cases; and it is to look back at what the purpose of the Act was.

The purpose of the Act was to bring all three branches of government to the table together to try to reach a position that was appropriate for all three branches of government and to reflect what the country was worried about.

Now, I have to tell you that I believed there was a very interesting intersection of cultural events at the time. You will recall -- if you don't, some of you don't remember, but you will recall that the sentencing guidelines came to the American table at almost exactly the moment that CNN and USA today came to the American table; so that what had once been pretty much local crime and pretty much local understanding of the criminal milieu in a community, just almost overnight became a matter of national concern. And I suspect I don't have to tell you it was a carjacking in Florida that very rapidly propelled onto the national screen we are worried about crime across this country.

Therefore, one of the concerns was are our criminal defendants being treated fairly across the country and, thus, came the words uniformity and proportionality. And sure enough, in totally anecdotal ways, the country became aware that some defendants somewhere were getting X sentence and some defendants Y

place were getting quite a different sentence.

Now, what does that say? We Americans have, at heart, a deep concern about equal justice under the law. So underlying the entire guideline system is some sort of basic and just internal gyroscope that says we have to make sure that sentencing reflects equal justice under the law.

Now, getting from that great and sort of lofty notion to a set of guidelines that could be used around the country required that all three branches sit down in a very, very thoughtful way, in a very careful way, and in a way that took into account the interests of all three. And I say that to say that I don't think anything has changed in that respect. Sentencing in and of itself, as Judge Hinojosa has so well pointed out, brings to the table all three branches of government in appropriate ways.

You probably don't remember, there was a big hoo-ha about whether judges should be on the Sentencing Commission. I have always thought, and thankfully have been confirmed in this, that judges are an essential piece of the sentencing decision, and what has transpired in these 25 years clearly confirms that. I was disturbed at one point in history when there was some concern about how many judges might be at the

table, but again, the view appropriately was that everybody, all three branches, should come together.

Now, when all three branches come together, there isn't any one right answer. Instead, there are a host of considerations to come into play. Thus, what came out of that original Commission -- and you understand I came on in '94, so I was the second generation, not the original Commission, but in a way it gave me a perspective -- or our Commission, a perspective to look back and see what an enormously effective job that original Commission did. In compromising all of the issues, it's simplified. Now every day I hear why can't they simplify the guidelines.

Now, I ask you how much more simple can it get. You have across one line of the grid criminal history and one line the offense. That's pretty much our sentencing guideline system. Now, we've got tons of notes, and nobody knows like judges that you've got to look at them, but I believe the original Commission was brilliant in how it designed that grid and how it put together the original guidelines, because you can do it. No matter who you are out there, you can do it; and more important for your purposes, you can add crimes, you can tweak criminal history, you can do all

of the things that have been required in these 25 years.

It also provides a very objective way to look at where things have gone slightly awry. Thus, the safety valve. When things went a little awry at the bottom end of the guidelines, though not easily done in a compromised situation, it really had a salutary effect to put the safety valve into position.

Now, there are others -- many, many examples like that, but what I hope for you to think about as you go forward with -- I'm interested, Judge Hinojosa, in your statistics, because as you go forward and the defendants change a little, the crimes probably will continue to change quite a bit. The 1985 impetus was largely guns and drugs, and that has, of course, not gone away, but it will evolve; and I am very proud that during my tenure we began to look at white collar crime and, to the great credit of Commissioner Goldsmith, we looked at it before now. There are lots of reasons that it was a very good thing to look at it at that time. So I say that there was compromise. There was a fairly simple, basic outline. It brought all three branches to the table together.

But a fourth point, and this goes to the role of the Commission, regardless of whether we're in

the *Blakely/Booker* era or whether we're in the mandatory guidelines era, it is also a clear testimonial to the role of a three-branch Commission in providing great data, bringing a terrific staff to bear on some very hard questions that inform judges, inform the legislative branch, and inform the Department; and it also brings a great group together to train in all of these very difficult situations.

For those who think that sentencing is empirically based, I simply challenge them to talk to any member of the Commission or any judge. Sentencing, at its heart, brings together the policy considerations that all of you have on your plates and the various issues that you bring to the Commission, but it also brings to bear what you see in an individual defendant, what you see in an individual crime, what you see from the bench. So there's never been a more important time to understand that all the data is very helpful, it informs the process, but sentencing requires that you use your best judgment; that every judge use his or her best judgment; and that we bring to bear for the purpose of this equal justice under the law, the national concerns with the individual concerns.

I believe that original Commission got it right. I believe we have worked fairly well in the

interim. I will give you and close with just one example, because I know, as sort of the poster child, for the crack cocaine debate. You will no doubt know that during my term on the Commission, we tried to address the crack cocaine disparity. I think it is fair to say, I know from my own personal standpoint and from the standpoint of the Commission when I was there, we all knew it needed some attention. We all knew it was not quite equal justice under the law, but our determinations about what might be the right fix, if you will, for the guidelines was quite different; and it is -- with all due respect to the Commission at the time I was there, it is no secret, for, I think, the first time in Commission history, a Commission recommendation went to the Hill with a dissent, which I wrote, because the Commission on which I served voted -- the majority voted, in a rather short meeting, and all who were there I think would confirm that, to recommend to Congress to go to a one-to-one ratio. I thought for a myriad of reasons it was wrong.

The one that's useful today is that it simply wasn't what Congress felt comfortable with on either side of the aisle. I believe that's right. I will not speak for everybody in Congress, obviously, but Commissioner Budd and I had been over to the Hill,

spent a lot of time. We got a pretty good sense of where they were.

Now, I tell you that little story because I think it's so important to a three-branch Commission. No one branch can act without a very good understanding of the other two, and it is not good for the nation and it is not good for the individual issue. It has been, if I could, sort of a tragedy of the tenure over which I've watched the sentencing guidelines, that we haven't been able in a very effective way to address -- in a way that brought everybody to the table, to address this issue, that still persists.

So I wrote that dissent. I have enormous respect for the other people on the Commission. I was joined by two other commissioners. And had we proceeded slightly differently at the time, instead of a divided Commission, I think we -- you might not have had it on your laps.

So I say that as sort of a history point that the past is prologue, if you will, and I -- I simply leave you with we have a, I think, even in -- and, you know, advisory, now we know constitutionally, guidelines period, the Commission has a powerful role to play in data collection, in training and in bringing

the three branches together. So I thank you for your work.

ACTING CHAIR HINOJOSA: Thank you, Judge Tacha. Is it going to be Judge Loken next or Judge Hartz?

JUDGE HARTZ: He has asked to go last, so I think that means it's me.

ACTING CHAIR HINOJOSA: Okay, Judge Hartz.

JUDGE HARTZ: Thank you very much for the opportunity to appear before you, and I share Judge Tacha's view of the fine work of the Commission, which we get to see far too often, I think, in our work.

I'm an advocate of sentencing guidelines, and I think they're a very good idea. My impression is that that's a minority view in the federal judiciary, even among appellate judges, who put great store on the discretion of the sentencing judge who can look at the individual defendants, see the case, and mold an appropriate sentence. I can appreciate that view. Certainly there are things that can't be captured in guidelines that you can see in a courtroom.

The problem with that is that when there's not enough constraint on sentencing, the

individual idiosyncrasies of judges play far too much a role in sentencing. There's no -- as far as I can see, there's no science about what the right sentence is. It's very much personal whether there should be harsh sentences or more lenient sentences, whether this crime is more severe than others; and what I've seen in my career as an appellate judge is the injustice, at least in my view, that results from that.

I was on the state appellate court for 11 years. We did not review sentences, but you couldn't help but see how people were being sentenced around the state of New Mexico. And the case that sticks in my mind was one in which a fellow got drunk in Hobbs and knocked over five tombstones in a cemetery. Each tombstone was one misdemeanor. This was not a racial or religious incident, and he was sentenced to five consecutive one-year terms, and I'm quite confident in Albuquerque that would have been a probation offense.

On the federal court, this is primarily by looking at *habeas* cases, I've seen people sentenced to death in one state who would be sentenced to a few years incarceration in another. If you focus only on the one court that's doing the sentencing, giving the judge the discretion, it can make sense; but when you

look overall, these disparities to me result in injustice.

So as much as I don't care to spend a high percentage of my time reviewing sentencing as a federal appellate judge, I thought that was a very useful role for the courts under the mandatory guideline system. And I would disagree with sentences, my general predilection is probably somewhat more lenient sentencing than the guidelines provide, but at least I felt this was even-handed around the country and it was justice.

I'd like to address my remarks now, and I'll turn to my written comments about what should happen now after *Booker*, just some suggestions. My impression, and you certainly have the data that you can correct me if this is wrong, is that even under the advisory guidelines, most judges, in most types of cases, sentence within the guideline range so that federal sentencing is in the main evenhanded, but there are outliers. As a result, the sentences for some defendants may vary greatly, depending on who the sentencing judge is. When the guidelines were mandatory, appellate review was a useful and, by and large, successful tool to obtain evenhandedness, but that tool has disappeared; and now that appellate

courts review the length of the sentences only for substantive reasonableness, appellate review will rarely result in setting aside the sentence below.

And that's because district judges are reasonable people, and they make reasonable decisions. If you just look at reasonableness, I think it's going to be very, very hard to say that a sentence imposed by district judges is unreasonable.

So is there anything that could be done to enhance evenhandedness under the advisory regime? I'm not sure, but I think so, and I'd like to make one suggestion, and I do it with some trepidation because it would increase your workload.

What I would recommend for consideration is an expansion of the guidelines manual to include additional commentary providing the rationale for various provisions. The guidelines provide a thorough, accessible compilation of the conclusions of the Sentencing Commission, and under a mandatory regime, the sentencing judge, as well as the appellate tribunal, needed little more than conclusions; but now that the guidelines are only advisory, they must not only be understandable, but also persuasive. A judge who is unaware of why the Sentencing Commission determined that a factor should be disfavored or why a

particular fact should significantly increase or decrease the offense level, I think will be more likely, it will be more likely that an informed judge -- I departed from my text and now my syntax is all wrong. But I think that an informed judge will be less likely to part from advisory guidelines.

Even if the sentencing judge disagrees with the Commission and the Commission's rationale, the judge may well recognize that the rationale applies to the particular case before the judge, and, in the interest of evenhandedness, will impose a guidelines sentence. I think judges appreciate the need to have evenhanded sentences and they will respond to the rationales.

And certainly an appellate judge will be more likely to affirm a within-guidelines sentence if that rationale applies to that case, and I realize that almost no within-guidelines sentences are being set aside now anyway. Of course, if a judge understands the rationale behind the guideline, he or she may be more likely to vary from the guidelines in cases where the rationale does not apply, but that's not a bad thing. Such variances are quite proper and should even be encouraged. Treating unlike cases the same is not the sort of evenhandedness that we should be striving

for.

Let me give a couple examples. One, I think a possible subject for a pilot project to see whether implementing my suggestion would be a useful effort would be §2L1.2(b)(1). I assume that the offense-level enhancements in that provision are justified primarily by concerns about the aliens repeating the prior offense rather than by the belief that the reentry itself is more serious because the alien had committed earlier offenses in this country. And if this is so, then the judge's decision whether to vary will likely depend on such matters as how old the prior conviction is and whether the alien can convince the judge that the alien has been leading a law-abiding life since that time.

The second section that I think would benefit from further explanation is §5A1.1. There is a list of specific offender characteristics that aren't supposed to be considered or disfavored and explaining why would be useful. There's such a temptation that I perceive district courts to give credit for charitable contributions and charitable work; and if that's not going to be considered, or it shouldn't be considered by judges, then I think further explanation of the sentencing guidelines manual would be useful.

That's basically my remarks now. Thank you very much.

ACTING CHAIR HINOJOSA: Thank you, Judge Hartz. Judge Loken, I think you're next.

JUDGE LOKEN: Thank you. It's a pleasure to be here to help the Commission commemorate the 25th anniversary of the Sentencing Reform Act. In addition to my almost 19 years as a circuit judge and six and a half years as a chief judge, I spent the six years as a member of the Judicial Conference Criminal Law Committee, and there I got to know a number of the still-here commissioners and, more importantly, learned and observed firsthand the dedication and professionalism of the individual commissioners and their staff; and for that reason, I wholly endorse Judge Tacha's and Judge Hartz's general remarks.

Now, I didn't practice criminal law. I was never a prosecutor, I was never a criminal defense lawyer, I was never a sentencing judge, and so while I have views, I didn't think that my personal views on the more controversial political issues surrounding federal sentencing was really a place I should go this morning. I thought what I do -- what I do want to talk about briefly is the institutional impact of the guidelines on the United States courts of appeals as I

see it, and speaking individually. Because I think the Sentencing Reform Act was sound conceptually, including its inclusion of the courts of appeals in the sentencing process to a far greater extent, but from my perspective, the way the Reform Act has been implemented has, from a cost benefit perspective, been almost a disaster for the courts of appeals. And let me do this with a couple of numbers, a couple of figures.

1986, the year before the guidelines were effective, 2,133 appeals were filed in the Eighth Circuit; 318 were direct federal criminal appeals, 15 percent of our cases filed. I wasn't there, I dare say no more than a handful had sentencing issues of any kind. 1991, my first year on the court, the fourth full year of the guidelines, we were up to 2,791 appeals filed, about, what, a 30 percent increase; but 596 criminal appeals, almost double, 21 percent of our filed cases.

Now let's go to last year. We're only up to 3,118 cases, but 1,183 criminal appeals, a full 38 percent of our new case docket, and 1,051 of those cases involves sentencing issues. That's 89 percent of the criminal appeals. In other words, our criminal caseload has more than tripled while our civil caseload

has grown about the same amount, as Congress has expanded my court from ten to 11 active judges.

Now, my initial reaction to the guidelines as a business litigator with no criminal experience other than having been a law clerk, of course, but so in 1991, I thought this is like the Internal Revenue Code, and I thought lawyers were reacting quite predictably to an array of legal issues in a manual that looked like a -- you know, something like the tax code. They litigated everything, and now most every issue was appealable.

And the appellate judges, lawyers themselves, reacted predictably. They analyzed every issue thoroughly, they drew fine lines that made the regime even more complex and, of course, in the robing room my colleagues complained a lot about this. And I thought it was, in large part, a self-inflicted wound because we were overlawyering the overlawyering, if you will, as a reaction to the guidelines manual, which, as Judge Tacha -- I agree with Judge Tacha was, in most respects, a brilliant piece of work and a successful one.

Well, I welcomed *Koon*. I thought that might be some relief to this excessive, but it didn't do any good. I'm just talking now the court of appeals

institution perspective, not the effectiveness of the guidelines' impact on sentencing. And, of course, more work is not inherently bad, but I think one institutionally looks at the possible benefit; and the universal justification and the complexity of the manual and the appellate jungle it was producing, is, well, we have to eliminate unwarranted sentencing disparity. But with all due respect, that is a fine objective, but one that's never going to be completely realized. All you have to do is look at 5K1.1, which was a political imperative, a necessity, but which to the person on the street, I dare say, contributes to a disparity in its day-to-day impact.

Curbing the extent to which judge's sentencing philosophies, disparate philosophies, create sentencing disparity, that's, to me, the real objective of the Reform Act and the guidelines, and that is an absolutely proper, essential objective. But as an appellate judge, my reaction is you don't need 43 offense levels and 258 sentencing ranges to do as much as realistically can be done to rein in what Judge Hartz referred to as the outliers.

So the guidelines resulted in a great deal of appellate work for a very modest benefit. I'm not one to say the courts of appeals can't handle the

work or that we're drowning or that we're not doing the job. We'll do the work that Congress and the litigants bring to us. But the task is less -- is less rewarding and less satisfying when there isn't time to do it to your personal satisfaction. Those of you who are district judges or those of you in all walks of life know that if you really have an intense desire to do a good job to the best of your ability, when you're swamped, it's -- it's disquieting, to say the least. And a great many important issues in the other parts of our docket are not getting the attention they deserve because, frankly, we're swamped with routine sentencing appeals.

Now, I thought, therefore, *Booker* and *Gall* held out great promise to improve the situation from the courts of appeals' perspective, and they may still do that, but I think your help is needed. After *Gall*, I urged my colleagues to accept the Supreme Court's invitation to opt out of sentencing, for the most part, but they haven't. And the lawyers, I think again predictably, continue to brief and argue advisory guidelines issues as though nothing has changed. And I cringe every week when I look at our stack of Eighth Circuit slip opinions and see how many 6-, 8-, 10-, 12-page opinions we're filing dealing with fact-bound

issues like role in the offense and drug quantity and the amount of fraud loss and criminal history category that, for the most part, don't really matter to the sentence that was imposed. I mean, they do to the district judge in the formative process, but they don't control -- didn't control the bottom line.

And so I think this is -- this is a really unfortunate waste of resources. And if you think about the criminal appeal, the -- one of the victims here is the federal taxpayer who is paying for the prosecutor, the appointed defense lawyer, the probation officer, the district judge and three circuit judges and their staffs. And so I think a certain amount of -- I think a cost benefit analysis is significant here, and I'm talking about one corner of the process that you have to -- to monitor and supervise or make recommendations.

And it's not the biggest thing on your plate, but I think you can do some things to help, and I've come with two relatively modest ideas, which I think if you took a position on would have an impact.

First, the concept of procedural error created by the Supreme Court post-*Booker* is, at least in the short term, being overlawyered beyond belief. And it's no doubt because, as Judge Hartz says, few

sentences are unreasonable to appellate courts after *Gall*, particularly my court which got its hand slapped in *Gall* itself. *Gall* was a very difficult case. I was on the panel and there was an outlier look to the sentence, particularly after 16 or 17 years of a mandatory guidelines regime; and the Supreme Court spent the first half of the opinion saying how to do it, which is exactly the way we tried to do it, and the last half of the opinion saying how silly our answer was.

So unreasonable is not a real attractive appellate grounds, so the lawyers are, what are they doing, they're regurgitating their drug quantity briefs and their roll in the offense briefs, pages and pages and pages. What can be done? Well, I think the Commission -- and, of course, the courts could do this themselves, the courts of appeals, but they're not quickly doing it, I don't think, and the Commission could more effectively craft a rigorous harmless error standard addressing the issue of procedural error.

To me, if a district judge, and I think carefully doing the -- determining the advisory guidelines sentencing range is a very important part of the process, and district judges need to do it carefully. But if a district judge says, I have this

fact-bound two-level issue that comes out on the cusp as a matter of both -- arithmetic, so to speak, if it's fraud loss or drug quantity and credibility of the competing witnesses at sentencing, and, okay, I make a call, I say X instead of Y, plus two or minus two levels, but I have to tell you it doesn't affect the sentence I'm imposing, I think that ought to be harmless error. And I think if the Commission said that ought to be harmless error, it would have an impact on the lawyers that are -- that are tempted, because they know the sentence itself is not unreasonable, to make a big deal, so to speak, on appeal.

Second, I think -- and this might be harder for you to swallow, so to speak, I think the Commission should declare its prior departure methodology outside the realm of procedural error. To me, once the advisory guideline range has been properly determined, determining the sentence should be -- should take one additional step of merging the former departure analysis into the 3553(a) variance decision; and obviously a district judge who related the variance decision in terms of the prior departure methodology is more -- that's a -- that adds credibility to the exercise.

But the lawyers come up and say, oh, the judge blew the departure analysis and that's procedural error and you have to reverse. So we have a three-step appellate process instead of a two-step process, I think unnecessarily, and I think you could, again, with some -- add some wisdom -- well, your wisdom would be appreciated. It might or might not coincide with my thoughts.

Of course, then third, I think it would be great if you simplified the whole manual, but I think there I suspect I'm asking way too much, and indeed you have enough on your plate that I doubt that you're about to do that. But I think the two small steps I urge you to think about because I think you could do those credibly and effectively and helpfully. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Loken. And we'll open it up for questions. Judge Sessions.

VICE CHAIR SESSIONS: Well, thank you all for your keen observations, and let me begin with the Tenth Circuit, because to some extent your -- I follow logically what you both have said, there may be an inconsistency, but there may be a consistency as well.

Judge Tacha, obviously you've been on the Sentencing Commission, and when you talk about our function, it is not just to empirically analyze, which we do faithfully, the proposed guidelines, but also to balance the branches of government, and that's a very important approach.

Now, then I hear Judge Hartz say that we should add a section of the guidelines which should describe the empirical analysis that we've done to arrive at a particular guideline. And you know what that could lead to, that could lead to a statement that, well, we passed this guideline because we felt that Congress would not go as far as we wanted to go or would not go as little as we wanted to go, and that the political considerations, which we have to do as a part of the Sentencing Commission, could not be adequately described in those kinds of addendum.

We are criticized by judges now in many opinions, which say that, well, this particular guideline was not empirically based. Well, you know, some guidelines were partly empirically based but also partly reflective of the political reality of the world.

I guess is there a conflict between a Commission that actually considers the politics and

then the necessity of actually describing empirically how you arrived at a guideline amendment, or can those two be meshed in such a way as to be honest?

JUDGE TACHA: Oh, yes, of course they can, in my view. Now, far be it from me to put words in Judge Hartz's mouth, but let me tell you what I think I hear him saying, and he will no doubt correct me. But I think I'm hearing both of my colleagues say that now on appellate review, what we're really looking at is did the district judge look at the 3553(a) factors. In -- and if you look at all this -- and I totally agree with Judge Loken, all this plethora of decisions that's coming down, it pretty much boils down to did they look at 3553(a) and do it right, because that's the statutory requirement.

I think I hear Judge Hartz saying that if for the benefit of the district judge there were a few more nuances, not the empirical ones -- I would differ with him on the empirical basis, but if there were some nuances into the rationale of the Commission that could be used by the district judge in articulating the 3553(a) factors, then it would bring the guidelines together with the statute, it would bring the appropriate role of the Commission together with the role of the district judge and not require an

[empirical basis].

Now, again even defining what's empirically based is a bit of a challenge, so I don't want to overuse that word, and I don't think any of us should.

I deviate a bit so let me simply say I thought I heard him saying that looking at the rationale of the Commission -- and I don't know whether I agree or disagree. We didn't share our remarks with each other, so I haven't thought about all of this very thoroughly. Sentencing -- and this is repetitive, but sentencing is both political and personal, and in neither of those does empirical data operate very effectively.

ACTING CHAIR HINOJOSA: Judge Hartz, I didn't hear you say it was -- talk about just empirical basis. I thought I heard you say -- and correct me if I'm wrong -- that we should discuss matters as a result of a directive from Congress where Congress indicated to us that they felt such and such about a particular -- and directed the Commission to act in such a fashion with regards to certain guidelines sections, or that as a result of comments from judges or that as a result of statutory provisions, that the Commission -- or empirical studies, that the Commission

decided this should be the set of guidelines, that you felt that that would be helpful to judges; that sometimes district court judges may operate not knowing where the Commission got this basis for certain guideline amendments or guidelines themselves, and that you felt a more detailed description as to where the Commission came from.

What probably we as district judges don't know is that we have a lot of that with regards to the black portion of the manual that we rarely open as district judges, because that's supposed to be kind of the history of where this comes from and the amendments. And perhaps we should do a better job of training people to go there and determine when a guideline amendment came and as a result of what.

We also, when we promulgate the guidelines, usually have commentary at the start that indicates what the Commission's view was, and perhaps we haven't done as good enough a job of making sure that people have access to that and understand that we do put that out. And I appreciate your comments and why you made them, but I had not heard you say that it should just be about empirical basis, but just a general explanation as to how the Commission reads these conclusions as far as a certain guideline or a

guideline amendment.

JUDGE HARTZ: I think you heard me correctly, that's what I was trying to focus on, and the rationale why -- why a four-level jump here, not on an empirical basis why it should be four levels, but why there's a distinction. And I don't know if this will work, and you certainly know much better, but that's why I suggested a pilot project. And the one that I would like to see most, perhaps, is one explaining the disfavored factors, because there's a lot of debate within our court on those issues. These are not debates and opinions, but just in discussing these matters. And it's the easiest way for a district judge to vary from the guidelines, is to take and count the disfavored factors now. It seems to me that seems to be happening more often than some of the other changes.

VICE CHAIR CASTILLO: Last month in Chicago, my circuit, Chief Judge Frank Easterbrook, suggested as a way to address some of these concerns that Judge Loken was talking about, expanding the zones, perhaps getting congressional legislation to do away with the 25 percent rule and perhaps having overlapping sentencing ranges so that I think, from his perspective, it would increase the chances of having a

harmless error analysis to some of these technical guideline application issues. What do you all think of that?

JUDGE LOKEN: Well, I think that's sound. We've already built overlap harmless error into our post-*Booker* jurisprudence, borrowing from case law and the mandatory regime. So if you expand the overlaps, you, by definition, I think, increase errors that everyone would agree were harmless procedural errors.

My suggestion was on the assumption that you will have strong resistance from various quarters to doing what Chief Judge Easterbrook urged and, therefore, going to blessing, if you will, district judges. And some of our district judges have started to do this, who say I wrestled with this two-level issue, and it didn't -- it doesn't -- there isn't an overlap; but given my expanded discretion post-*Booker*, I can tell you right out, my sentence would have been the same.

And it occurs to me that it should take something like the threshold showing that you need to get a Franks hearing when you accuse a law enforcement officer of lying to a warrant-issuing magistrate to overcome the inherent credibility of a district judge

who says that. It seems to me you can work out -- your Commission, with the time and experience, could do some -- you know, could do something along those lines.

And I don't know -- one problem, is it a policy statement or is it an application note? And I like the black manual. I always go to the black manual to get the explanation right out of the box for something that's come up years later, and then I don't have to worry about how binding it is. I just -- it's like legislative history.

JUDGE TACHA: The only thing I'd add to that is, this is your Sentencing Commission hat, and this so runs into the policy question and it's hard for me to shed my Sentencing Commission hat, and the 25 percent rule was just pretty sacrosanct with an awful lot of policymakers; so that if there's a way to do it that doesn't run into the 25 percent rule, it seems to me, again, apropos my remarks, that that makes a lot of sense.

JUDGE HARTZ: May I comment on that?

ACTING CHAIR HINOJOSA: Yes.

JUDGE HARTZ: I was very interested to hear Judge Loken's remarks about this, the sheer quantity of appeals we're getting. And the question is, why if they're not helping -- maybe you get a

remand and end up with the same sentence, but ultimately it's not helping the defendant, and that's usually who is appealing. Why are the appeals being made on this ground?

Now, under the Armed Career Criminal Act, and there's some comparable provisions in the guidelines, defendants are having some success. And I really hope Congress will pay attention to Justice [Scalia's] concurring opinion about a year ago suggesting that that be revised so we don't have so much litigation regarding whether something is a violent felony or not. But I wonder why these appeals are being brought and you are having public defenders appear before you, and it might be interesting to hear from them.

One thing that occurs to me is you don't want to submit an Anders brief, so what are you going to appeal on. And maybe in the old days there was a hearsay question that would be raised, and now it's a sentencing guideline issue instead, so it's not so much the guidelines. That's just the easiest way to pursue an appeal.

And, well, with respect to substantive reasonableness, for example, I, in my opinions, try not to write more than a paragraph about it, and I hope

that will send a signal to counsel on both sides don't bring these appeals on substantive reasonableness. Unless it's extraordinary, you're going to lose. And we're getting 20-page briefs on this thing explaining all the circumstances of this fellow and why this is unfair, and nothing truly extraordinary. And it would just be very interesting to hear the explanation of why so many of these appeals are being brought. They're not frivolous, but they don't help the client that they're being raised for.

COMMISSIONER HOWELL: I just want to thank all of you, and echo the thanks of my fellow commissioners for being here and taking your time to bring your perspectives on the Commission -- on the guidelines to us and sort of the criminal justice system as a whole.

Judge Tacha, I particularly wanted to ask you about one issue that the guidelines are regularly criticized for, and that is the linkage between the drug table and mandatory minimums, particularly given your experience in the mid-'90s in the crack powder arena, which I think set back that debate for at least a decade.

And understanding -- and I think you also talked about the empirically-based criticism of

the guidelines, which is particularly lodged at that linkage that the original Commission put between the mandatory minimums and the guideline table, the drug table. In part because the Commission doesn't just look at empirical data, it also looks at the policy decisions, some people call it politics, I call it the policy decisions by Congress as to what's necessary to protect public safety, and this Commission has to pay attention to those policy decisions by Congress.

And so we are going to hear even witnesses today or tomorrow bring up again that criticism of the linkage, and I am interested in your perspective on that linkage and the risk that you might perceive, having lived through the mid-'90s, should this Commission adopt a delinkage position, which is not one we opted to do when we reduced -- with our crack guideline reduction amendment, and just hear your perspective on that, given your history, your work in the trenches of sentencing policy.

JUDGE TACHA: Thank you for this opportunity because I was afraid I was going to take everybody -- too much time because the linkage between mandatory minimums and the guidelines is, obviously, if you will, of the sentencing guidelines perceived the great compromise. And I, of course, wasn't there at

the time that compromise was made, but did run headlong into it in the crack cocaine debate. I have talked with, I think, every member of the original Commission about that decision, and it is absolutely a perfect example of what I was talking about.

At that time in history, now I want to -- I want to bracket that because at that time in history, the concern about guns and drugs and safety in the streets and all of the issues that were so high on the public's minds, simply, I think, mandated that mandatory minimum compromise.

I was told by members of that original Commission -- and this is pure hearsay, but it's pretty reliable -- that it may have been one of the linchpins to acceptance of the guidelines. You know, it's all about what's possible as a political, as a sort of an ongoing pragmatic determination. So I believe it was both political and pragmatic and that that original Commission thought it was the way to put together the guidelines in a way that all three branches could feel comfortable at the time.

Now, let me fast forward a bit. In the crack cocaine debate, I actually raised this question with several influential people on the Hill in the mid-'90s, and here is a direct quote from a very

influential staffer on the Hill at the time: "Deanell, mandatory minimums are a button on my computer." That told you -- told me how engrained it was in the minds of the elected branch of government that there was a point below which they did not want to go.

Now, I was greatly relieved when the safety valve was adopted because that took care of a little piece of that issue, not of the crack cocaine issue, but of the linkage issue.

Now, this is pure speculation, and I have no empirical data to support it except what I hear around the nation, which is there may be, even in the public's eye, a little dilution of whether that mandatory minimum amount is absolutely necessary. And I think it may -- again, this is speculation, but it may be, for some of the reasons Judge Loken pointed out, that the financial imperatives and economic considerations may be so high on the public's mind. Again, total speculation. But this is where you are so important, getting to the Hill, getting to the Department, getting to where the policymakers are.

Because, of course, judges -- the judicial conference has been on record, for as long as I was there, against mandatory minimums. The judicial branch has been four square against them for quite a

long time. So in my judge role, I have no problem telling you the Judicial Conference of the United States is against mandatory minimums, thus would be against the linkage. But that is not where the issue resides, and it seems to me that is maybe front and center of the policy issues on your plates, is to figure out how we bring together these concerns.

I mean, I don't have to tell any of you, if we -- if there's even a dilution of the commitment to mandatory minimums, then the public may get scared again. I don't know the answer to that one. I simply don't know. But in the crack cocaine debate, it was very much an issue. I tested the waters personally and found no receptivity.

JUDGE LOKEN: Let me just add, maybe I don't understand where the question is coming from, but it seems to me that *Booker* and *Gall* have -- should have taken some of the heat off the linkage issue, because -- well, the linkage is -- analytically it's hard not to link your guidelines ranges to what Congress has decreed, so some linkage, it seems to me, is -- well, you can divorce and under an advisory system, I guess you could more -- you could more credibly divorce from an advisory.

But to the extent that linked guidelines

produce a sentencing range completely above the mandatory minimum, which I do see happen a fair amount, it seems to me district judges now just go -- if they don't have a 3553(e) motion or a tenable safety valve issue, they just go to the mandatory minimum, and so your -- the harshness of the linkage-produced higher range is now easy to ameliorate.

VICE CHAIR CARR: Judge Loken, one of the places that this question comes from, and what I got in your written testimony and from what you said today, Judge Hartz, was that it's ever more important now that the guidelines not only be understandable, but be persuasive. And particularly from some district court judges in our prior hearings, we've heard a suggestion that we want to look to your guidelines, your guidelines are helpful, but we need for them to be credible. And one of the things that to some of us -- this is the district court judges speaking -- is not credible is when you just tie your guidelines to the statutory mandatory minimums. And we've had some judges suggest just publish the guidelines that you think would be appropriate for particular drug quantities, regardless of what Congress has done. Yes, there will be those defendants who suffer those cliffs because they go one gram too high in drug quantity, but

that's where some of these issues have been coming from.

JUDGE LOKEN: I think it's a legitimate position, and you've got to wrestle with it and with all of its political ramifications, because I also think it's credible to keep the guidelines linked to what Congress has decreed.

COMMISSIONER FRIEDRICH: Judge Tacha, one of the things the Commission is closely tracking in this advisory guideline world is whether the degree of unwarranted disparities are creeping back into the system, and we're tracking that very carefully.

What defenders of the existing system say to us repeatedly in these hearings is not to worry, the appellate review is working, there will be a body of -- common law body of sentencing that will guide the district court judges and rein in the outliers and give them guidance in applying advisory guidelines. And what we're seeing, from reading the opinions, is both courts are struggling with coming up with a principle basis on which to apply substantive reasonableness.

The courts routinely say it's the rare, unusual case. Judge Hartz, you've said that on substantive reasonableness, you don't write more than a paragraph. Do you think your goal, that we all share,

which is evenhanded application, equal justice under the law, is that something that can be achieved in this existing system? Do we need statutory reform to continue to further the goals of the Sentencing Reform Act?

JUDGE TACHA: I very much believe it can occur in this regime. I actually kind of like the suggestion about you doing something about harmless error. I think that would go a long way. As my understanding -- and I didn't look at these disparity statistics this morning before we started. My understanding is it is creeping in a little bit more than we would like to see it, but that's not surprising. You go from a totally bridled system to a slightly less bridled system, and I suspect it's not surprising.

Now, there's where the Commission can play a very important role, in watching this, as you obviously are, very carefully. But if you look at the opinions -- now, my district judge colleagues may tell me I'm -- in the Tenth Circuit, it's just crazy. But if you look at the opinions, the appellate courts, like the district courts, are still using as rationale, guidelines rationale, still looking at -- I think that's why Judge Hartz is talking about this what

should be considered issue -- still looking at all those things. So I can't imagine the disparity is going to get as large that it would become a statutory change problem. I just can't quite see that happening.

COMMISSIONER FRIEDRICH: Even though district court judges now clearly have the authority to disagree with policy decisions the Commission's made, and those are routinely affirmed on appeal?

JUDGE TACHA: Well, you know, I think, at least the case to which you refer, is, in my view, an outlier because of the subject matter. There's just such a concern about that particular problem. I don't think district judges, and I don't think appellate judges, will ignore the policy guidelines very often. They'll look at them very carefully. In fact, what I hear Judge Hartz saying is they'd like to look at them more. So I'm forever the optimist, but it seems to me that we will find, if not a comfortable range, a pretty acceptable range of disparity, and then it won't go beyond that. But that's my prediction.

JUDGE LOKEN: I have one that I think you should watch from this standpoint, and that's child pornography, because the cases -- I've got two or three of them in the next -- the rest of this week, and you've got three or four or five or six enhancements,

and the resulting sentences are horrendous. And I think reasonable judges can differ dramatically on whether -- on whether for some of these crimes that's good or bad.

So I think if *Gall* has thrown rational review of substantive reasonableness out the window, and it's very hard -- as Judge Tacha says, we're struggling after *Gall* with how do we do this, how do we define and rein in the, quote, outliers. I think child pornography is one where you've got judges who don't think you've got enough enhancements on there and judges who think what you put on, and are mostly Congress's directive, I believe, are terribly unfortunate.

JUDGE HARTZ: May I speak on that issue, because I don't see it quite the way of my colleagues. I have a fair amount of communication with the district judges in New Mexico, and I think, for the most part, they would like to be consistent with the guidelines, and they appreciate the value of someone coming in their court and knowing I'll get about the same sentence as if another judge was sentencing. But there are outliers, and I don't think that the mass statistics -- I think that the quantity of statistics will mask this, because you might have 90, 95 percent

of the judges agreeing on the sentences for this type of case, and you'll have some outliers. And at least in our circuit, I don't think there's going to be a significant control through substantive reasonableness. We have our call me crazy case, which you may be familiar with, and that's about the only time I think we've found a sentence substantively unreasonable.

There's some control you can provide through procedural reasonableness, and I meant to say this in my opening remarks, but if the guideline manual says charitable contributions should not be a consideration for these reasons and the sentencing judge doesn't explain why that judge is giving consideration to that factor, despite what is said in the manual, that might be an issue for procedural reasonableness review and can also have some -- can result in some peer pressure, perhaps, on that judge.

But I'm not -- I think if you have a few judges in a few different types of cases being significantly outside the mainstream, even though you're still getting 95 percent compliance, I think that's a serious problem, and I'm not sure it's solvable right now.

JUDGE TACHA: Could I just add on a couple of topics. And it's the child pornography that

prompted me. Again, I'm wearing my old matriarch hat, but the public right now just doesn't understand all this cyber crime stuff, and there's such a generational gap, even in whether we know what we're talking about, that I think it is terribly important for the Commission and all those with whom you work to begin to look at that, because it will become -- that kind of thing will become the kind of thing that guns and drugs were in the mid-'80s, we're just so scared of it that we've got to sort of push the statutes.

The other place I'm concerned is in gain and loss, and I was part of the guidelines on gain and loss, and district judges are somewhat constrained at what they look at in the gain slash loss area. And in these days of immense public concern about economic crime, I think it may -- and I favored what we did whenever it was we did that, but now I think it may behoove us to say, you know, gain and loss, maybe the district judge ought to just kind of look at what's taken into account, what's the most effective deterrent, punishment.

COMMISSIONER WROBLEWSKI: Judge Hartz, I just have a quick question. You mentioned the Armed Career Criminal Act, and we've heard over and over again, I hear in the Department, we've heard during

these hearings, about the application problem associated with the definition of crime of violence, aggravated felony, not just in the Armed Career Criminal Act, but in the guidelines and elsewhere. One idea that we're kicking around, we're taking up Justice Scalia on his dissent, but where we've gone so far is a longer list. Right now Armed Career Criminal Act says robbery, extortion, and then a catch-all.

Do you think it's just simply as simple as expanding that list to explicitly describe, whether it's residential burglary, whether it's aggravated assault, is that the road we go down? Do we get rid of the category of goal approach. Have you and your colleagues thought about this at all?

JUDGE HARTZ: I can't speak for my colleagues, I've given some thought to it. The problem is more than just listing things because then is that generic robbery; is this statute in California; does it have some different elements of robbery or kidnapping or -- I don't remember the precise terminology on the sexual offenses, but whether that fits. If there's going to be a list, it would be helpful to have the elements of the offenses listed. That may get totally out of hand. I'm not sure I have a solution, but I'm so pleased to hear that somebody is working on it.

COMMISSIONER WROBLEWSKI: Thank you.

JUDGE LOKEN: I've spent a lot of time with that, and my two new least favorite words in the English language are otherwise involved. I think *Taylor* adopted the categorical approach for very understandable reasons, but I'm leaning toward the dissenters who say it needs to be rethought because it hasn't worked.

JUDGE TACHA: Added work.

JUDGE LOKEN: Well, and then the laundry list, as the problem of all laundry lists, the ones that go in that people think shouldn't have gone in and the ones that aren't there that should have been.

COMMISSIONER WROBLEWSKI: Our alternative is to watch the Supreme Court year after year take up one case after another. Last year it's [escape], this year it's --

JUDGE LOKEN: What if the failure to report is not violent, but what about walking away from a camp. I've got this next week.

JUDGE TACHA: Stay tuned.

JUDGE HARTZ: We all have that case.

JUDGE LOKEN: It's terrible. I don't know what Congress should do, but I wish they'd fix it.

COMMISSIONER WROBLEWSKI: If you come up

with any ideas, let us know.

JUDGE LOKEN: Keep working. I'm glad to hear that.

ACTING CHAIR HINOJOSA: Well, on that note, we want to thank you again for taking your time from your busy schedules to share your thoughts. They've been very informative and very helpful. Thank you all very much, and we'll take a short break before we hear from some district judges.

(A break was taken from 10:05 a.m. to 10:26 a.m.)

ACTING CHAIR HINOJOSA: We're very fortunate to have two distinguished district court judges give us a view from the district court bench. We have Judge John Thomas Marten, who has served as a district judge in the District of Kansas since 1996. Before he took the bench, Judge Marten practiced privately in McPherson, Kansas; Minneapolis and also in Omaha, Nebraska. Following law school, he served as a clerk for Justice Tom Clark, and Judge Marten earned both his BA and JD from Washburn University.

We also have Judge John L. Kane, who has served as a district judge in the District of Colorado since 1977. He did take senior status in 1988. He also has served as an adjunct professor of law at

Colorado School of Law since 1996. Prior to his nomination, Judge Kane worked in private practice in Denver, as well as he also served on the Peace Corps with his missions in India and Turkey. Judge Kane received his BA from the University of Colorado and his JD degree from the University of Denver College of Law.

Judge Marten, are you going first or Judge Kane?

JUDGE KANE: Judge Marten.

JUDGE MARTEN: We hadn't discussed it, but I'll defer to my senior judge's deference in this case. I appreciate very much the opportunity to be here. I'm actually here in lieu of our Chief Judge Kathryn Vratil, who asked me to come in her stead. I came at this from, I think, a completely different perspective than a lot of folks did, because although I practiced with a large firm for about three and a half or four years, when I started, I ended up in a community of 12,000 in Kansas, where we did about every kind of work that came in the door. We were a six-person firm, and I ended up doing the lion's share of the litigation, and at that time had actually done trial work in our firm; and we did a lot of court-appointed work, as well as retained criminal work, so probably 25 percent of my practice was

criminal defense work.

We didn't have a guidelines system in Kansas. Although I handled a couple of federal criminal appointments when I was practicing in Omaha, Nebraska, I had no federal practice on the criminal side during my years in Kansas; so when I came to the federal bench, although I was familiar with the criminal justice system certainly, I had no experience with the guidelines. And as I've mentioned in my materials, I heard from a lot of lawyers and judges about the guidelines, and there were two major complaints.

One was that they were just entirely too severe, and the second was the lack of discretion on the part of the judges. And, frankly, I was one of the people -- my predecessor, Patrick F. Kelly, declared the guidelines unconstitutional. He was a very vocal opponent of the guidelines. I, frankly, was pretty happy to have them, because to me it gave us a starting point. You had an offense level, you had a criminal history, and that took you to a point on the grid. Where I had problems with was what happened at that point. I thought that ought to be the starting point rather than the ending point on sentencing decisions. And all of the factors that I had argued as a defense

lawyer in the state court were disfavored factors under the guidelines, and I never really came to understand, and don't to this day, and this is one of the things I think that Judge Hartz was talking about in the prior session, I don't understand why all of these things that differentiate one person from another are disfavored factors for purposes of sentencing.

Tom Robbins, a novelist who's not a legal scholar, not even a lawyer, but who has some fairly cogent observations about things, wrote in one of his books that equality is not in treating different things similarly; equality is in treating different things differently. And to me that captures what a lot of the problem was with the guidelines, from my perspective. We were trying to take people who had very, very different experiences, maybe their criminal histories were fairly similar, maybe their offense conduct was fairly similar here, but we were trying to say that they ought to be treated in the same way and ignoring what's probably 98 percent of the rest of their life out there that is going to set them apart from the person that they're being compared with, or the great body of people that they're being compared with.

Another lesson that I learned early was

from Justice Clark, when I was visiting with him about a case and said this is controlling, it's square on all four corners; and he smiled and said, every case is distinguishable on the facts. And, of course, that's absolutely true, and that is what I felt we were missing as judges.

Nonetheless, I think most of us made every effort where we felt that, in good conscience, we could, and, in compliance with the law, stuck with guidelines sentences, and it was not in that many instances that we departed. If we did depart, we didn't depart much. And this ignores, of course, the 5K1 motions and that kind of thing; or where there was a plea agreement, for example, that Rule 11(c)(1)(C) plea agreement, where the parties were recommending a particular sentence that was a departure or variance from the guidelines.

Where we did, I'm not sure we departed much. Once in a blue moon there was that occasional exceptional case where we felt that the guidelines so completely missed the boat that we went, in my case it was usually below the guidelines -- I can't think of a case where I've ever departed upwards, frankly -- and felt it was imperative in the case of this particular defendant to give a sentence that was very, very

different from what the guidelines called for.

Now, in the wake of *Booker*, I think most of us still feel constrained. We feel the congressional pressure not to vary or depart to the extent that we would under different conditions, because none of us wants to be the trigger that causes Congress to come back into the picture and to start looking at an overhaul of sentencing again. And I think we all understand that the way the politics works is there can be a hot-button issue that comes up, one case somewhere that gets enough publicity and there's enough public outrage, that Congress comes to the rescue, passes an Act, puts maximum sentences, maybe a minimum with it as well, and that may be the only case that that's applicable to, but it's out there muddying up the waters in so many different areas.

I was telling Judge Kane beforehand if I had a law clerk who came to work at 11 o'clock, went to lunch and then went home at 1:30, I've got a couple of choices. I can either deal with the law clerk or I can make everybody punch a time clock every day; and nobody needs to punch a time clock but that one employee. Chances are it's not going to have any impact on that employee anyway. You just need to find another way to deal with it.

But congressional responses to so many issues that come up in the sentencing context, I believe are not particularly well thought out. It's one of the things that I admire the Sentencing Commission for so much, is that you generally are able to take on congressional responses to get them settled down a little bit, to take a look at the much larger picture and to get some perspective on where that particular case fits in the context of everything else. Is it really that big a deal; does it really need this kind of action?

There are a couple of other things that have happened as well. Obviously plea bargains have significantly affected sentencing. 11(c)(1)(C) plea agreements -- and my friend and colleague Judge Kane doesn't accept them. I sit in Las Cruces a few weeks a year to help out down there, and 11(c)(1)(C) agreements are pretty common down there. They're very helpful down there. They've taken to using them in Kansas in certain instances. They're certainly not right everywhere, but at times they serve a purpose. And appellate waivers pretty much take care of sentencing issues, as long as you're within the guideline range or the parties have, as part of their agreement if the sentence is within this or that, that there will not be

an appeal. So I think plea agreements have been very important.

The other thing is -- and this also is a political matter, but I think there has been a real shift in focus from the prior administration to this administration in terms of what sentences are appealed and what are not. And you can see that, I think, just in the attitudes that a number of the prosecutors are taking as they come to court in terms of what sentences they vigorously resist, those that they don't. And I think that the direction that they're getting from the government -- and I have no way of knowing this, it's pure conjecture on my part, but it seems to me that they are not nearly as concerned in this Justice Department with strict adherence to a guidelines sentence as what the prior administration was, and I think that that's going to have some impact as well on sentencing in the years ahead.

The last thing that I want to say in terms of opening is I've been affirmed and I have been reversed on a number of sentencing cases over the years. I've actually had the unique experience of having been reversed and given directions to give a guidelines sentence, which I did, it was appealed again, that was reversed and sent back for resentencing

post-*Booker*. So I actually had the same case three times for sentencing. He ended up the third time with the same sentence that he got initially. So you just never know what's going to happen.

Again, it's a pleasure to be with you here today, and I'll be happy to answer any questions at the appropriate time. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Marten. Judge Kane.

JUDGE KANE: Well, first of all, thank you for inviting me. I don't get out much and, as my former chief judge said, he kept a short leash on me. I'm glad to be here and, of course, I don't speak for the District of Colorado. I have five points I wish to make and one overall observation.

The decisions from *Booker*, *Gall*, *Kimbrough*, so forth, that have made the guidelines advisory have left, in their wake, a labor force of judges, probation officers and prosecutors and defense attorneys, most of whom had never sentenced without the guidelines and they had no experience sentencing under what was, in effect, the criteria of 3553. They just simply followed the guidelines. And the presentence reports are the same. Now that they are advisory, there are certain changes that have to be made, and I

would suggest, respectfully, to this Commission that providing that kind of insight is something that the Commission could do, rather than trying to adhere strictly to guidelines to look at the various criteria.

Let me give you now the points that I want to make. Approximately 98 percent of criminal cases are resolved by plea agreement. Jurisdictions' policies differ greatly and render much of the sentencing guidelines inoperative. For instance, some jurisdictions do not allow for any reduction for acceptance of responsibility if a defendant has filed pretrial motions. Some prohibit requests for downward departure and require a defendant to waive his or her right to appeal. There's nothing in the law that says that. That's what they do. The differences between jurisdictions and sentencing practices produce results that are the antithesis of the congressional purpose for the guidelines.

The next point I want to make is a little bit, again, somewhat tangentially, you will all recall the recommendations and observations of the 9/11 Commission after the World Towers were -- and the Pentagon were attacked and destroyed. And the principal -- or one of the principal criticisms that the 9/11 Commission waged -- or asserted, rather, was

that while information regarding terrorists was known to the CIA and other information was known to the FBI and other information was known to the National Security Administration, they were all like ships passing in the night and they didn't exchange information and they didn't cooperate; and some scholars have said in the 9/11 reports, commentaries on them, that all of the information was available ahead of time to prevent the 9/11 disaster had that exchange of information taken place.

I submit to you that the same kind of lack of contact and communication exists today between and among the Sentencing Commission, the Justice Department, the United States courts and, pretty clearly, the Defense Department and the Veterans Administration. And let me expand upon that for a moment, because as a judge here in Colorado, I am definitely on the front lines in this situation.

The Rand Corporation estimates that more than 320,000 veterans of Iraq and Afghanistan have experienced brain injury while deployed. Traumatic brain injury -- TBI is an acronym for traumatic brain injury, and it is called, and I quote, the signature injury of the Iraq war. As of August 1, 2008, the official Pentagon figures listed more than 78,000

service members as wounded, injured and ill. Three-hundred and twenty-four thousand Iraq and Afghanistan veterans had already visited a VA facility to receive healthcare for their injuries, and over 300,000, more than 30 percent of eligible veterans, had filed for disability. The numbers have increased and with respect to them the waiting lists for award of benefits, evaluation for treatment and then waiting for treatment once evaluated continues to lengthen.

In localities, such as in Colorado, surrounding military installations receiving returning veterans, criminal cases of murder, family violence, suicide and drug use and sales have increased, and such increases are attributable to the behavioral and psychological problems suffered by returning military personnel.

Not all such brain injuries, both physical and psychological, are caused by direct hits or combat. Many are caused by prolonged exposure to high temperatures and dehydration. Many of these injuries do not manifest until two or three years following service. In addition, because of the voluntary military force that we have, repeated combat tours have an exponential effect upon the rate of injury so that one person having to do two, three or

four tours has a significantly higher chance of developing one of these kinds of brain injuries. Many are caused by prolonged exposure to high temperatures and dehydration. Only 10 percent of Iraq and Afghanistan vets with TBI had severe and penetrating wounds to the head.

In April 2007, military doctors issued a report showing that 18 percent of soldiers deployed to Afghanistan and Iraq from Ft. Carson, Colorado, exhibited at least one of the following symptoms: headaches, memory loss, irritability, sleep disorders and balance problems.

The state of Colorado, in El Paso County, where Ft. Carson is principally located, has a state district judge who is a former major general in the Army, and he has established for the state courts a veterans court to try and deal with many of these problems. The Sentencing Commission has not addressed this, nor have the courts. I presently have cases involving veterans and I have to ask myself, somewhat emotionally, is this the way we treat our heroes. Are these decisions to prosecute, are these decisions to sentence and what kind of criteria to be applied, are they taken into consideration by anyone. At the present time I suggest it's only on an *ad hoc* basis,

and I strongly recommend that the Commission and its staff devote considerable attention to this growing problem. It isn't going to go away.

The third point I want to raise is one that you've heard before by other people, and I will try not to dwell on it, but it deals with child pornography. I've written an opinion, a sentencing memorandum is what it is, that I will leave with you if you care to look at it, and explaining the problems of trying to follow the guidelines and what happens with this particular individual.

One of the difficulties is one that Judge Marten mentioned, and that is that we do not see producers of these films. We don't see the parents who sell their children or the step-fathers who captured them and attacked them in film and the actual perpetrators. What we see are people like in this particular opinion, a man who is on dialysis, confined to a wheelchair and spends all of his time confined already, and there's no economic analysis that was ever done about how much it would cost for the Bureau of Prisons to keep this man in prison. None. The Department of Justice sent out three people from the Justice Department demanding that he receive the maximum sentence. That's the same sentence for, as I

said, the person who is actually profiting from these films, selling them and dealing with them. The criteria that the sentencing guidelines have now, that the use of a computer is an aggravating factor is anachronistic. Of course the computer is going to be used. There's no other way that it's going to be by most of these people.

I sentenced in Grand Junction, Colorado, another child pornography case, and the man is a quadriplegic, and the only thing he could do with a computer was to have a stick with a mouthpiece attached to the stick to turn it on by using his head; and he was left alone during the day and, according to his own testimony, accidentally tripped upon a child pornography site, started looking at it and, thus, was traced and found and caught. Now, this is someone that, according to the guidelines, according to the criteria, is supposed to get ten years in prison. What in the world are we going to do with him? It would cost over $150,000 a year just to house him and the Bureau of Prisons would not let him have his electric wheelchair in the process.

So it's, again, something that I think that you really need to look at, is that all -- I had a law professor once who said all Indians walk in single

file, at least the one I saw did. And that's the problem that you have trying to treat all of these things the same.

The third -- or the fourth, rather, comment I have deals with felons in possession of weapons. When the Sentencing Commission was first organized and the staff began its study of these issues, it was considered that the kind of weapon involved would be included within the criteria, but that was abandoned, and so now I have, as an example, a felon in possession of a weapon. The weapon was a single-shot Derringer .22 short ammunition, no ammunition with it, and it was found under the back seat of an SUV. At the same time I have a case in which on the driver's side, between the console and the right side of the -- the right hand of the driver, was a fully-loaded .45 automatic with one in the chamber. Now, according to the guidelines, that's the same thing. That doesn't make any sense. And if you want to know why I will not follow the guidelines in those circumstances, it's because I think it's a far more serious offense, and I have already notified counsel that I'm going up. It's a higher sentence because of that. So I think that that kind of a distinction has to be made.

Now, the last one is a little bit more difficult to -- a little bit more abstract, but my last point is this: That while the concept of rehabilitation was minimalized by the guidelines, the correlative data on recidivism rates being affected by the length of the sentence has not been undertaken. This study would answer the question of proportionality; that is, what amount of time under attendant circumstances yields the lowest rate of recidivism. In any given case, concerning the crime committed and the offender characteristics, is an appropriate sentence 12 to 18 months? Is it 24 to 36? Is it 48 to 60? I suggest that recidivism rates in those strata would answer the question.

While sentencing, I frequently ask the prosecution, the defense attorney and the probation department why a certain sentence is recommended. The usual *pro forma* answer is because the guidelines say so. That's like the child asking his mother or father something, because I say so. It is not a matter of logic. It's not a matter of reason. Because I say so.

Well, none of them could answer the following question, and that's why do the guidelines recommend this particular range. Because the guidelines are now advisory, I suggest that greater

transparency is needed. If, as a sentencing judge, I am to consider the advice of the guidelines and follow it, then the reasons for those guidelines must be clearly presented. Otherwise, I am abusing my discretion, contrary to law, by following a statement without an articulated basis for it.

Sometimes a reasoned argument can change a judge's mind, but otherwise, what we have frequently is an ideological food fight. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Kane. Commissioner Howell.

COMMISSIONER HOWELL: I think this is one of the themes we've been hearing through our hearings, which is in terms of how the Sentencing Commissions' role may be changing a little bit under an advisory system, and I talk specifically to what you just mentioned, Judge Kane, which is the explanation for our specific guidelines.

You know, I think Judge Marten, you've referenced, both in your written testimony and orally, various -- you know, Plato, Tom Robbins, you know, all sorts of great writers, and I'm not sure that this Commission or any other Commission can sort of live up to that kind of writing skill, but as we -- I mean, I think for each amendment that we issue and in the

various reports that we do -- and we are issuing reports soon on child pornography that should be released, I think, fairly shortly, the child pornography guidelines -- we feel as if we do explain why we're amending the guidelines in a particular way, both when Congress has directed us to do so and the various factors that we've considered that sometimes Congress has directed us to do or not.

I mean, the identity -- we got a directive from Congress regarding identity theft last year, and we did change some guidelines in response to that directive, and other factors that Congress told us to consider we decided didn't warrant any change in the guidelines and we sort of explained that in our explanation.

So as we hear this repeatedly, not just from you two, but you heard in the panel before from circuit court judges, that additional explanations would be helpful, we're trying to figure out how can we better serve the people who are looking to the guidelines for guidance and making fuller explanations. Some have suggested that we should, in fact, more precisely detail how we have considered each of the 3553(a) factors when we're looking at the amendment. Some have said -- you know, and we do do empirical

research for every single amendment in terms of looking at the data, how many people would it affect and so on, we should make more of that public.

There are -- so I'm actually curious from you, district court judges who also think we should have fuller explanations, what would you actually find more helpful in our explanations for our amendments and for specific guidelines. What kind of information?

JUDGE KANE: Well, I've suggested one. I think that an empirical study needs to be done to show with the sentences that have been imposed for a certain crime and use the offender characteristics as well, and do a study to show after they have served their sentence how many of them have come back, what kind of a break in recidivism. There is a certain amount of time that is condign, and there's -- if it's too little, it's a waste of time; and if it's too much, it's a waste of money, as well as being cruel in most instances. So I think that the ideal sentence is one that a judge struggles with, irrespective of any guideline.

That's what we used to do when we sentenced before the guidelines, was try to figure out how much is necessary to keep this from happening

again, at least with this person. Now, there's a lot of data out there about deterrence, and I haven't seen any that comes to any conclusion to say that deterrence is really effective as it relates to others. But we do know that there are people who you sentence and they just -- they write back and they come back and they say I've had enough, no more, I'm through with this life, I'm through with this kind of thing. How much does it take to get that.

Another aspect is that there have to be qualitative considerations that are raised about these people. The majority of people that we district judges sentence did not graduate from high school. The majority of the ones I know that I've sentenced haven't held a job for more than three or four weeks at any given time. What's necessary there to keep that kind of criminal activity from happening again. And I think that studies need to be done on that basis.

If you'll forgive me, I want to be a little bit theoretical. The sentencing guidelines are harnessed at the present time, and have been from their inception, to a utilitarian calculus. It looks like Jeremy Bentham wrote them, that's the way in which they're measured, and all of the thinking is done the same way; and yet, the sentencing function itself is a

matter of the philosopher Manuel Kant's categorical imperative. And you have to look at it in those terms, of what is it that we're trying to do; and in order to do that, what is imperative. What is imperative to maintain human dignity for the victim as well as the offender. That's usually the critical question that we have, and the guidelines don't help.

So I think that that's -- I think that this *Gall*, *Kimbrough*, *Booker* opens up a great enormous area for the Sentencing Commission to do research and to look at, but it has to -- it has to be something that, as I pointed out in this opinion which I'll leave with you on the child pornography --

COMMISSIONER HOWELL: Is that the *Rausch* opinion?

JUDGE KANE: Yeah, *Rausch*. There's nothing -- there's no basis to sentence that man that was given in the sentencing guidelines.

COMMISSIONER HOWELL: I think there's some reference made to that opinion by the U.S. attorney who's going to be testifying later.

JUDGE KANE: I'll leave it for you.

ACTING CHAIR HINOJOSA: Judge Kane, you and I have been long enough on the bench that we actually did sentencing without the guidelines, and

obviously we did it during the mandatory system and under the post-*Booker* system. And my question is, during the mandatory system, did you find anything in Chapter 5K2.0 that would help you with regards to your two felon in possession cases?

JUDGE KANE: Well, I have to make a confession, due to an entirely coincidental matter regarding my health, I became a senior judge at the time the guidelines came out, and I never sentenced under the mandatory guidelines.

ACTING CHAIR HINOJOSA: Are you doing sentencing -- well, you're obviously doing sentencing now.

JUDGE KANE: I'm doing sentencings now, but it's advisory.

ACTING CHAIR HINOJOSA: Did you find anything in Chapter 5K2.0, §5K2.0 that would help you some with regards to these two felon in possession weapons cases?

JUDGE KANE: No, I haven't.

ACTING CHAIR HINOJOSA: Because, you know, 5K2.0(a)(3) addresses, I think, the point that you're making, which says, “departures based on circumstances present to a degree not adequately taken into consideration.” It says, “a departure may be

warranted in [an] exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range if the court determines that such circumstance [is] present in the offense to a degree substantially in excess [of] or substantially below that which ordinarily is involved in that kind of offense." Which is the point that you were making.

JUDGE KANE: The point I'm making is but it's not an exceptional thing. We have to look at the weapons in each and every case. It's not an exception.

ACTING CHAIR HINOJOSA: But the cases you pointed out are not necessarily the ordinary case, and I think that was your point. And I think, you know, when the guidelines were written, even under the mandatory system, Congress anticipated that there would be departures, and, you know, the guidelines themselves have discussions about departures.

JUDGE KANE: Well, the Congress anticipated it and the courts of appeals discouraged it.

ACTING CHAIR HINOJOSA: Do you think that's true of all courts of appeals?

JUDGE KANE: It certainly is the Tenth.

COMMISSIONER WROBLEWSKI: I have just a

couple of questions. Judge Kane, I found a lot of what you said interesting and a lot of what you said troubling, and I don't know if you would be prepared at some point to perhaps shoot us a letter with the names of these cases, especially the two cases with the wheelchair-bound defendants.

JUDGE KANE: One of them is right here I'll give to you. The other one I will be happy to give you that information.

COMMISSIONER WROBLEWSKI: Also, if you could, also include a couple sentences about the situation with veterans and the experience that you've had there, and I think we need to look into those.

JUDGE KANE: I'm writing a sentencing opinion on that even as we speak, and I'll be happy to send that detailed opinion to you.

COMMISSIONER WROBLEWSKI: I would appreciate it. One thing to both of you, I heard what I think was somewhat contradictory statements about plea bargaining, and I'm not sure I got it right, so I want to ask you for your comments. Judge Marten, you said that recently you've seen a lot more flexibility from the prosecutors in the plea bargaining process, and you seemed to speak favorably about that. And, Judge Kane, you talked about the fact that 98 percent

of the cases are resolved by plea, that there are a lot of differences, and you called that an antithesis or opposite what the Sentencing Reform Act really calls for.

JUDGE KANE: Yes.

COMMISSIONER WROBLEWSKI: Are those contradictory statements and could you comment on that? Because we are struggling -- just so you know, we are struggling in the new administration with coming up with a policy for prosecutors. Should there be more guidance to prosecutors so that they act similarly one district to the next, one case to the next, or should there be more flexibility with prosecutors. And, frankly, we've heard on all sides on this, both -- within the Department of Justice, we've heard prosecutors say, no, there should be more guidance and more uniformity, and other prosecutors saying there shouldn't. We've heard from defense attorneys saying that existing disparity, to the extent it exists that's unwarranted, is the fault of the prosecutor. We've heard from other prosecutors saying there should be more flexibility, we should get rid of what was called the Ashcroft Memorandum, and charging the most serious, readily provable offense.

So it seems like not just on this panel,

but generally we're hearing contradictory things, and I'm curious if you could comment on it.

JUDGE MARTEN: Well, I'd be happy to talk about my experience in Kansas and also my limited experience the few weeks a year in New Mexico. Because I started sitting in New Mexico probably six or seven years ago, just to help out with the border crunch in Las Cruces. And, Judge Sessions, I think you may have done that too.

VICE CHAIR SESSIONS: I did. And it was one of the most memorable experiences that I've had on the bench, frankly.

JUDGE MARTEN: Well, I've heard that there are judges going there thinking they're going down to take a little vacation and, of course, it's anything but that. It was unlike anything I've ever seen and it's an eye opener.

But I started that during the Bush administration and then, of course, had an experience this summer with the U.S. Attorney's Office under the Obama administration. And I -- my sense is in New Mexico, very limited experience there, but in Kansas, is that the U.S. Attorney's Office feels much less restricted in terms of its ability to make decisions that it thinks are appropriate in terms of plea

agreements than what they could under the prior administration. And I think that's a very good thing. So much of it is probably going to depend -- or depend on the people who are in the office. I have a huge amount of respect for the people who are in the U.S. Attorney's Office in the District of Kansas, just as I do the people who are in the federal defender's office there and, frankly, our CJA panel and our criminal defense bar. They're very good lawyers. And I think to the extent that they were hand-strung and shackled by Justice Department policy in terms of doing what they felt was really appropriate in the case, that made everybody's lives more difficult.

I am seeing now what I think are far more reasonable plea agreements which result in far more reasonable sentences. Some things are not binding. Obviously there are recommendations that are made to the court that certain matters, the parties agree, will not be considered for purposes of determining an offense level. I think that's all to the good, frankly.

One of my major complaints about the guidelines from the beginning is that in virtually every instance, except for simple possession of certain drugs, the guidelines sentences were, I think,

unbelievably harsh, and there were just so few places to go with them. And so much of it is prosecutorial driven as well. If you charge somebody with 27 crimes, they may plead out to one; but if you can consider the conduct of the other 26 in determining the offense level, what's the benefit of that plea bargain. And so I think that a number of things that are now being incorporated into plea agreements are helpful to the court, and I think it serves the system well.

VICE CHAIR SESSIONS: Judge Marten, you gave me a couple of great things to think about. In your written submission, I really appreciate the comments that you made about Justice Clark saying that our court is not the lower court.

JUDGE MARTEN: It always sounds a little self-serving when a district court judge says that, but it's something that I've believed since he told me that.

VICE CHAIR SESSIONS: There are two questions that I have. The first is your observation that judges -- district court judges think about the possibility of offending Congress when they impose sentence. It opens up the broader question about how judges in the real world think about the political consequences of what they do, and that's obviously from

the Commission's perspective, but judges in general. And I'm interested to know how prevalent you think that is, that judges are very concerned about triggering some congressional response.

And the second thing is that you talked about discouraged factors, and you can't understand how they arrived in the guidelines system. Frankly, they arrived in response -- most of them, arrived in responses to congressional directives. But I guess today, in this world, is it that important to remove discouraged factors? Because essentially some of those discouraged factors may not play a significant role when you apply 3553(a). I mean, is it something that we should really focus in upon or is it of limited value?

JUDGE MARTEN: Judge Sessions, first of all, the question regarding how many judges have in the back of their minds, or maybe even in the forefront of their thinking, what impact the sentence might have in terms of triggering congressional action, I think it's extremely widespread. And I think anytime -- and I know I have been accused of being much less sensitive to that than what perhaps I ought to be from time to time, but I can tell you that every sentence that I pronounce, I have thought through all of the factors

that one is supposed to think through. And if I have decided to depart or to vary, I've thought to myself what degree do I really, at a gut level, having considered all of these things, think is appropriate, and, to a lesser degree, how is that going to look in terms of trying to maintain some sense of equilibrium and not get into the disparity issues.

If somebody wanted to send this -- and one of my sentences ended up in Attorney General Gonzales's speech that he gave to victims of crime at one point, you know, how is that going to play if it's brought to the attention of Congress. It's not a determinative factor, but it's something that's always there, and it tends to, I think, from time to time, cause you to put on the brakes a little bit from going to the place one thinks might be the truly appropriate sentence as opposed to one that's better than it might have been but not still where one would like to go. I think that's a fairly widespread attitude.

With respect to the second question about the disfavored factors and how important they are in the post-*Booker* era and with the 3553(a) factors, they're probably not as important, but I think as long as they are suggested as being disfavored or not considerations that one ought to use in a typical

situation, we are doing a disservice to the persons who are appearing before us in sentencing.

I think that just saying that they are disfavored is going to eliminate them from consideration by some judges, when, in fact, they ought to be looking at those as well.

As you're probably aware, I have a 102-year-old colleague, Wesley E. Brown, who still comes to court every day, still tries cases and he still does sentencings. And Judge Brown said when the guidelines came in, it made my job easier than it ever had been. And he stays pretty close to those guidelines at his age, but even now and then, once in a while -- and he's probably got a better track record than any judge in our district in terms of complying with them, but even Judge Brown every once in a while will see his way clear to move away and say, you know, I just don't get it.

I think what Judge Hartz said about the reasons for some of these things and what he said about because I said so, doesn't meet the test that Judge Hartz was talking about, and which I agree with, is that if we had some persuasive explanation, not just empirical data, but actually something that if we listened to it and we said, you know, that really makes

sense not only at a logical level, but it makes sense at an emotional level too, because I think fairness incorporates both of those concepts.

VICE CHAIR CARR: Judge Marten, could you be a little more precise in what you described as more reasonable approaches by the prosectors in their plea bargains. Are they lowering drug amounts? Are they not filing 851s? Are they avoiding statutory mandatories? And does the probation office ever say, hey, they're bargaining away facts.

JUDGE MARTEN: Once in a while the probation office will point out bargaining away facts. And, by the way, we have a phenomenal probation office in Kansas, and you'll be hearing from our chief probation officer in the next session, Ron Schweer, and they are extraordinary.

But when I'm talking about them being more reasonable, I'm talking about typically the charges they are allowing the persons to plead to. It's not always the most serious of the charges. I'm talking about in terms of the provisions in the agreement, the government is frequently -- more frequently now agreeing to recommend the low end of the guidelines; and while it might oppose a departure, it's not taking away as part of the agreement the defendants

ability to argue for a departure or from a variance. And even at the time of sentencing, when the government states its position, if you indicate that you're inclined to vary or to depart, you don't get anywhere near the kind of argument from the Justice Department -- or from the U.S. Attorney's Office that we did a year ago or two years ago.

ACTING CHAIR HINOJOSA: Does anybody have any other questions? If not, we thank you all very much and we realize that you took time out from your busy schedules to share your thoughts with us, and they're very much appreciated.

JUDGE MARTEN: Thank you for having us.

ACTING CHAIR HINOJOSA: We'll have a short break at this point.

(A break was taken from 11:18 a.m. to 11:40 a.m.)

ACTING CHAIR HINOJOSA: Although our next panel isn't scheduled until 11:45, my experience in the courtroom is that the probation officers are always there first, so this is no exception, and we'll go ahead and get started. We are very fortunate to have two distinguished probation officers with us today to share their view from the probation office with regards to the federal sentencing system.

We have Mr. Kevin Lowry, who currently serves as the chief U.S. probation officer for the District of Minnesota. Prior to that he was a probation officer for the District of Nevada for 12 years, and he also has experience working with both juveniles and adults in both correctional institutions and community-based settings. Mr. Lowry earned his B.S. in criminal justice and psychology from the University of Nebraska Kearney and an MA in criminal justice from the University of Nevada Las Vegas.

We also have Ronald Schweer, who has been the chief U.S. probation officer for the District of Kansas since January 2009. He has previously served as the deputy chief in the Eastern District of Missouri and the supervising U.S. probation officer for the District of Kansas. He also is a safety consultant for the American Probation and Parole Association, the National Institute of Corrections, the Sam Houston State University in Texas, and he has been with the Community Corrections Institute.

And we appreciate both of you being present and taking your time from your schedules and your offices to be with us today. Is there a preference as to who goes first? Mr. Lowry, did you want to go first?

MR. LOWRY: Yes, Your Honor, I think we agreed. He wanted to be the clean-up man to finish off, so we decided to go in this order.

ACTING CHAIR HINOJOSA: We'll get started with you then.

MR. LOWRY: I'd like to start by thanking the Sentencing Commission. I think it's a great honor and opportunity to provide testimony on behalf of the District of Minnesota Probation Office regarding sentencing, policies, practices in the federal judiciary on the 25th anniversary of the Sentencing Reform Act.

My testimony was derived from the input of the district probation officers who work daily in the sentencing process. I acknowledge that these are not new topics. These issues have been previously addressed in the actions of the Commission and in regional hearings by other members of the court family.

The following is testimony and recommendations from the probation office perspective. First, it is recommended that the Sentencing Commission continue its pursuit of elimination of disparity between powder cocaine and cocaine base, crack, within the sentencing guidelines drug table quantity -- or excuse me, Drug Quantity Table.

From an officer's perspective, great strides have been made to begin the elimination with the two-point reduction and we're very pleased with that. We hope that that movement will continue to both reduce the disparity in sentencing and the excessive sentences for crack cocaine. This issue is of two concerns or twofold for a probation officer considering both the length of sentence and the attempts to transition and habilitate offenders into the community by assisting them in developing successful law-abiding lifestyles after their term of incarceration.

Officers continue to observe that offenders sentenced for cocaine base offenses receive harsher sentences than similarly situated offenders sentenced for cocaine powder and other drugs. Their observation also continues to be that, with rare exception, the offenders sentenced for cocaine base are African American. Currently we see offenders return to our communities that have been severely institutionalized from lengthy terms of incarceration resulting in major culture shock that overwhelms even the hardest of offenders in their return to the community.

Many of these offenders are more often than not from low socioeconomic backgrounds with

limited life skills to start with. The vast majority of these offenders reside in high drug trafficking areas, are often involved due to family ties, receiving minimal gains, and live from a hand-to-hand existence. This is not to say that drug trafficking is not a serious offense and warrants proportionate punishment, but rather it's to say that those with smaller roles in the distribution process who reap only modest proceeds should not bear the full burden with those with aggravating roles benefiting the most.

Oftentimes members of conspiracies who have mitigating roles suffer with addiction and are involved to support their personal habit. These offenders are often lumped in with major offenders in a conspiracy and fall prey to sentences for significant quantities and mandatory minimums. More often than not the low-level offenders never have enough information to cooperate with the government or to be eligible for a downward departure. A bad day from the perspective of a probation officer is to see an offender with a minor role in a case receive a lengthy sentence. Sentences could be more effective if the factors about the offender and the offense were considered that appropriately punish, deter, protect and consider what would be necessary for the offender to develop a

successful law-abiding lifestyle.

We are truly grateful for the progress that has been made by the Commission in the arena surrounding the disparity around cocaine base and support the Commission's continued efforts in that area.

Secondly, it is recommended that the Sentencing Commission continue to pursue the elimination of mandatory minimums to remove the conflict that exists between the statutory goals of sentencing contained in 18 [U.S.C. §] 3553 and the mandatory minimum sentences that exclude the consideration of any of the many offense and offender characteristics.

Title 18, [§] 3553(a) directs the court impose a sentence sufficient but not greater than necessary to satisfy the goals of sentencing. Statutory mandatory minimums often drown out and extinguish relevant offense and offender characteristics. Mandatory minimums tie the hands of the court and contradict the need for appropriately tailored punishment that will deter, protect and provide corrective treatment.

Defendants who are unable to provide substantial assistance and are not safety valve eligible are often confronted with significant terms of

imprisonment. Presentence officers often investigate defendants who never served more than one year in custody on a single case but now face the mandatory minimum typically of 60 to 120 months. While those officers concede that the previous sentences of probation, state custodial sentences and/or limited jail time have not deterred or promoted a new respect for the law, the mandatory minimum defeats any ability to fashion a reasonable sentence and a graduated sanction.

As a representative of my officers, I'm here to echo the concerns of the Commission and many in the field regarding the complications and conflict by mandatory minimums. Substantial assistance motions under 3553(e) provide the judicial discretion to go below the mandatory minimum, but that discretion is limited to those considerations for only assistance-related factors.

As for the safety valve, while it opens the door for those with no criminal history, it also permits those with criminal history to hold the score to reap the benefits, yet the safety valve excludes defendants with a more recent criminal history but limited to only minor criminal history, history that is occasionally dissimilar from the instant federal

offense.

Even in the absence of drug mandatory minimums, for example, statutes such as [21 U.S.C. §] 851 could prove as a mechanism which by to enhance sentences for drug offenders with previous drug convictions. The Commission could amend the safety valve to capture a larger category of offenders which would then permit the court to exercise judicial discretion weighing relevant factors to appropriately tailor the ultimate sentence. However, the fact remains that in order to mandate -- or remains that in order for the mandate of 3553(a) to be fully recognized, Congress must either simply eliminate mandatory minimums or broaden the court's limited authority to impose sentences below statutory minimums. Absent that discretion, the court will have no option but to uphold the law and continue to impose sentences that are greater than necessary.

My third point is that it's recommended that the Sentencing Commission go further to lower the specific offense characteristic levels for nonviolent aggravating felonies in illegal reentry cases due to lengthy prison sentences that currently often surpass sentences for a violent offense such as bank robbery. These illegal reentry enhanced sentences overcrowd our justice systems and prisons and fail to deter illegal

reentry with great expense to the public.

The immigration guideline at 2L1.2 has gone through many iterations since the guideline took place in 1987. Over the years, the Commission has heard concerns of the many stakeholders, and in 2001 implemented a major overhaul of the guideline to provide more graduated enhancements for illegal reentrants deported after criminal conviction. This major change went a long way toward improving the application of the guideline imparity in sentencing, but it is believed that more can be done.

It is recommended that the staff of the Commission undertake a comparison of sentences imposed for illegal reentrants convicted of nonviolent aggravating felonies to those sentences imposed for other defendants convicted of violent felonies. The field frequently sees quite lengthy advisory guideline ranges for nonviolent illegal reentrants who may have been previously deported for an aggravated felony and lower advisory guideline ranges for defendants convicted of crimes of violence such as bank robbery.

The guidelines should be simplified to provide clarifying definitions of certain crimes such as those considered crimes of violence in Chapter Four of the manual, which are not considered crimes of violence

in the immigration guidelines. Current circuit conflicts should also be addressed in any amendments made. Such clarification would assist the field in making correct and consistent guideline applications.

The discrepancy sometimes seen in the guideline definitions compared to the statutory definitions should also be addressed. Currently there appears to be an inconsistency between certain guideline definitions of a crime of violence and the statutory definitions for aggravated felony. For instance, there is a crime of violence definition at 2L1.2, which leads to a 16-level increase and, within the statutory definition of an aggravated felony, a separate definition of crime of violence, which would lead to an 8-level enhancement. Any merging of those definitions would go a long way toward simplifying guideline application and avoiding inevitable circuit conflicts.

Finally, we urge the Commission to lobby the Department of Justice to expand that early disposition program at 5K3.1 to all districts. Currently the District of Minnesota border case does not have such a program. Our judges are hampered in imposing a sentence consistent with other districts which have the benefit of that option.

Fourth, it is recommended that the Sentencing Commission more narrowly define what constitutes a crime of violence as it applies to career offenders and make a recommendation to Congress to similarly redefine violent felony definition for the purposes of armed career criminal determinations.

Pursuant to [28 U.S.C. §] 944(h), Congress directed that the Sentencing Commission assure that certain categories of offenders, career offenders, be sentenced to near the authorized maximum imprisonment term. Ultimately, after some modification of the statutory definition, the Commission developed 4B1.1, career offender. Most recently, a great deal of time and effort has been spent by officers, attorneys, judges trying to identify and define those predicate crimes of violence that the career offender guideline should capture but are not specifically listed in the guideline name or the offense elements. Instead, the determination turned to whether the offense otherwise involves conduct that presents a serious risk to the physical harm of another.

In *Taylor v. the United States*, 1990, the Supreme Court adopted the categorical approach focusing on the generic elements of the offense, not the underlying facts; then in *Shepard*

v. the United States in 2005, announced modified categorical approach. Over the years, there have been a gradual flow of offenses found to present the necessary potential risk, including commercial burglaries, theft from a person, motor vehicle theft, all escapes, possession of a sawed-off shotgun, reckless discharge of a firearm, fleeing police in a motor vehicle and felony driving under the influence.

The Eighth Circuit Court of Appeals determined that the definitions for crime of violence and violent felony were similar; therefore, these predicate offenses impacted application of both career offender and the armed career criminal. Often defendants learned through their presentence reports that they now face significant imprisonment terms that they did not contemplate under their plea agreements.

In April of 2008, the Supreme Court decided *Begay* and clarified the otherwise clauses of the respective definitions were not intended to capture every crime that presented such a potential risk; consequently, some of the previously mentioned offenses found to be predicate offenses and violence for violent felonies no longer qualified as such. Under *Begay*, officers took a more in-depth and complex analysis. Officers reviewed state statutory language and

definitions and were able to obtain charging documents and plea transcripts to determine whether the potential predicate offense involves conduct that presents a serious potential risk of physical injury to another and whether it typically involves purposeful, violent and aggressive conduct.

Although this two-prong approach was a step forward, a more universal narrow definition, it has not simplified the process in identifying career offenders and armed career criminals. Adding further confusion to this issue is the fact that the term "crime of violence" is defined differently within the immigration [] guideline of 2L1.2, and the Commission is now analyzing statutory and guideline definitions of crime of violence, violent felony and, given recent case law, is urged to put forth amendments and recommendations to Congress that will simplify and make more consistent guideline applications in these areas.

And last, I just want to touch on the probation officer's perspective on post-*Booker* sentencing. That is sentencing guidelines are a good systematic structure that identifies similar offenses committed by similar offenders. It is believed that the guidelines being advisory allow the court to

appropriately weigh other factors and characteristics for imposition of a just sentence tailored specifically to fit the characteristics of the offense and the offender.

Overall, probation officers have responded favorably to post-*Booker* era and are more confident that offenders are now being treated as individuals by considering the totality of circumstances as they relate both to the offense and the offender when considering an appropriate sentence.

Pre-*Booker*, officers expressed that they often felt that considering only severity calculations, criminal history and limited departures due to criteria was very limiting. Now officers believe they have been revitalized by the value placed on their comprehensive investigations regarding offender characteristics, knowing that they can again have greater impact on just sentencing of offenders. Being able to identify significant reasons for a variance and providing the court with sentencing options have been positive steps for probation officers and the effectiveness of the judiciary as a whole as we believe it to be.

As one U.S. district judge passed along to us, your probation officer truly made me a better judge today in this case by the information and

guidance that was provided. I am confident that I've arrived at the best possible sentence, given all of the circumstances of the case.

As previously testified before the Commission by Chief Probation Officer Chris Hansen of the District of Nevada, the United States currently incarcerates a higher percentage of its population than any other country in the world. This is evident of the continued reliance on the prison systems to solve our social ills, and when that individual strategy failed, sentences were increased. It is clear that we have a nation that abandoned the treatment of offenders and lost track of multi-dimensional purposes of sentencing.

In the early 1990s, it was strongly publicized that nothing worked in the field of corrections. This was a difficult hit for the profession of probation officers and the correctional field as a whole. Since *Booker*, there has been renewed hope from probation officers that sentencing practices are starting to evolve from a philosophy that longer punishment is more effective and that warehousing our social ills is an acceptable solution. The return to fair and just sentences appropriately tailored to the offense and successful correctional intervention for the offender is great progress in our field.

With regard to successful correctional interventions, bringing further renewed hope to probation officers is the movement of evidence-based practices, known as EBP. Evidence-based practices are correctional practices that have shown by empirical research to reduce recidivism. A number of these specific practices were previously discussed before the Commission in detail by Chief Probation Officer Greg Forest from the District of North Carolina, so I will not take the Commission's time to further elaborate on them.

The opportunity to combine tailored sentencing and the implementation of evidence-based practices, to better facilitate interventions for offenders to reduce criminal lifestyles have resulted in many officers believing there has never been a better time to be in our profession.

On behalf of the District of Minnesota Probation Office, we thank the Commission for taking the time to consider our input and recommendations from the view of the probation office. We truly appreciate the continued diligence and progress the Commission has made with the continued adjustments and redefining the guidelines and your work with Congress to redefine sentencing legislations to best serve just sentencing.

ACTING CHAIR HINOJOSA: Thank you, Mr. Lowry. Mr. Schweer.

MR. SCHWEER: Your Honor, members of the Commission, if you don't mind, I'll probably paraphrase some of the things that I have here. Because of all the things that have been presented, all the issues that have been presented by my colleagues up to this point, this being the fifth of seven hearings, it's going to run together, I'm sure, for you by that seventh hearing you have.

First of all, I'd like to thank you very much for the opportunity to be here and thank you on behalf of my staff. This was a terrific learning opportunity for me and my staff to actually have an opportunity to give you information that they see on a daily basis. And also, I'll compliment your staff in that we just recently completed some training in the Western District of Missouri that we were invited to. Chief Lyon over there sponsored that training and we sent several members of our staff; and each time I attend one of those trainings, I go back and I pull out my guideline manual, which typically is not too far from me, and review what we are learning on a daily basis and in many of the hearings and in the dispositions that are imposed by our courts, and it's

really, how shall I say, inspiring to see the staff asking questions about how to do that job and can the Commission assist us in various ways to lend guidance to the recommendations that we make to our courts. So thank you very much. I don't know if you get thanked much, but sincerely the District of Kansas appreciates everything you and your staff does for us.

As noted in my third paragraph, you've heard a number of my colleagues, not the least of which is my colleague to the right, Chief Lowry, comment on a number of specific issues, and one of those specific issues that was given to me by my staff in discussions right prior to preparing the testimony had to do with definitions. And the definition specifically is addressed by the second question in Topic Number 4 on the list of questions that we were provided, and it relates to crime of violence.

Now, I imagine as many times as you've evaluated this very issue, it has come up that it's getting, to me and my staff, more convoluted, and that's my terminology, to reflect a passion and then to a sense of frustration of the things that we're seeing now in relation to the categorical approach, which I believe was mentioned by one of the commissioners earlier, and the modified categorical approach, as to

what that really means.

We're spending a great deal of time analyzing specific cases and analyzing specific state statutes as to how to apply the categorical approach and the modified categorical approach when we provide information to our courts. And as you can imagine, which was mentioned early, the word remand is not a popular word when it comes to trying to do the job the best we can and provide information to our courts to impose sentences.

And I cite in the first full paragraph on page 2 a number of cases that are Tenth Circuit and Supreme Court that point to the issue of defining crime of violence. And there in the last paragraph, I note, first of all, some minutes from the Probation Officers Advisory Group, which we fondly call POAG, and they, in their minutes for January 24th, recommended to the Commission that you revisit the definition of a crime of violence, specifically relating to U.S.S.G. 2L1.2 and 4B1.2.

And so when I was going in, preparing for this testimony and this appearance today, I went to the website, I reviewed the testimony, and then I reviewed the POAG minutes from their meetings, and I see that this isn't a new issue. As a matter of fact,

pulling out the guideline manual and looking at the definitions myself, I see it's not all that dissimilar to when I was actually writing presentences a number of years ago, and it's obviously still there, that we are recommending that we get more specific with the crime of violence versus the general definitions. And I hope you can understand that from our perspective as officers, we're always looking at specifics, you know, give me something that I can then convey to my judge to hang our hat on in making the recommendation that we would for any given case.

And then further, I went back a little bit more on how long it's been since this came up, and I cited minutes from August 15, 2005, that POAG had again visited, even a number of years ago, the issue of crime of violence and the definitions for crime of violence and making recommendations that that be revisited.

And then finally, in the meeting that POAG just conducted on July 14th and 15th in Washington, D.C., they are, and I quote this, “members expressed a desire for the Commission to address the priority identified in number 6,” which is relating to a study of the statutory guideline definitions of crime of violence, and then they cite other definitions that

they'd like to have you revisit.

So when I'm looking at this one issue alone, and I asked my staff what is the most significant issue that you can convey or that I can convey for you to the Commission, it comes back to the definitions that are contained in the application notes in the guideline manual.

There's one other thing that's not in my testimony as well, and with your permission, Your Honor, I'd like to mention it, and that has to do -- and this may be an appropriate segue from definitions, and that has to do with the variances, and that word has been used here just a couple of times this morning, and heaven knows how many times up to this in your previous hearings. But when you look at the 5K, at the departure issues, the definitions and clarifications that are very nicely set forth there, just the issue of variances now coming up is starting to cause questions from staff of certainly our judges are looking at variances, conveying to us, hey, is there something else out there that may be outside the scope of the definitions of the departures set forth in 5K that we can utilize in any given case, or a case-specific is usually when we get the question.

And a recommendation that staff had as

recently as last week, which was following my written testimony being presented to staff, it was recommended that we also bring up the issue of variances and would it be possible that the Commission visit specific elements of defining or clarifications on what are the variances that have been utilized to this point for us to look at.

Obviously time's an issue. We certainly follow the cases out of the Tenth Circuit, our home circuit, and other circuits, certainly Supreme Court cases as well, but we're very interested, and our staff is very interested, in what are the variances out there that are being looked at by the other district courts and the other circuits in imposing sentences.

So albeit that that's not mentioned or written in my testimony, I'd hoped that it be memorialized here in this hearing that we are quite interested in looking at the issue of variance and is there something that the Commission can do to help guide our officers and staff, not to mention the other districts, in what is an appropriate or what is perhaps an inappropriate variance that a court might look at.

That said, I'll summarize certainly that my terminology of a convoluted mess when it comes to the issue of looking at the categorical and the other

definition of the modified categorical approach, is certainly causing us some, perhaps, issues -- I'll use the term issues -- of really what does that mean, what statutes do we have to look at, what elements do we need to be looking at, and any kind of guidance offered by the Commission would certainly be appreciated.

I can tell you that it's not often that we have an opportunity to comment on very specific issues, and that's why some of the generalities of history you'll not hear in my testimony because it's already been presented. I'm going more towards specific elements related to definitions, and the variances of providing some guidance to us.

Bottom line is if there's guidance provided by the 5K factors that warrant departure that are set forth in the guidelines manual, why not start looking at variances for some information that would help guide us in imposing -- or recommending sentences to our courts and the courts imposing those sentences. Thank you very much.

ACTING CHAIR HINOJOSA: Thank you very much. And I guess I'll have the first question. You all brought up 2L1.2 and the definition of crime of violence that is contained in that guideline section. So my question is if you could make this clear or

different, what is it that you would do?

MR. SCHWEER: Generally speaking, when you're looking at the statutes, the statutes, as you know, state law, counties, et cetera, when we're looking at the criminal conduct, past criminal conduct and convictions, the titles of those offenses vary widely, and then when you start doing --

ACTING CHAIR HINOJOSA: That would be the enumerated offenses.

MR. SCHWEER: Yes.

ACTING CHAIR HINOJOSA: As opposed to the definition of any other offense under federal, state law, which is taken strictly out of the statute.

MR. SCHWEER: Yes.

ACTING CHAIR HINOJOSA: So your concern with the enumerated offense where you have 51 jurisdictions and 50 states, and then we have Puerto Rico and we also have the United States, that that causes issues with regards to determining the elements that would be one of these enumerated offenses.

MR. SCHWEER: Surely. And that's why, right to the point, Your Honor, I couldn't say it better, is that we're looking at the specific elements of what is a crime of violence versus the general guidances provided to us, so we feel, in the guidelines

in those definitions.

ACTING CHAIR HINOJOSA: And then the other portion of that definition comes strictly from the statute. You would have to change the statute in order to define what crime of violence means under § 16(a), Title 18 § 16(a). But your concern is with the enumerated offenses and how that leads to a whole discussion as to the elements of those offenses, and is that the generic term of burglary of dwelling as opposed to what they might be defined as the elements in a particular state.

MR. SCHWEER: Exactly, that's the point.

MR. LOWRY: And I agree with both of those characterizations, yours and Mr. Schweer's. That's the same thing that we were looking at, we were experiencing with all these different variations, not only 50 states, but then counties and other jurisdictions within that that have different definitions of things and also looking at and finding records to compile just generic language from charges to also, you know, what they were pled to or convicted of, and there's a number of different caveats that could be rolled into that, that make this --

ACTING CHAIR HINOJOSA: Do you think there's anything else? Those that are listed offenses,

enumerated offenses, I think most people would agree that they're very serious offenses. So the question is, is there anything else that could be put in the definition? You know, some circuits have a modified or somewhat of a common sense approach to this. The Fifth Circuit has that, for example, with regards to if it seems like it is, it must be type thing. Do you have any suggestions as to whether that could be put into the application notes here?

MR. LOWRY: I would just suggest, yeah, I think that's looking in the right direction of a good fix, because I don't think we're ever going to get everybody all together on all of these different definitions, obviously, we have so many jurisdictions involved, but to maybe set out some sort of generic statement that would categorize that and allow for that discretion. And, you know, you probably had a number of examples put before the Commission where simply you look at a firearms offense where somebody was firing a firearm off on New Year's Eve, they were intoxicated, there were other circumstances surrounding it, where it necessarily wasn't a crime, and then all of a sudden that becomes more serious based on certain definitions or, you know, is complicated with the inability to determine those factors, you know, just one of many

that jumps out there. So I agree with that.

VICE CHAIR CARR: In your districts, are your officers who are writing presentence reports writing them any differently to take into account 3553(a) factors?

MR. LOWRY: I think where we're covering those is in our variances. We also do, besides the recommendation, we do a section on the variance where we will compare and do a comparison between the guidelines and 3553 and present information to the court based on that analysis.

VICE CHAIR CARR: So you do a departure section and a variance section?

MR. LOWRY: Yes.

ACTING CHAIR HINOJOSA: What information do you think there would be for 3553(a) variance factors that wasn't already in the presentence investigation report for a judge to use if he or she wanted to? Other than an analysis of I feel that somehow this sentence should be different, what -- either family situation or prior history or employment or education or whatever, what was not included in the information that was given to us by probation officers that you would say needs to be included now? Other than the personal opinion of the probation officer that

this is a case where there should be something different.

MR. SCHWEER: There's a few cases that we have that extend over a long period of time on pretrial supervision, for example. And one case comes to mind, a person has been in our supervision for four years. It's a rather complex multi-defendants conspiracy case and it just keeps going and going. This person has pre, not post, release programs they've gone through, et cetera, that the court may consider. Also illness, there's been some illness issues that have come up, family death issues that have come up.

ACTING CHAIR HINOJOSA: Wouldn't that already be in the family section?

MR. SCHWEER: Yes, you would have that in there, Your Honor, but, actually, when you're starting to look at comparing the departure, things that qualify and things that don't qualify for departures, and you're aware of those things that don't qualify for departure, but there may be some, how shall I say, gray area information in there that's not specific --

ACTING CHAIR HINOJOSA: So it's more of an opinion as opposed to something in the body of what's already been presented as far as information.

MR. SCHWEER: Sure.

ACTING CHAIR HINOJOSA: It's just pointing it out to the court.

MR. SCHWEER: Yes. And given all the cases that have been cited to this point of what the judges are looking for in working with individuals, how shall I say -- maybe that's not an appropriate term, working with individuals, but when these individuals are sentenced, the difference between 10 years and 48 months, for example, and the post-supervision programs that this person may have started prior to incarceration, which you're starting to see a lot of districts developing programs that are preincarceration, carries through incarceration and then follows with post-incarceration programs is providing some basis by which the court can look at those issues. And I speak beyond actually Kansas when I say there's districts looking at all of those elements for the courts; and that's where a lot of that information is appearing, is in that section for variances.

VICE CHAIR SESSIONS: Mr. Lowry, you talked about mandatory minimums, and obviously the safety valve was designed to at least address some of the concerns. What do you think about various changes

in the safety valve either come by way of recommendation to Congress, if there's a direct impact on safety valve or perhaps even indirect, and I'm thinking of ways of expanding the safety valve, that is, expanding the zone, the Criminal History Category II, as an example; expanding the safety valve to beyond drug offenses, is another example; and an indirect impact on the safety valve would be to change the various factors within the criminal history score. For instance, the status of points or recency of points or the age of the convictions, which might be modified in some way to thereby restrict the criminal history so that you might fit into the safety valve. Have you thought about those? Do you have a sense of whether that would be a wise thing for us to look at?

MR. LOWRY: No. I think all three of those areas that you brought up would be good areas that we continually see problems with. The drug offenses or the criminal history category may need to be changed or the individual criminal convictions to be looked at on a specific basis, would all be good avenues.

VICE CHAIR SESSIONS: Would you have concerns if we recommended the expansion of the safety valve to Criminal History Category II, for example?

MR. LOWRY: You know, I guess it would be a step in the right direction. I would say that I wouldn't take that away. But I guess overall, I think the mandatory minimums themselves are a real obstacle, and I think, you know, taking away discretion that, you know, the court and all the players involved need to fashion a good and appropriate sentence is not a good thing, and I think most of the court family colleagues believe the same thing. And so, you know, I guess it would go back to, you know, is that enough. I think it would be a definite step in the right direction, but then on the other hand, is that enough when we see some of the tragedies that occur with mandatory minimums.

VICE CHAIR SESSIONS: What do you think about taking criminal history points and reducing the age for the assessment of points, it's now 10 to 15 years, reducing that in some way, or changing the status of recency points, you know, two points for being on probation, and that, thereby, impact the application of the safety valve. Would you have strong feelings about that one way or another?

MR. LOWRY: You know, I think that it's something that could help. I mean, all of the things that you suggested are, I think, good steps that could go further to maybe lessen the might of the mandatory

minimums and some of the negative outcomes of those minimums. But, you know, ultimately I think that there has to be some sort of mechanism built in that goes beyond maybe some numbers. You know, I mean, whether there's -- you know, we have a system for departures with the guidelines, maybe there should be a better system and more lengthy, and all the suggestions that you've made today could be probably compiled into something that would be maybe a whole arena of things in which there could be a reason to depart from a mandatory minimum.

VICE CHAIR SESSIONS: Two ways of skinning the cat; isn't that the expression?

MR. LOWRY: Yes.

VICE CHAIR SESSIONS: We have that in Vermont.

MR. LOWRY: I don't talk like that. My wife's a cat lover, and we have a couple cats, so I've pretty much eradicated that from my terminology; so if I get in the habit here of saying it, I get home, I'm going to be in big trouble.

COMMISSIONER HOWELL: I just wanted to follow up on one area dealing with departures and variances and then talk to you about an area that neither one of you brought up and is of particular

interest to the Commission, and that involves alternatives to incarceration. So let me talk about first the departures and variances. I think, Mr. Schweer, you talked specifically about how we can make it easier for probation officers and judges to sort of look at what variances are being used in other courts. And we have on our priority to look at the Chapter Five departure language now, in part to take what's in our source book, which lists all the different variances that courts are relying on and, you know, from -- in terms of, you know, ones that are cited a lot, all the way down to ones that are not cited that often, and how we can bring those variances back into the relevancy of the departure language in Chapter Five.

So part of that may be taking the factors in the departure language that are not ordinarily considered relevant and putting that in, perhaps, a more positive spin in terms of giving more guidance as to, you know, how age should be considered and why. Do you have any, you know, particular information you can share with us as to how we might be able to incorporate those variances into a rewrite or an updating of our departure language in Chapter Five?

MR. SCHWEER: I think what you mentioned

is very appropriate, instead of creating a new section, to take what we have in the way of the existing departure language and then maybe clarify what that means in the departure, the 5K, Chapter Five, instead of creating something totally new. One of the thoughts that we were discussing last week with staff was take your main categories of your 5K departure issues and then break them down what is, what isn't.

To help save some problems that maybe relate to an officer misinterpreting what a departure -- especially our new officers coming out, which I think you can imagine there's been several new officers added over the years, and we try to train them very well before they're actually making those recommendations to the courts in the presentences; but anything we can have to provide additional guidance, be it part of an existing guideline application or a new section on variances. It would not matter to me if it's new or not, but since there is one, that being 5K, look at those specific elements and incorporate it there, perhaps, like you suggest.

COMMISSIONER HOWELL: Thank you. Mr. Lowry, do you want to comment on that?

MR. LOWRY: You know, I agree with what he says, and I think it's a good idea. I think that

there's probably those that obviously wouldn't agree with the structuring of a variance because oftentimes I think that it's felt that the -- or believed that the variance is a way to accommodate a situation that has not been able to be captured or numerically graded, and there are probably those that would be further concerned with creating a chapter to do just that, just like with the departures. I'm not saying that I would oppose it. That's just one issue that would probably come up in that area, as most of you would probably guess would be the obvious thing.

COMMISSIONER HOWELL: Then on alternatives, in your work do you see that there are some cases, or does it happen frequently or not, that because of where the offender's offense level falls within certain zones, that they are precluded from perhaps a nonincarcerative term; and that if we're considering how the guidelines can help promote, in appropriate cases, consideration of alternatives to incarceration, whether you think that there are zones that should be merged, eliminated, expanded. And also could you address whether you think that alternatives to incarceration are considered sufficiently when it comes to supervised release revocations.

MR. SCHWEER: Let me first address the

issue of specific cases that are basically in between incarceration/nonincarceration zones, is that there are a number of financial cases that are handled in our district and not that -- I can think right off the top of my head a few cases where because the amounts exceeded -- or went over a limit, that now calls for incarceration that nonincarceration, because of the specific amount, may come to play when a person may not have ever been in trouble before, may be the sole provider of family, whatever the other elements that may apply, that is a kind of case, a type of case, where we run across that occasionally.

Also, when it comes to the matter of -- and maybe I should ask you to clarify what you mean by alternative programs or sentences that a court might impose. Can you restate that, please.

COMMISSIONER HOWELL: Well, just in terms of sort of strict prison-only terms, home confinement terms, community confinement, or home detention or just straight probation.

MR. SCHWEER: To speak to home confinement cases, we have a very significant compliance rate with home confinement, finishing the term of home confinement, et cetera. There are a few cases, certainly, that causes issues with that when it

comes to monitoring, they end up coming back for those violation actions that you touched upon.

Our courts, I think in general, based on being a new chief coming back to a district that I had left for some years, the big element that I noticed, that the courts want opportunities to sentence individuals to appropriate sentences that allow them an opportunity to become part of the program upon release -- programs upon release, not the least of which is employment programs, which Your Honor talked about earlier, and a myriad of other programs that are now being made available through probation, and pretrial services offices, actually, to where the courts want to try those programs on these individuals. Instead of imposing those mandatory minimums of 10 years, 15 years, want to go down to a more reasonable sentence and the person go out and be able to participate in those programs.

So I see courts, or judges in particular, kind of torn between, okay, how do I get there, how do I get to that sentence. And that's where you start, pardon the expression, tap dancing on gray areas, where is the government going to appeal it; and if the government appeals, are they going to remand it, based on going down too far, perhaps.

So some of this additional guidance that I recommend in clarification of the definitions might help us certainly get to a point and, thereby, the courts get to a point where they can fashion a sentence that they would like to see, bottom line. Now, is that a long way around answering your question?

COMMISSIONER HOWELL: That's okay.

COMMISSIONER FRIEDRICH: As you all may be aware, Judge Cassell is going to testify later today, and he's recommending in his testimony a number of reforms, both to the guidelines and to statutes, to further incorporate -- integrate victims into the sentencing process. I know in the past probation has expressed concerns with similar recommendations, but I would like your view on two that he's proposed that I think are somewhat different than prior proposals.

The first is to require probation officers to solicit information from the victim directly, not just include, as Federal Rule of Criminal Procedure Rule 35 provides, that you have to include victim information but to actually seek it from the victim directly. And in support he provides a case in which he thought that the judge was disadvantaged in not having information regarding the degree of bodily injury directly from the victim.

The second is a proposal that would provide statutory change, of course, but would provide that prosecutors would be required to provide portions of the presentence report on request by victims but could redact those to take care of confidential sensitive information.

I know in the past probation has expressed concern about the burden on probation about the sensitive information. I'm just curious what your reaction is to those proposals, because some of the concerns I've heard raised in the past don't seem to be quite in play.

MR. LOWRY: To start with, I guess -- and I've read some of the other testimony and some of the proposed stuff on the rendering or giving information out of a presentence report to victims, and a number of those issues have already been reiterated, and those are simply that much of the information that we put in the report in different sections of the report come to us from sources where they're not allowed for secondary dissemination, and that creates complications for us in the way in which we gather our information; and should that be compromised and then publicized on top of it, it could probably shut some doors for us and disallow us to continue to get a lot

of different types of information.

I -- you know, I guess I should say personally, but, you know, I could see and understand why the victims would want portions of the report and understand why that they want that information.

COMMISSIONER FRIEDRICH: Particularly the calculations, I think, he's focusing on, the way in which you reach your recommendation; perhaps not as much of the text as the guideline calculations.

MR. LOWRY: Right. And criminal history without the details and those things. I guess I never spent a lot of time considering that particular angle, but I think that's, you know, a possibility, and that's something that could work out, maybe, to satisfy some folks.

COMMISSIONER FRIEDRICH: What about direct contact with the victim?

MR. LOWRY: You know, I think that's a good policy. I encourage all my officers the best that they can to have direct contact with the victims, because I think that really to identify the impact of the offense on the public and the victim as a whole, you have to have that.

At times I think that there are roadblocks with that, and the roadblocks come from

sometimes victims that are afraid to be involved or victims that can't carry out the process of being interviewed and that it's so traumatic that they're not cooperating with us. So there's caveats like that that make it difficult to deal with an across-the-board mandate of in every case you shall interview and get input from the victim. Which I think is very important, like I said, to determine the case's, you know, impact on the victim, but in every case it's not always possible.

MR. SCHWEER: If I might, several years ago I personally did a presentence report on a financial fraud scheme that was an insurance fraud scheme where the court specifically wanted the victims identified, contacted, comments back, forms even submitted by the victims specifying losses, et cetera, and impact on their lives. It had to do with insurance coverage for high school athletic programs, and there were a number of paraplegic, quadriplegic victims that had sustained injury in that case. And our staff continues to do that, works very closely with getting information from the victims, the victim witness coordinator, the U.S. Attorney's Office, to identify who the victims are and go about contacting them to find out specifically financial loss, you know, impact

on their lives, things like that. So I don't know that we've gotten away from that. Again, pardon my returning to Kansas from being gone, but I haven't asked officers specifically is that an issue.

Now, we are also working in what's called a victim information notification system with the U.S. Attorney's Office and being able to identify victims as they continue through the process, even post-sentencing, post-release of payments that are coming in from the offenders, during the course of supervision, getting out to the victims and such. And the clerk's office is now becoming involved in that process as well. So I think we're working as diligently as we can.

Now, you talk about resources. Anytime you add another duty on to us that equates to time, resources, effort, et cetera, it then lengthens -- and can potentially definitely lengthen the amount of time between the plea or the conviction and the sentencing date. And currently we operate on 11 weeks from the conviction, either plea or trial results, to sentencing. And generally we have about a 35-day period to do that report, when you start backing into it all the disclosure times and objection time frames that counsel for both the government and defendant

have. So right now we're already working with a very finite period of time. Even in our modified presentence cases, that's down in our district to 39 days to get those cases processed from start to finish.

So yes, I mean, anything that you would add obviously is going to be a workload, a time load, and perhaps a financial burden on our districts to complete the process, and I don't know that anyone -- I certainly am not aware of anyone that has done a financial impact review or survey of what that actually means in the way of resources. But, yeah, adding any additional duty at this point in time could very definitely lengthen the time frame that we would have to get our work done.

MR. LOWRY: And just after further reflection after we first started talking about it, I think something like that would have to include some language that would make it where it's practical and possible. Because an example is we just recently had a substantial fraud case where there were numerous victims, 5,000-plus victims, being notified by mail and allowed to send their victim impact statements back in. For that case to go forward, if there was a mandate that strictly said you have to interview every victim and it couldn't be written or there were parameters

that wouldn't allow for such freedom of movement to accommodate such a big case, it could be a real obstacle, not to mention the time factor that Chief Schweer brought up.

ACTING CHAIR HINOJOSA: Mr. Lowry, you mentioned the issue of minor players or minimal players in drug trafficking cases. Do you all have an issue with regards to judges considering the mitigating role adjustment with regards to defendants in drug cases? Because if you do, then that obviously is going to drastically change the sentence for that individual based on the mitigating role cap, as well as the subtraction of whatever number of points you use for the mitigating role itself.

MR. LOWRY: And I guess just as an example, I'd say there's the possibility of the mitigating role not technically fitting definition that it's a mitigating role. If somebody is involved and, in reality, say a family member -- and I've seen cases where maybe -- and I can just think of one example where a mother of a number of children in their 20s were all dealing substantial quantities of drugs. She's in the house, the phone is there, and she takes phone calls and messages and certain things and received a substantial amount of time. And really,

because of the number of activities and quantity and everything that had taken place, there was really no way to get to maybe a fair sentence, and it was a very lengthy and extensive sentence for what could have been a lot less sentence based on --

ACTING CHAIR HINOJOSA: Was there some other member of the family that was also involved, or what was the issue?

MR. LOWRY: It was mother and children, and the children were the ones trafficking, and the mother got involved on the periphery, but it continued, coordination, as the phone was at the home and that was their base and they lived there, and the numbers went up so much because of the quantity that had changed hands and the number of phone calls and certain other things that took place, that it was a very lengthy sentence.

And when we talk about what Commissioner Howell had talked about of getting to the right sentence and the right zone, sometimes in a situation like that you can't get to a sentence that would be necessary where you see somebody getting ten or more years, and five would have simply sufficed in this case, that's the kind of situation that we would be talking about, where, you know, by definition and the things

that transpired were -- you know, there's times when you just can't get to that situation where the sentence would be a lower level without reasons for a downward departure that oftentimes don't exist.

ACTING CHAIR HINOJOSA: Well, we thank you all very much and we appreciate your time and your work. Thank you.

(A lunch break was taken from 12:43 p.m. to 2:10 p.m.)

ACTING CHAIR HINOJOSA: We'll go ahead and get started. We appreciate the U.S. attorneys acting like U.S. attorneys, waiting for the judges and the members of the Commission to show up and being very patient about it. I know you all have good training on that.

We have two distinguished U.S. attorneys with us today to share their thoughts, and we certainly appreciate their taking time from their busy schedules to share their views with us. We have Mr. David M. Gaouette. Do I have that correct?

MR. GAOUETTE: Yes, sir, very good. It took me years to get to that level.

ACTING CHAIR HINOJOSA: Who is the U.S. Attorney for the District of Colorado. He previously served here as the first assistant U.S. attorney, and,

prior to joining the U.S. Attorney's Office, he was a police officer with the Lakewood Police Department. He also received his undergraduate degree from Florida State University -- some day their football program will get back to where it belongs, I guess -- and his law degree from the University of Denver.

We also are very pleased to have Mr. B. Todd Jones, who is the U.S. Attorney for the District of Minnesota. He has been appointed by Attorney General Holder to chair the Attorney General's Advisory Committee of U.S. Attorneys. In 2002 to 2003, he chaired the U.S. Sentencing Commission's Advisory Group on Organizational Sentencing Guidelines, and he received his BA from Macalester College and his JD from the University of Minnesota Law School.

We certainly appreciate your presence, and does one of you want to go first?

MR. JONES: I'll do the reverse of Judge Loken, so I'll go first. Thank you very much, Mr. Chairman and members of the Commission, for the opportunity to appear here today and provide you with information about the impact of *Booker* and its progeny on the prosecution of federal cases in the District of Minnesota. I've had an opportunity 60 days on the job, we were a part of the first batch of new presidential

U.S. attorneys, along with Tris Coffin in Vermont and several others, to be in place in part as a presidentially-nominated senate-confirmed United States attorney, so I am 60 days into the job. A fair amount of that time has been getting reacquainted because of my prior service as the United States Attorney with the office. So to a certain degree, I'm feeling a bit like Rip Van Winkle, particularly when it comes to the guidelines and what's happening after several months of observation in our office and what I was used to the last time I was in the office, as both the U.S. Attorney and an assistant United States attorney, which was pre-*Booker*.

Let me begin by telling you a little bit about the District of Minnesota, which is not a unique district, but it is a single district in the Eighth Circuit. It does have the whole spectrum of federal criminal issues that we deal with, given that we have non-PL 280 Indian reservations that we have exclusive responsibility for. We have a major metropolitan area with all of the attendant fraud, financial issues. There are a number of Fortune 100 companies that are headquartered in Minneapolis. We have a border, a northern border, with Canada, with all of those attendant issues, an international seaport in Duluth,

and the whole spectrum of Bureau of Prison issues, federal lands from public parks, so we deal with all kinds of crimes at the federal level.

It is a large district. We have a 700-mile border. We host a major airline hub. There are several interstates that cut through our state and, in fact, Interstate 35, Judge, as you probably know, it starts in Laredo and ends in Duluth, Minnesota, so as a result of that we have our fair share of issues involved with drug trafficking and Mexican drug cartels.

Over five million people live in the state, more than 500 communities. We've got 87 different counties there that each have their own elected county attorney and elected sheriff. We have a history and a tradition of working very collaboratively with state and local law enforcement and we have a growing and diverse population. We have the largest Somali community outside of the Horn of Africa. We have a very large Hmong community, second only to California; and we have an increasing number of Latinos that live in our state that are on a par with our African American population.

I'm briefing you about the state's border and travel, the demographics, the quality of

life to shed some light on what is to follow on why Minnesota handles the kind of cases it does, ranging from terrorism, healthcare fraud, mortgage fraud to firearms, trafficking and civil rights abuses.

You know, we have provided you with some written testimony. I know that we're going to have a chance to do some Q and A, but let me briefly highlight some of the things that are in my written testimony that I think might provide you with some jumping-off points for other things.

You know, 60 days into this and being very much aware of the Department of Justice speaks with one voice, a lot of the information that I am sharing with you are statistically based, based on experience that I gleaned in talking to assistant U.S. attorneys in our office and just getting a reassessment and reacquainted with the sentencing guidelines again as a prosecutor. Because for the last eight years, I've been a defense attorney, and what you see depends on where you sit; and forgive me if I'm still in that transition mode, so I'll just stick with the hard data, much of which is generated by the Sentencing Commission, which I think is an invaluable service in terms of what we have to do within the Department of Justice as prosecutors.

You all know the history and the genesis of the sentencing guidelines, which were created in part to minimize sentencing disparities amongst similarly-situated defendants who appear before different judges in different districts for similar conduct. In addition, they were developed to address the inappropriately high percentage of offenders given minimal sentences in certain economic crime cases or white collar crime, including fraud and taxes.

The *Booker* decision, in which the U.S. Supreme Court held that district court judges are not bound by the guidelines but only must take them into consideration when determining a sentence, has prompted you all as the Sentencing Commission to revisit a number of earlier issues. Our view of your data, the Commission's own data, indicates that that visit is warranted. As of the end of June 2009, about 43 percent of federal sentences imposed nationwide during the first three quarters of the fiscal year 2009 were outside the guideline range, up 38 percent -- up from 38 percent in 2006. Moreover, outside-the-guideline-range sentences were found in far more than white collar cases.

By failing to adhere to the guidelines in close to half of all sentences, some have suggested

that the courts may unintentionally be jeopardizing the principle of equal justice under the law. They argue that similarly-situated defendants may be, in fact, receiving dissimilar sentences, which ultimately could weaken the federal justice system. After all, victims, witnesses, jurors, defendants and the public at large must see the system as consistent in its treatment. Otherwise, it loses its respect and its credibility.

Furthermore, the federal system, the federal criminal justice system, has long been viewed as the forum for addressing the most egregious crimes. I know that's true in the District of Minnesota. With stiff and certain sentences and no parole, the federal system historically has been feared by potential offenders and has acted as a pretty effective deterrent in most circumstances.

That deterrent effect has never been more important now that while we struggle through some serious economic turmoil brought on by misconduct of those who play fast and loose with things such as federal securities laws, it's doubly important that we continue to hold ourselves out as a primary deterrent for criminal misconduct.

A return to outside-of-the-range sentences, particularly in the economic crime area,

could weaken the deterrent effect, in addition to sending a pretty devastating message to the general public. That's especially true if the sentences imposed regularly fall below guideline ranges, which is the case, according to the Commission's own data.

Again, according to that data, over the past several years, 96 to 98 percent of all sentences imposed outside the guideline ranges have fallen below guideline minimums. Granted, judges alone are not responsible for the below-guideline sentences. In fiscal year 2007, for example, 25.6 percent of all sentences were government-sponsored, below-range impositions, while only 12 percent were imposed by the courts over the government's objections.

However, a shift is occurring. During fiscal year 2008 and the first three quarters of 2009, the percentage of below-range sentences imposed by the courts over the objections of the government, which, you know, outside of the bounds of a plea agreement or some discussions beforehand, climbed to 15.7 percent of all sentences. That's a 3.7 percentage increase in just 21 months. The trend can be seen in far more than just economic crime cases.

Specifically between October 1, 2008, and June 30, 2009, the government sponsored and the

courts have approved 838 below-range fraud sentences, 866 below-range firearms sentences, and 172 below-range pornography/prostitution sentences, among others. But, during that time period, and over the objections of the government, judges imposed an additional 989 below-range fraud sentences, 1,135 below-range firearms sentences, and 546 below-range pornography/prostitution sentences. As a result of those actions and similar actions in other crime categories that contested -- and I use contested in quotes -- below-range sentencing rate jumped five percentage points over that nine-month period.

The contested below-range sentences imposed during that time were significantly below guideline minimums in many subject areas. For example, in fraud cases, the average contested below-range sentence was 5.2 months, an average decrease of 9 1/2 months from the guideline minimums. In firearms cases, the average contested below-range sentence was 35 months, an average decrease of 13 1/2 months from the guideline minimums. And in pornography, particularly child pornography cases, the average contested below-range sentence was 59 months, an average decrease of 26.8 months from the guideline minimums.

Now, that's all based on the

Commission's own national sentencing data. And let me spend the last part of my testimony here before questions and answers on the impact of *Booker* at the district level in the District of Minnesota.

As of June 30, 2009, our district possessed a comparatively high rate of contested below-range sentences at 34.6 percent of all sentences imposed during the first nine months of fiscal year 2009. That's based on Commission data. As stated, the national average was 15.7 percent on that day. At the end of fiscal year 2008, the District's rate was 22.4 percent, compared to the country as a whole at 13.4 percent. Thus, while the national rate has risen not quite 2 1/2 percentage points over the last nine months, in the District of Minnesota we've seen a spike of over 12 percentage points of sentences imposed outside of the guidelines that were contested.

Now, no one knows for sure why we post a higher than average rate of contested below-range sentences. Maybe our judges are being spoken to by Chief Judge Loken on the Eighth Circuit. And I apologize for throwing all these figures out at you, but it is important as you figure out from the prosecutor's perspective what's happening in terms of judges in the District of Minnesota, probably

reflective, from what I've seen of other United States attorney's testimony who have appeared before you, are not necessarily an anomaly. They're going beyond. They're flexing their muscles. And some of the things that Judge Loken spoke about this morning as to what they're seeing on appeal and some of the things I've seen in the short time since I've been back in the office, clearly indicate that they have taken to heart *Gall* in our district, the judges, and they've taken to heart the advisory nature of the guidelines.

The significant jump in the rate between October 2008 and June of 2009 is likely the result of a growing comfort level among our district court judges relative to imposing outside-the-range sentences. Again, that comfort is undoubtedly due in large part to the Eighth Circuit becoming increasingly more supportive of the district court's autonomy and sentencing after being reversed by the United States Supreme Court in *Gall*.

Let me give you some examples specifically from the District of Minnesota. About six months after the *Booker* decision, we had a case involving the owner and operator of a company in the district that pled guilty to cheating on his taxes by logging personal withdrawals from the company as raw

material expenses and subcontractor expenses. He also involved his bookkeeper and coerced her into making false entries in the company books. In pleading guilty, the defendant in that case, Mr. Ture, admitted that he mischaracterized the withdrawals, totaling about $645,000 over three years, resulting in a tax loss of close to a quarter million dollars. The guideline range was 12 to 18 months, but the defendant received no prison time. Instead, he received a sentence of probation and was required to complete 300 hours of community service. We appealed that case in the district, the prosecutors appealed that case, and the Eighth Circuit reversed and remanded with a strict injunction to the judge that the sentence include incarceration. The judge, however, waited nearly a year to schedule the resentencing and then in April of 2008 imposed the exact same sentence. That's a reported case, *United States v. Ture*.

Shortly after the remand in the *Ture* case, but before the resentencing, the same district court judge heard another tax case. This time involving the operator of a home building company who failed to pay the government approximately $600,000 in income, Social Security and Medicaid taxes withheld from his employees. The guidelines called for a

sentence of between 18 and 24 months but the defendant was given probation.

Our office appealed, the prosecutors appealed, the Eighth Circuit reversed, citing *Ture*, and remanded with strict instructions to impose some term of imprisonment. Prior to the sentencing, however, *Gall* was decided. It emboldened the judge, who imposed a very minimal sentence, three months of work release. That's the case reported *United States v. Carlson*.

Disparity in sentencing has also been an issue on occasion in Minnesota due to *Booker* and its progeny. For example, in early 2008, we had a case where a male teller was prosecuted for -- a bank teller was prosecuted for stealing a quarter million dollars from his employer bank. He was sentenced to 21 months. And the case is cited in the written testimony, *United States v. Del LeClair*.

In late 2008, a female bank officer was prosecuted for stealing a similar amount of money from a different bank, but was sentenced to just three months by the same judge, *United States v. Justesen*. Even though the female bank officer's scheme spanned a longer period of time and was arguably more complex, she received a sentence far below 24 to 30 months sought by our office. According to the judge,

the reason for the variance was the bank officer had children, which would have been a questionable departure in the days of guidelines adherence but not so now.

The local trend in below-range sentencing and the impact of *Booker* and its progeny is probably felt most keenly in child pornography cases. This is something that I've become quickly acquainted with in my return back to the office. When I left, Project Safe Childhood was in its embryonic stage and has been going full bore, and that is a top priority with the Department of Justice. A number of cases have come through the office and, as I recall, from hearing earlier testimony, and you've heard from other United States attorneys, that particular area and sentencing is problematic.

For example, in a 2008 case where the defendant in the case had more than 23,000 pornographic images he shared through a peer-to-peer online network, the court ordered him to serve 24 months, even though the guideline range was 78 to 97 months. In imposing this sentence the judge repeatedly discounted the serious nature of the crime of possession of child pornography, characterizing it as mere viewing. And that's *United States v. Kahmann*.

In another recent child pornography case involving possession, the sentencing judge cited *Kimbrough* in ordering the defendant to serve 48 months, even though the guidelines indicated a sentence of 120 months would be more appropriate. Again, the judge, a different judge than the first case I cited -- that I previously cited, said he disagreed with the severity of the guidelines in, quote, unquote, mere possession cases. And that's the *United States v. Kennedy-Hippchen*.

In response to these sentencing practices, there are some things that currently within our district we've altered in the way we do business. For example, assistant United States attorneys now have become greater sentencing experts and much more conversant in § 3553(a) factors and have become sentencing advocates. While we have not yet seen a more exhaustive sentencing hearing move in the District of Minnesota, as is already occurring in other districts due to *Booker*, we fully expect the sentencing stage of federal criminal prosecutions to morph into what I commonly participated in as a judge advocate right out of law school, and that's the sentencing phase under the manuals of court martial, where during my time as a criminal defense lawyer, a judge advocate

in the Marine Corps, most of the work that I did as a defense lawyer in that venue was on what was the ENM stage, where we spent all of our time preparing extenuating and mitigating circumstances and engaged in very vigorous advocacy with judge advocates who were prosecutors on that stage, much less so than guilt or innocence in a number of circumstances.

That evidence-based time -- that was very time consuming, it was evidence based and it was an important part of the court martial process, and I see, in the short time I've been back, our AUSAs spending a significant amount of time getting ready for sentencing hearings, much more than before *Booker* and *Gall*.

At the present, in the District of Minnesota, we also employ closer supervisory review of plea agreements drafted by our AUSAs, but we have not, in our district, initiated use of binding plea agreements under Rule 11, as some districts have done. Those agreements, with their departure and variance waivers, are not readily accepted by the federal bench in Minnesota. That's maybe different in other districts, but our benches made it clear that they don't like those. Moreover, since *Booker*, we do not encounter many defendants who wish to enter into

binding plea agreements, as there's little motivation for them to do so.

In addition, particularly in some particular kinds of cases, we look at our charging alternatives, where below-range sentences are otherwise likely. For example, in firearms cases, we normally charge the defendant as an armed career criminal when possible based on the evidence because of the certainty of the sentence under the statute. If we have the evidence, those are the kind of cases that we look at federally in the District of Minnesota.

Same with child pornography cases with only possession, which carries no mandatory minimum, we work through our PSE program and our prosecutor program, encourage AUSAs to work with the investigative agents to establish grounds for receipt, if warranted by the evidence, because that offense has a mandatory minimum.

Finally, we have, in the District of Minnesota, decreased the number of cases we appeal on sentencing grounds. I was here this morning for Judge Loken. He cited the numbers from the Eighth Circuit, and I can guarantee you that a lot of those numbers aren't being driven by federal prosectors appealing sentencing cases out of the District of Minnesota. The

Eighth Circuit has made it clear, through its rulings post-*Gall*, that it supports the judicial independence practice by our district court judges when imposing sentences, and we made the very practical decision not to challenge those sentences to the Eighth Circuit.

While we are working to and anticipate and address the imposition of unsponsored below-the-range sentences in our district, we must note that the autonomy demonstrated by our judges is not always unwelcome. As a new United States attorney, I'd like to believe that the government seeks below-range sentences in all warranted cases, but I realize that in some instances substantive fairness is achieved only because the sentencing judge may sentence below the guidelines.

Furthermore, I cannot help but wonder if the rate of government-sponsored below-range sentences and the increasing rate of contested below-range sentences imposed by the court in some instances are signals that perhaps the present guidelines should be reevaluated. It's true we want the federal system tough enough to be a deterrent to crime and feared, but it must also be fair. We have not lost sight of that.

Now, on the flip side, regular deviations from the guidelines by the government and

the courts, may cause Congress to legislate more mandatory minimums. As a defense counsel, within the last two years, I was on the public defender's panel, I had the opportunity to defend a young man 19 years old who got caught up in a conspiracy case involving identity theft, and he was subject to 18 U.S.C. § 1028, aggravated identity theft, and I was dealing as a defense counsel with the young man with no criminal history as an adult. He had some challenges as a juvenile, but no Criminal History Category I, and he was looking at a two-year minimum mandatory because he was charged with aggravated identity theft.

And there is a concern, I think it's a legitimate one, that we have to be very careful about the effort to legislate more mandatory minimum sentences. After all, Congress does react to constituent groups.

I heard the earlier testimony from the judges on the Tenth Circuit. I remember as a line assistant when the carjacking statute was passed, the child porn statutes, Adam Walsh Act, the aggravated identify theft. Congress is very good at reacting to constituencies and the need to mandate sentences to be tough on crime, and that's something that everyone within the system needs to be alert to, because they do

react to constituent groups who often lobby for enhancements of the criminal code following a horrific act, particularly if that act is not redressed with stiff, consistent penalties. In an effort to address those concerns, as well as those constituents who are often grieving or angry, Congress may enact extremely harsh and unforgiving mandatory minimums that as prosecutors we live with.

As a result, we -- when I say we, I mean federal prosecutors in the courts -- must try harder to achieve sentences within the guidelines ranges, thereby sending a clear message across the country and throughout all of the districts that the federal system is tough, is fair, and is consistent. By doing so, I believe we will see fewer sentencing enactments by Congress.

In addition, I applaud the Commission for taking steps to evaluate the current use of the guidelines post-*Booker* and am supportive of a review of the guidelines themselves to determine if there's some need for them to be adjusted for justice sake.

With these steps, I believe we can further our primary sentencing objective as judges and as federal prosecutors and as defenders in court, and that's equal justice under the law. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Jones. Mr. Gaouette.

MR. GAOUETTE: Thank you, Mr. Chairman, members of the sentencing committee. Let me first thank you as well for the opportunity to speak to you today about the federal sentencing policies and the state of the federal sentencing guidelines, specifically here as it relates to the District of Colorado.

It appears that the District of Colorado is very similar to the District of Minnesota. We are a little bit further south and we don't have a seaport, but we do encompass the entire state of Colorado. And in addition to the entire state of Colorado, we do have a different interstate that runs north/south, Interstate 25, that runs from El Paso, Texas, further north. Then we have an east/west interstate that runs -- I-70, Interstate 70, runs from California eastbound. We have in the past been a transmission point for a lot of drugs, a lot of illegal aliens, and our ski resorts and other tourist attractions employ a lot of undocumented aliens that come to our state. So we have truly a cross-mix of crime in this district.

We have rural populations, we have urban centers as well. The Front Range, from Fort Collins

all the way down to Colorado Springs and now even into Pueblo, is our major population area. We also have quite a bit of federally-owned lands, and a lot of our docket in the branch offices in Grand Junction, Colorado, and Durango, work with violations with the Forest Service and BLM, Bureau of Land Management, because two-thirds of the Western Slope is federally maintained and owned property.

We also have the distinction, I guess, of hosting five Bureau of Prison facilities, including the administrative maximum facility, ADX, or sometimes called Super Max, in Florence, Colorado, which, of course, as the Commission knows, houses the worst of the worst convicts here in the federal prison system. And then there's a lot of litigation that springs from that facility down in Florence as well.

And like Minnesota, we also have within our district two Indian tribes that also contribute a lot to the violent crime, unfortunately, in the docket here in the District of Colorado. As a result of the statewide responsibility we have, our federal law enforcement agencies have teamed up with their state and local colleagues, and a number of joint task forces throughout the state to better address and further spread our resources through the entire state. Some of

the most effective task forces include the Metro Gang Task Force. We do have a burgeoning gang problem here in the District of Colorado, and not just in Denver, but it's being seen in other parts of the state as well as the Western Slope, and touching upon our Native Americans on the reservations as well.

Safe Streets Task Force deals with mainly bank robberies and other violent crimes, as well as numerous drug task forces. As I mentioned, we are sort a trans-shipment place for drugs to come through, but also we're finding over the last, perhaps, five or ten years that this is a distribution center as well. The District of Colorado has become that as well. And the Front Range Task Force, which is a HIDA-sponsored drug task force. And that's just to mention a few that we work with these state and local folks.

Now, dealing with the Supreme Court decision in *Booker*, that has changed the way we in Colorado approach our sentencing hearings. Our AUSAs now must focus, obviously, their advocacy on the factors that are outlined in § 3355(a), and despite such advocacy, the advisory nature of the guidelines post-*Booker* has resulted in greater inconsistencies and sentences among our judges here in the District of Colorado.

Of the six federal judges, it's hard to really assess how they view the guidelines. We have some that follow the guidelines and consider the guidelines in their sentencing and usually sentence within those guidelines, we have some that sometimes do that, and we have some that don't use the guidelines and have even stated in court that the sentencing guidelines are arbitrary and they would not be followed in the courtroom.

Now, it's certainly my belief, and I'm sure that of many others, that the criminal and sentencing laws must be tough, they must be predictable and they must be fair and not result in unwarranted disparities. Such a system not only protects the public, but it's fair to both victims and defendants alike.

Without such certainty in sentencing, our office's participation in many of the task forces that I just mentioned would be minimized. Our partnership, among other reasons, is based on -- with these various task forces flourish, at least in part, due to the existence of tough and predictable federal sentences associated with the sentencing guidelines. It is important to note, and I can say with certainty, because not too long ago I was actually doing real work

as a AUSA in the Organized Crime and Drug Enforcement Task Force, the OCDETF task force, and I heard from many of the would-be criminals and the people that were charged during debriefings that they were fearful of the strict sentencing guidelines used by, as they call it, the feds.

These drug dealers or gang members did not want to end up on the federal side of the court system because they knew that they were going to jail, rather than their state colleagues, fellow defendants, who most likely would, for the very same conduct, and because of a number of factors, receive a very lenient sentence or even probation.

These debriefings also showed me that some of these defendants admitted that they consciously decided not to, for instance, bring a gun to a drug deal because they knew that there would be a mandatory minimum and there would be a stiff sentence that would result from the federal sentencing enhancements.

Now, I should note that some of the judges are making it clear what they believe an appropriate sentence should be with little or no consideration of the advisory guideline range.

Child pornography, as Mr. Jones mentioned, and as I think this Commission has heard

from many of our colleagues across the country, is one of the cases that is especially becoming troublesome in this district, and I know that the Commission has heard from a judge this morning from our district talking upon the very same case that I'm going to talk about now. And that was the case that the defendant was convicted of child pornography, and he possessed a very extensive collection of such pornography, and the advisory guideline range was calculated between 97 and 121 months. The individual was sentenced to one day imprisonment and credit for that time served and a lifetime of supervision. Now, cases like this, although there were circumstances and medical issues involved, but certainly cases like this and others suggest the current state of the federal sentencing system increasingly favors judicial discretion over uniformity, consistency and certainty.

Recent appellate cases suggest that there is little meaningful appellate review of sentences. For example, in a recent concurring opinion in the Tenth Circuit, the judge opined that the court's present approach appears to be that a sentence that is substantively reasonable -- is substantively reasonable if the sentencing judge provides reasons for the length of the sentence.

Now, the result, the circuit judge continued, will be a great inequity in sentencing because, as the judge said in his opinion, that reasonable people -- district courts are reasonable people, but, however, they can differ as to how lenient or harsh a sentence should be, both in general and for a particular crime and particular type of offenders. Now, the resulting inequalities will have the imprimatur of the courts if this continues, and under such an approach, the court may go through the motions of a substantive reasonableness review, but it will be an empty gesture.

The same judge suggests a different approach, which would not only require sentencing judges to consider all of the factors set forth in § 3553(a), but to focus on two factors in particular. These two factors are, 1, the sentencing range in the guidelines; and 2, the need to avoid unwarranted sentencing disparities among the defendants with similar records found guilty of similar conduct. This approach would allow an appellate court to find a particular sentence unreasonable if solely based on the judge's idiosyncratic view of the seriousness of the offense, the significance of the defendant's criminal history and personal qualities, or the role of

incarceration in the criminal justice system.

As it stands now, the government has little chance -- and I agree with Mr. Jones that our office as well has greatly reduced the number of appeals that we bring to the Tenth Circuit, because we believe that we have little chance of being successful in appealing a sentence, unless the judge fails to make any record of a 3553(a) analysis or uses prohibited reasons, such as race or gender, as the basis of the sentence, and we just don't see that.

While it's not a productive wish to return to a presumptive sentencing guideline system, that system did incorporate many of the goals of a fair and predictable sentencing system. We should take it as our goal to try to achieve as fair and as equitable a sentencing system as possible. And I recognize that fashioning a post-*Booker* sentencing system is a difficult task and does not lend itself to an easy solution, and that's why I commend this Commission and you, Mr. Chairman, for the willingness to take on such a task and inviting me to speak with you today. Thank you.

ACTING CHAIR HINOJOSA: Thank you very much, sir. And I'll open it up for questions.

COMMISSIONER HOWELL: I have one

question for Mr. Jones and one question for Mr. Gaouette on two totally different subjects. I'll start with Mr. Gaouette and the child porn situation. I think that below-guideline-range sentences in the child porn arena are among the highest of any offense type, and it is something that the Sentencing Commission in our sort of dynamic examination of statistics to figure out whether steps should be taken are paying close attention to what's going on with compliance or lack of compliance with the child pornography guidelines.

And I think it's fair to say we're taking sort of a twofold approach. One is addressing it with additional educational tools. We're likely are going to be issuing shortly a paper about child pornography guidelines. And another approach is we're taking a look at the specific child pornography guidelines to see if there should be more refinements that make more sense to sentencing judges to encourage more compliance or persuade them to comply with the guidelines more.

You know, as -- and they're not easy cases, necessarily, and I think the *Rausch* case, which is the one that Judge Kane talked about this morning and the one that you had mentioned in your testimony,

is one of those situations that it's difficult when you look at the facts of that case where Judge Kane was faced with a defendant who, you know, had -- based on our excellent staff summary of the case, you know, he had had -- he was on a donor list for a kidney transplant, he had renal failure. Sentencing him to prison might have likely been a death sentence. He was a Bureau of Prisons guard, so he, Judge Kane, heard professional opinions of psychiatric and psychological experts that said he was at high risk of being vulnerable to victimization in prison. So between the medical care issues, his vulnerability, the fact that he had been in home confinement successfully without violating conditions of that home confinement, and so on, Judge Kane reached -- you know, varied quite dramatically from the guideline range, as you point out.

And I just wonder whether you can site that opinion as an extraordinary example of an extraordinary downward departure; but on the other hand, is your criticism of that sentence that no variance was warranted or -- and if that -- if that's not the situation and you think that a variance might have been, in fact, warranted in that case, then is your criticism of the decision that the variance was

too great? And if so, what was the appropriate sentence that you think should have been given in the case?

MR. GAOUETTE: Well, the sentence -- I guess you asked a lot of questions and, hopefully, I'll give you a lot of answers.

COMMISSIONER HOWELL: I think my point is that these cases are -- with one line in your written testimony, you sort of -- it's eyebrow raising, the sentence is eyebrow raising, given the departure from the range; but when you actually look at the facts and what the judge had to struggle with, it's a little bit more complicated than that.

ACTING CHAIR HINOJOSA: Just to interrupt for a second, do you think it was grounds for departure and a variance?

MR. GAOUETTE: Probably a variance would be more appropriate.

ACTING CHAIR HINOJOSA: You don't think there could be departure grounds?

MR. GAOUETTE: There could be, certainly, but I think in the individual situation, a variance would probably be more appropriate. And all the things that you mentioned, the medical conditions and the previous employment of prison guards, those can

be addressed by the Bureau of Prisons. And I'm just wondering, and I don't know, whether the same dramatic issue, call it a departure from the advisory guidelines, would be taken for another type of crime.

Because throughout -- and I've been with the Department of Justice for 25 years. There have been many situations the personal characteristics of a defendant have come before a sentencing judge; and whether they would be medical, whether they would be employment, such as you mentioned, it seems that in the past then those may have been grounds for a departure, they may have been grounds for a variance, but they were not -- I mean, Bureau of Prisons has medical facilities, as you know. They take all sorts of medical conditions and can deal with operations or to contract those out, and so I think that they're able to deal with medical conditions and also informants, previous police or prison guards. And so I guess it strikes me that -- that there are ways that a criminal defendant, when facing such a large advisory guideline range, would -- for those reasons which have been addressed in the past by the Bureau of Prisons and other institutions, would go from a potential of 121 months down to essentially nothing.

And I think -- to answer your question,

I think that an appropriate range or appropriate sentence would be some incarceration for those other factors that I don't believe the judge either weighed as heavily or took to heart. Because what you don't want is such a large -- such a huge inconsistency because of a medical condition that others may have found themselves in Bureau of Prison custody that may have similar or even worse medical conditions or similar or worse situations as being an informant or being a previous prison guard.

COMMISSIONER HOWELL: Thank you. So, Mr. Jones, I wanted you to put on your hat for when you were in charge of our organizational advisory panel, and you did a great job in that role. And one of the areas that, you know, I think that the Commission has been complimented on a lot is in the organizational guidelines chapter that some people have said sort of generated an entire industry of compliance officers. I think when we in our -- in §8B2.1 where we provide the outline of the seven or eight minimal requirements for having an effective compliance program, the seventh one has to do with remediation. If criminal conduct occurs, what an organization should do under its effective compliance program to address that and remedy that situation.

What we don't say, and this is where we fall short, in fact, even by comparison to what the Justice Department guidelines look at in terms of organizations that have engaged in criminal conduct, is whether as part of their remediation of the criminal conduct they've tried to identify any victims and make restitution to those victims.

Do you think that that's something that the Commission should think about adding expressly to the minimal requirements for having an effective compliance program as part of that remediation step, that an organization takes steps to identify any victims of the criminal conduct and takes steps to make restitution to them?

MR. JONES: Well, that experience was invaluable to me, and I find myself more often than not thinking about that in terms of my view of the guidelines. I think everyone understands an organization as a criminal defendant is kind of in a unique situation. The other thing from that several-year experience is that Chapter Eight is not used a whole heck of a lot because a lot of organizations resolve their issues with the government if they're in that criminal arena before there ever is an indictment or information filed; and if there is one, then it's

usually done in conjunction with some prearranged, pre-indictment package that's been put together.

COMMISSIONER HOWELL: And it is, in fact, when the government is looking at whether or not to charge or resolve the investigation of the organization in an alternative way that the government actually looks to see what the organization has done in terms of making restitution.

MR. JONES: And I think that's primarily driven whether or not what you suggest should be done. I -- you know, I don't -- I don't -- you mentioned that there's been a whole industry that's come out of that.

COMMISSIONER HOWELL: Compliance officer.

MR. JONES: The compliance officers, the ethics officers. You're bringing back all of these recollections from that experience. But I do think you have to take Chapter Eight and sort of put it in a unique category in terms of it being both driven to a particular kind of criminal defendant and also the uses of the guidelines in terms of them being more proactive and not reactive, in that people are looking at those things, like the seven steps and seven factors on an effective compliance program up front. I mean, there are companies I know from personal experience,

companies that look at that in terms of the basics for their compliance program, even though they've never been in trouble with the law and even though they hope that they never have to deal with Chapter Eight, either with a sentencing judge or a probation officer.

So that chapter is a little bit unique in that it does outline and give a lot of guidance as to what could happen to you at the back end, where most of its use is at the front end so that you never get to Chapter Eight, which kind of makes it a unique chapter in the guidelines.

ACTING CHAIR HINOJOSA: Do you think that that's something that could be looked at from the standpoint of the front end in individual sentencings as opposed to organizational sentencings with regards to the theory of this step being taken before sentencing or sort of a restorative justice type of action?

MR. JONES: Let me put on my DOJ hat and let you know, if you don't already know, that the whole panoply of federal criminal justice issues is under review currently.

ACTING CHAIR HINOJOSA: I think we've been through that.

MR. JONES: There are numerous working

groups, and I've talked with Jonathan beforehand, and as chair of the AGAC, you know, even though it's 60 days into this, I know that there are numerous issues being looked at, both on the restorative justice front, the reintegration front in terms of reintegrating people being released from the custody of the Bureau of Prisons, which is something that I don't know if you've heard is going to be quite a challenge for probation officers, just the sheer volume of people that are coming out of federal prisons; and, of course, what happens in between, through the criminal charging decisions, sentencing advocacy, particular issues like crack powder disparity. I mean, that's all part eight months, nine months into this administration, that people are very busily looking at under some pretty tight time constraints, and in addition to dealing with issues like Guantanamo.

So the Department of Justice is working very hard to come up with some best practices. We're talking to a lot of people, as I'm sure Jonathan has let you all know, as an *ex officio* member, a lot of constituencies, academics, federal defenders, all kinds of groups, and we fully anticipate that there will be meat on that bone here within the next six months.

VICE CHAIR CASTILLO: I want to get to a

point that I have found disconcerting about this particular set of hearings, which is our fifth set of hearings, and that is consistently hearing about judges who are just starting out by flat out rejecting the advisory sentencing guidelines. It seems to me that even the Supreme Court that got us all in this boat of an advisory guideline system has consistently said in all of their opinions -- *Booker*, *Kimbrough*, *Gall*, *Rita* -- that you need to start out every sentencing proceeding by at least applying the advisory sentencing guidelines before looking to whether or not there should be a variance from the sentencing guidelines. But I don't know if judges have been emboldened by *Gall* or if this is just something unique to this area of the country, and we've been in several difficult areas, not the least of which is the northeast quadrant of the country where I'm going to next, but I've yet to hear of judges just coming right out on the bench and saying it's not going to be a guideline sentence, let's talk about what it could be or what it should be.

Do you want to comment on that? Am I misinterpreting what you're saying here, or are judges just rejecting the advisory guidelines?

MR. JONES: You know, in my observation, again, several months in as a prosecutor, as the chief

prosecutor in the District of Minnesota, but with seven years of observation as a defense lawyer and on the defender panel, is that the judges, in my view, are just testing the boundaries. They all have their own personal sense of justice. They're not sort of throwing the guidelines back in anyone's faces. They're working within the case law, both the Supreme Court case law and the Eighth Circuit case law. But my personal view is that they're testing the boundaries. They're testing the boundaries in terms of how far they can go in particular areas.

You know, you mentioned the child pornography area, and this is still a work in progress. And again, that's a particular area where back in the position I'm in now, I have a greater clarity about the seriousness of those offenses. There's lots of discussion, both with law enforcement and in the prosecutor ranks, about making sure that people's own well-being is taken care of when they do a lot of those cases. And, you know, quite frankly, I don't know whether some of the judges that are looking at this mere possession factor in this area and getting all mixed up with what people do in the privacy of their homes or First Amendment issues or whatever it is. I can tell you this, we've started to make available to

judges the images themselves, and that's made a difference to the judges, when they see some of this child pornography that's out there. And I think that that will work its way out just as part of the sentencing advocacy, irrespective of the case here in Colorado, the personal and physical situation of the defendant.

Because I do think that in those circumstances, that sometimes the judges lose sight of the deterrent -- again, it's my personal opinion, the deterrent impact in certain kinds of cases and the message that's sent and get locked in on the individual circumstances, as sad as it may be. What kind of message are you sending to the general public about this when you have someone who's got a very sad personal situation but is engaged in this kind of behavior and engaged in this kind of a crime, and they get a light touch.

MR. GAOUETTE: And to answer for the District of Colorado, whether it's testing the boundaries or what have you, I believe we do have some sentencing hearings that it is clear that the judges, not all the time, but do not want to follow the guidelines and will not follow the guidelines; and whether that's a -- because based on any number of

factors that apparently only a judge knows, and the judges have -- at least one has said that he's not going to follow the guidelines. And there are instances that depend upon the case. Some of our judges do not follow the guidelines and they have a preconceived -- what I consider, and again, this is my personal opinion, a preconceived notion as to what an appropriate sentence would be, and that is not anything to do with -- it's not the starting place, as you mentioned, sir, of their determination or their decision.

ACTING CHAIR HINOJOSA: If a judge makes that statement on the record, do you think that is any different than saying I'm just not going to consider 3553(a)(2) at all?

MR. GAOUETTE: Oh, I think so. That's tantamount to the same thing.

ACTING CHAIR HINOJOSA: So it isn't so much saying that on the record, it's just obvious to you based on what's going on; is that right?

MR. GAOUETTE: Correct. And there are some things that are off the record as well, with negotiations that have occurred where it's clear that the judge has a sentence in mind, and he's working -- he or she is working towards that sentence.

ACTING CHAIR HINOJOSA: The judge is engaged in the plea bargain discussion?

MR. GAOUETTE: No, sir, not plea bargain. Sentencing.

VICE CHAIR SESSIONS: Mr. Jones, you talked about the difficulty and balance here between a firm system and one that results in fair sentences, and I have a couple of questions. First is with regard to mandatory minimums and the safety valve. I know the Department is thinking about this, but do you see any -- and this is for both of you. Do you see any reason why the safety valve should not be expanded, either to Criminal History Category II or expanded to other offenses or use indirect ways of expanding the safety valve, that's first.

And second, I've heard General Holder on three occasions now speak about alternatives for low-level drug defendants. And, of course, you have the ability to create diversion programs within your systems.

I wonder if, first of all, there are low-level drug defendants within your system. Do they come in? Are there low-level people at the end of the conspiracies? And second, have you thought about those kind of alternative proposals?

MR. JONES: Let me choose my words carefully, because --

VICE CHAIR SESSIONS: I don't want to put you on the spot.

MR. JONES: Thank you, Judge. A number of issues again are being looked at from a policy standpoint, and I think several factors will drive that. One of them, of course, is being fiscally responsible about what's realistic and what's not. You know, the other is our comity with our colleagues in state system in terms of what we take federally, which loops back into charging decisions and sort of intake as a matter of principal when you're talking about -- at least in the District of Minnesota, and I will hone in on that. For drug defendants, we have for a number of years worked collaboratively with task forces and with our state prosecutors -- and in Minnesota it's 87 different county attorneys -- in terms of determining where people should rightfully go, in large part driven by the repercussions of ending up in either federal or state court.

The long and the short of it is, hopefully we're not seeing a lot of the low-hanging fruit and minimal involvement drug dealers that are coming into the federal system in the first place.

Now, there are circumstances in conspiracy cases where you do sort of work it in the textbook way, where you get people to come in and testify and sort of use things for leverage, but I think that we've resisted the temptation to drive numbers by bringing a lot of people in to the federal system in the drug arena, and that's been a lesson that's learned -- a very difficult circumstance over the last 20 years in federal prosecution in the drug arena. Not getting any better, but getting a little smarter.

Your other question about the safety valve isn't really, quite frankly, one I've given a lot of thought to. I'm sure that there is a working group that part of their review and examination in terms of suggested statutory fixes or things that the Department might want to advocate as a department in its overall review, but I'm really not in a position where I can comfortably either provide you with a personal opinion or inappropriately provide you with any kind of policy statement on behalf of the Department of Justice.

MR. GAOUETTE: And I would like to concur with Mr. Jones. We, in the District of Colorado, in the drug task force, in our drug cases, we don't have the low-level or the low-hanging fruit, as Mr. Jones said. And we too work with the state and

local side, as I mentioned, on many task forces, and with the district attorney's offices, and sometimes we're accused of giving, you know, the lower level cases to the state, which we do. Because we try to keep the conspiracies to the conspirators and sentence those people as part of the conspiracy. So if they're low-level, merely possessing and whatnot, those are the type of cases, as Mr. Jones said, that go to the state prosecutors.

As far as the safety valve, I know that we use that in order to take into account individuals who are part of a conspiracy, for instance, in a drug case, but don't have the criminal history that would warrant a sentence that is somewhat for a higher criminal history category; and so I think that is a tool that is used to try to balance out criminal histories and conduct.

COMMISSIONER WROBLEWSKI: One quick question. First, before I do, thank you both for being here and participating in all of this. It's tremendously helpful, both for the Commission and Department of Justice, so thank you.

My question has to do with crimes on native lands. There's been concern in the media, there's been concern in Congress about crime on native

lands. There's legislation now pending, and the criticisms have ranged both in terms of the federal government doing too much and also the federal government doing too little. Do you have any thoughts about that and specifically about sentencing policy on native lands?

MR. GAOUETTE: Well as I mentioned, we have two Native American reservations in the District of Colorado, and it's interesting that they are very much different. One tribe has really done a lot to form a criminal justice system with police, with judges, with correctional facilities and whatnot; so they're fine. And so to answer your question, they probably don't need help from the federal government, or as much help as their brother tribe that has not done any of that and is always looking for more assistance from the federal government. And so there's really that dichotomy here in the District of Colorado.

As I touched upon in my testimony, the branch office that handles the Native American tribes is in Durango, and they have a terribly violent crime docket. I mean, the crimes that occur on those Indian reservation are horrific, and they're very difficult to prosecute, they're very difficult to follow through and investigate and whatnot, especially when you have one

tribe that really doesn't have any resources dedicated to the investigation, and so the FBI does what it can. The FBI does more than they really should have to do, but I think if you -- depending upon who you talk to, for instance, in this district, one tribe will say the federal government involvement is fine, the other will say that they really need more.

MR. JONES: You know, I -- there's been a concerted effort to really review federal law enforcement, both responsibilities and the current state of things in Indian country culminating next week in a big listening conference, national listening conference in Minneapolis, and we've been involved both on the AGAC front and in planning for that. And Minnesota is somewhat unique in that it's a PL 280 state, which means that out of the 11 Indian reservations that are in Minnesota, we only work with two bands of Chippewa, which, for their own various reasons, are not -- are exclusively federal. And for our office the work that's done on that reservation is some of most difficult and some of the most satisfying that we do because we are, in essence, the county attorney or the local DA for them.

With respect to your role, I would strongly suggest that as part of this overall review in

Indian country, that you look pretty closely at the guidelines for violent crimes or things that we know if you look at certain provisions of the guidelines that are going to have the greatest impact in Indian country because -- you know, whether it's a sexual assault or whether it's a traditional violent crime, homicide, bodily assaults, other than happening in Indian country, if it's not in a federal prison or on federal lands, that's not something that the U.S. Attorney's offices are dealing with or the guidelines are going to impact.

I think it would be real important as part of this full-spectrum review of how the federal government interacts with tribal nations in terms of public safety in Indian country, that that include the Sentencing Commission looking at and tweaking, if you need to, certain provisions of the sentencing guidelines, advisory guidelines when they impact or have the most impact in Indian country. Because that is a very, very difficult issue and it's one that I know the Department is taking a full-spectrum review of.

COMMISSIONER WROBLEWSKI: It would be, I think, extremely helpful in this last listening session, and also if there's been information from the

previous listening sessions that directly impact the issue of sentencing, if we can figure out a way to provide that to the Commission.

MR. JONES: Well, the other thing that I'll say after becoming really immersed in this, very quickly, is that to the extent that the federal judiciary generally has an interest -- and I know that the Eighth Circuit has an advisory panel, Judge Schreier -- and I may be digressing from the Sentencing Commission, but there are judges up here that, you know, their relationships with tribal courts, I think, is something that would be really important in terms of providing mentoring and training to the extent that they can. And I understand from Judge Schreier in South Dakota that the Eighth Circuit -- and I'm not sure if the Tenth Circuit -- has an analogue with some kind of committee that does work with the tribal court system in the Eighth Circuit, which is primarily North and South Dakota and Minnesota in terms of Indian country. But I know the Tenth Circuit and the Ninth Circuit may want to look at that because tribal justice systems need a lot of help. And the federal judiciary generally may be a good place that can help enhance the court system.

That is separate and apart from law

enforcement challenges with the BIA or tribal police departments, which, from our perspective as prosecutors, is probably the most difficult issue; because if we don't have the evidence and it's not collected right, we can't do the prosecutions.

ACTING CHAIR HINOJOSA: Thank you all very much. I do want to clarify something. Mr. Jones, you mentioned the 12 percent, the 15.7 percent departure variance rate. I just want to clarify that what the *Sourcebook* identifies that as is not government sponsored. There may be another place in the *Sourcebook*, and our staff would certainly work with you, that actually indicates those may include cases where there was no objection from the government, and they may not have objected to those departures or variances, and there is another place in the *Sourcebook* where that is reported, and our staff would be glad to help clarify that with regards -- I don't want to leave you with the impression that the *Sourcebook* indicates that those were all contested hearings or objected to.

But thank you all very much, and it's been extremely helpful. And we know you are busy and that you took time out today from your busy schedule to be with us. Thank you all very much. And we'll take a

short break before the last panel of the day.

(A break was taken from 3:18 p.m. to 3:34 p.m.)

ACTING CHAIR HINOJOSA: We do want to welcome or next panel, our most patient panel. We do have three distinguished representatives of different groups who will speak to us on community impact. We have Ms. Diane Humetewa, who is a principal of the law firm -- and I hope I've done okay with the name. About as well as sometimes people do with my name, I guess. With the law firm of Squire, Sanders & Dempsey in Phoenix, Arizona, where she specializes in Native American law, government relations and public efficacy, natural resources and litigation. She previously served as a U.S. attorney for the District of Arizona from December 2007 through August of 2009. She also served as a member of the U.S. Sentencing Commission's Native American Ad Hoc Advisory Group, and previously she served as counsel to the U.S. Senate Committee on Indian Affairs and counsel to the deputy attorney general, and she has her BA and JD from Arizona State University.

We also have Mr. Ernie Allen, who is president and chief executive officer of the National Center for Missing and Exploited Children and the

International Center for Missing and Exploited Children. An attorney in his native Kentucky, Mr. Allen came to NCMEC after serving as chief administrative officer of Jefferson County, director of public health and safety for the City of Louisville and the director of the Louisville Jefferson County Crime Commission.

We also have a former U.S. district judge, Mr. Paul Cassell, who currently serves as a professor of criminal law with the University of Utah, a position he also had previously held from 1992 to 2002. He did serve as a U.S. district judge for the District of Utah from 2002 to 2007, and during that period of time he also chaired the Criminal Law Committee of the Judicial Conference. He previously served both as an assistant U.S. attorney and an associate deputy attorney general for the U.S. Department of Justice and he holds his BA and JD from Stanford.

And we will start with -- so I won't mess this up, with Diane. I know she has to also catch a flight, so if any of us have any questions after she finishes, it would probably be appropriate to do it before we call on the other two.

MS. HUMETEWA: Thank you, Mr. Chairman.

Chairman Hinojosa and members of the Commission, I thank you for giving me this opportunity to appear before you to provide my views on the state of the Sentencing Guidelines and the 20 years of impact they have had on the federal justice system. I speak to you from my experiences as a former federal prosecutor, who every day applied the sentencing guidelines to a myriad of cases, including homicides, child sex cases, white collar offenses and cultural resource crimes.

I also appear before you, as mentioned, as a former member of the U.S. Sentencing Commission's ad hoc advisory committee on Native American issues and a former United States attorney for the District of Arizona, a district with one of the largest criminal caseloads in the nation. And so my testimony will touch on issues that I've personally confronted in working with the sentencing guidelines and my general observations related to the policy implications associated by changes to the guidelines. I speak today only for myself and from my experiences.

I entered service with the Arizona United States Attorney's Office at about the same time that the federal sentencing guidelines were in the infancy stages of implementation. Twenty years later, generally speaking, the goals of the Congress were

achieved because the sentencing guidelines evolved into a sentencing system that introduced predictability in what was previously a fairly unpredictable national federal sentencing scheme.

However, over the last 20 years, the uniformity goals that the Congress had in mind when it passed the Sentencing Reform Act evolved, in some circumstances, into a rigid sentencing scheme that provided almost pinpoint predictability in sentencing outcomes such that all parties who walked into a courtroom knew precisely what the sentencing outcome would be. The need for impassioned argument at sentencing by both parties in some cases may have diminished. Federal prosecutors began using the guidelines calculation to shape their plea deals and determine whether or not to proceed to trial or whether to introduce witness testimony at sentencing.

It's important for this Commission to understand the profound impact that it has had over the last 20 years for our nation's federal criminal justice system. The question now before the Commission is this: Where do we go from here? Post-*United States v. Booker*, my observations are that federal judges and the defense bar are only just beginning to test the limits of discretion in sentencing. I refer only to

the defense and the bench because historically federal prosecutors have had to adhere to and apply strict policy directives from the Department of Justice in prosecuting cases. Consequently, post-*Booker*, federal prosecutors may be the only parties who depend on the strict calculation of the guidelines. As mentioned, we've already witnessed this in the area of child pornography cases where trial courts have handed down probation sentences with dramatic departures from the guidelines and appellate courts have upheld these sentences as reasonable. The question here is whether the appellate standard of review ultimately will eviscerate the uniformity in sentencing that was the original goal of the Sentencing Reform Act.

The challenge for the Commission is to determine how to react to the fact that under the new post-*Booker* sentencing scheme, actual sentences increasingly may depart from the previous uniform guidelines. Can a balanced sentencing approach be achieved between a sentence that is wholly outside the guidelines, yet determined judicially to be reasonable and a sentence that is at the same time sanctioned by the Commission.

These tensions will continue to arise between all parties; therefore, we need to consider who

should take the lead in moving forward to reconcile the Sentencing Reform Act and the results of *Booker*. Should it be the defense bar, the federal prosecutors, the Justice Department, or the Commission. Those are questions that I leave for you to ponder.

I do wish to turn now to the impact that this Commission and the sentencing guidelines have had on Indians and Indian Country. As a federal prosecutor, I prosecuted a large caseload of Indian Country crimes under the Major Crimes Act. The District of Arizona includes 22 Indian nations, among them two of the largest in the nation, the Navajo Nation and the Tohono O'odham Nation. Like county prosecutors, these offices are responsible for prosecuting violations of specific federal offenses committed in Indian Country for over half of the 564 federally recognized tribes in the nation. The Major Crimes Act was enacted in 1885 and the Indian Country Crimes Act was enacted shortly thereafter. Neither statute has dramatically changed since enactment, but what has changed is the Congress's desire to increase federal penalties, including those applied to Indian Country through the Major Crimes Act, which, roughly, specifies 17 specific federal offenses to apply to Indian Country.

In so doing, Congress usually does not consider the potential disparity that may occur to Indians in Indian Country. When the Congress acts, the Commission must act. The Commission's changes, therefore, have the potential for creating unintentional disparity to Indians; therefore, I urge the Commission to create an institutional mechanism within it for Indian tribal government consultation when considering changes to the sentencing guidelines that involve Indian Country crimes. I make this recommendation based on my experience with the guidelines, my work with Indian tribes and Indian Country crime victims who are often removed from the federal justice system but greatly impacted by it.

As you know, the U.S. Sentencing Commission's Ad Hoc Advisory Committee on Native American Issues was established in 2001, and we delivered our findings to the Commission in 2003. We were asked to consider -- quote, consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Acts. We analyzed the impact of the sentencing guidelines on Indians, seeking particularly to address whether there was a disproportionately harsher impact on Indians as

compared to non-Indians generally. The general perception was that the guidelines treated Indians in Indian Country more harshly than those adjudicated in the state system, regardless of Indian status. The dearth of state sentencing data made it very difficult for the committee to confirm this belief; however, the committee was able to confirm this in specific areas where data was available. For example, with regard to drunk driving homicides and sex offenses.

The Commission gave serious consideration to our findings, and we, the members of the committee, do appreciate that. The Commission increased the guidelines for drunk driving homicides, and today it brought those types of cases in line with national state sentences for the same act. Indian Country deserves no less.

However, one roadblock to accomplishing this guideline fix is the Major Crimes Act and its interplay with the federal statutes referred therein. So, for example, one delay to increasing the manslaughter guidelines was the maximum statutory penalty of the manslaughter statute and its relation to the maximum statutory penalty for other homicide statutes. Modification of the manslaughter sentencing guideline could not be achieved without increasing the

statutory maximum penalty for manslaughter and the sentencing guidelines for other homicide statutes.

This result is a consequence of a general unawareness of the practical impact that changes to the federal sentencing scheme and the federal statutes have on Indians in Indian Country. This realization points out the need to establish, I believe, a permanent mechanism to gather and keep sentencing data related to Indian Country and to examine it on an ongoing basis. You know, the overall implications that may arise from these changes, however slight, can, and often does, have great impact to Indian Country crime victims, defendants and communities.

While the ad hoc committee did not find racially-biased sentencing between states and federal courts generally, we did note that the Major Crimes Act jurisdictional scheme that applies the Chapter 109A offenses in Indian Country promote sentencing disparity. We noted that the federal sentence for non-Indians are more severe than state sentences because the data on hand revealed that the Chapter 109 offenses are more likely to be charged in Indian Country than any other federal enclave.

For example, between 2002 and 2005 the

Bureau of Indian Affairs responded to 2,593 child abuse cases. That figure does not include the referrals to the FBI or to local tribal law enforcement. We found that the perception that Indians are sentenced more severely than non-Indians in this area is accurate; and because our report was made in 2003, we weren't able to examine the newly enacted PROTECT Act of 2003, which imposed increased sentences for specific sex offenses. The committee observed generally that the existing average federal sex offense penalties would dramatically increase under the PROTECT Act, resulting in disparity between federal and state sentences for these offenses.

The committee's observations were soon realized and continue to be in play in U.S. Attorney's offices within Indian Country -- I'm sorry, with Indian Country crime jurisdiction. For example, in Arizona, the immediate reaction of defendants charged with a Chapter 109A offense was not to work to resolve the case by plea, but rather to go to trial because the new sentencing guidelines restricted any benefit that would occur from admitting guilt. Under the amended aggravated sexual abuse statute, once the defendant is charged, he's bound to a 30-year minimum mandatory sentence. Therefore, we experienced a surge of

defendants going to trial. Relatively no consideration was given to the potential that instituting severe sentences, including mandatory minimums, would have on limiting a prosecutor's ability to resolve these sex cases.

To illustrate this disparity, I wanted to point out that in North Dakota, I found a case where a defendant received a 12-year sentence. He received four years on each of three counts for fondling a 10-year-old child. He faced a maximum sentence of 20 years. Compare that to a federal case in North Dakota where a 20-year-old pled guilty to one count of attempted sexual abuse of a 10-year-old with very comparable facts, and that defendant received a 30-year sentence. This challenging set of circumstances is not occurring nationwide but rather primarily occurring in Indian Country and to Indian defendants and Indian victims. Had there been an institutional mechanism for such consultation, it may have prevented this problem from arising. In moving forward, I believe this Commission would greatly benefit from institutionalizing a mechanism for permanent tribal consultation.

I did want to turn just briefly to the area of immigration. I know that you know in March of

2008, I testified to you in my capacity as the United States Attorney for Arizona. I testified that illegal immigration comprised approximately 58 percent of Arizona's federal criminal docket; and in 2007, each federal district court judge in Arizona sentenced about 250 felony defendants, compared to the national average of approximately 75.

I don't want to reiterate my testimony here, but I do want to encourage, as I did then in 2008, this Commission to continue working on the sentencing guideline that impacts those districts so greatly that have borders on it to develop some streamline mechanism to deal with what falls under the category of an aggravated sentence and is very important for those districts, and I think it will go a long way to addressing the virtual backlog of cases that we experienced in Arizona.

Finally, I wish to comment on the stark absence of crime victim participation in the sentencing guideline scheme and the nation's federal sentencing system. I will only briefly state my experiences because Professor Paul Cassell has provided in-depth analysis on this issue.

You may not know that my first position in the U.S. Department of Justice with the Arizona U.S.

Attorney's Office was as a crime victim advocate. At that time in the mid-'80s, United States Attorney's offices were beginning to implement President Ronald Reagan's recommendation to implement procedures and policies to bring crime victims into the federal justice system. Since then great policy and statutory changes have occurred, yet these advances provide only minimal participatory rights, often left to the discretion of the particular judge. In 2004 the Crime Victims Rights Act sent a clear congressional message to the federal bench that these rights had yet to be fully realized. The CVRA provided several important mechanisms to permit victims to have standing to claim a violation of their rights, including the right to be heard at sentencing. While the right to be heard at sentencing is an important benchmark, it does not include a victim's right to affect a defendant's sentence calculation.

Compounding this void, the 18 U.S.C. § 3553 factors do not expressly call for the sentencing court to consider crime victim impact; therefore, while we have made great strides in bringing crime victims into the federal criminal justice system, victims have yet to be fully integrated into the federal sentencing scheme. So I thank the Commission for recently

creating a committee to examine the impact of federal sentencing on crime victims.

I want to thank each of you for permitting me to share my views and experiences. I've spent the majority of my career working with these issues, and I know that this Commission takes its responsibilities seriously. I've witnessed the deliberate care it has taken in amending the sentencing guidelines in the wake of congressional and court decisions, and I thank you for your time-honored service.

ACTING CHAIR HINOJOSA: Thank you, Ms. Humetewa. Are there questions before she has to leave?

COMMISSIONER WROBLEWSKI: I have two questions. First, on the consultation with Indian Country, Todd Jones testified in the panel before. He referenced some listening sessions that the Department of Justice has been undertaking recently. I don't know if you're familiar with those. Is that mechanism one that you think is a good mechanism to get consultation? Do you think the working group mechanism is the best way? Obviously Indian Country represents an awful lot of tribes and an awful lot of people. So if you could talk to that.

And secondly, before you were leaving -- before you left the U.S. Attorney's Office, can you -- could you gauge how much the assistant U.S. attorneys there felt that *Booker* had a significant impact and their hunger for reform? Was it a lot, a little, hard to tell?

MS. HUMETEWA: Let me take your last question first. I will say it was a lot. I grew up, in federal prosecution, relying on the sentencing guidelines. And I think U.S. Attorney Jones may have touched on it when he was relating to his past experience as an advocate in the military, that he sort of reflected that now AUSAs are going into court with a little bit more of an aggressive arsenal in terms of sentencing. And I think what happened, as I alluded to in my statement, is that we became so confined and we depended on the predictability of the sentencing guidelines. It drove all of our decisions, I believe -- or let me couch that and say it drove a majority of our decisions on how to resolve cases.

And so when you have situations where in the Justice Department you have policies and procedures, such as child safe neighborhood policies, that are being driven out to take an aggressive stance, for example, on child pornography and then in the Ninth

Circuit you see a 41-level downward departure in a child pornography case where the parties agreed in a plea agreement that the confines of guidelines were such that everyone had an understanding that that was what the sentencing outcome would be and you have this very large departure, it can send a chilling effect on to the line of systems in that you may want to throw your hands up and say where do we go from here, how aggressively should I charge this next case, should I work to resolve this case, and how do I resolve it in the wake of these decisions.

So I think there is a hunger for bringing back some level of certainty; but as I mentioned, I think it is also now the case where we do see district court judges exercising discretion, and so there we are.

With respect to the Justice Department's listening sessions, I just came from the National Congress of American Indians, where a number of tribes voiced a concern that they've identified the issues they want to move quickly toward action, and I think that action is being played out in the recent Tribal Law and Order bill that was introduced by Senator Dorgan and signed by some 17 co-sponsors, to give greater, I think, flexibility for Indian tribal

governments to administer justice and in some cases take over, in some areas, criminal jurisdiction for particular offenses, expanding their authority -- their sentencing authority.

So there is a real desire by the tribal government community to take control of these areas, and I think one of the -- one of the issues that I've tried to point out, and I have done my level best as an assistant U.S. attorney, as a senior litigation counsel, as a U.S. attorney is this: That our system, the Major Crimes Act, the operation of the United States attorneys and their prosecution role in Indian Country has been so far removed from the local tribal communities that oftentimes the information is not being trickled down to those communities.

So in my experience, when I prosecuted a homicide or a child sex crime on the Navajo nation, the court proceedings are taking place in Phoenix or Prescott, hundreds of miles away from the local community, which is greatly impacted by this. So oftentimes you have communities who have no idea what occurred, only the immediate family members may know that an individual disappeared from the community for a lengthy period of time, but they don't know that he's gone to federal prison, and so there is a disconnect

between the tribes and their understanding of how justice for these very serious offenses is being meted out, and one of those components is federal sentencing.

And so I think we generally need to do a better job of bringing that information to those tribal communities. And again, I pointed out to the fact that the Major Crimes Act that we're operating under today is an 1885 law, but it still has a tremendous implication for Indian Country going forward. I hope I answered your question.

ACTING CHAIR HINOJOSA: Does anybody else have any other questions? Thank you very much.

MS. HUMETEWA: Well, thank you. And I apologize for having to leave so early, but I do appreciate the opportunity to testify before you, and I was honored to sit on the ad hoc committee, and I look forward to the Commission's work going forward. I know you have a lot of work to do and a lot of work to contemplate, and I again thank you for your service.

ACTING CHAIR HINOJOSA: And thank you for the help you've given the Commission in the past, both through testimony and your service on the ad hoc committee. Mr. Allen.

MR. ALLEN: Thank you, Mr. Chairman, members of the Commission. I have submitted extensive

written testimony. With your permission, I'd just like to briefly summarize it. I appreciate the opportunity to testify, and my focus will be far more narrow than other witnesses from whom you've heard. I'd like to talk about the guidelines for child pornography offenses.

I know for the past nine months this Commission has heard testimony from many arguing for changes in the guidelines for child pornography based on their presumed excessiveness or that they're too severe. Post-*Booker*, we're also very concerned about the increasing number of downward departures and in some instances what we believe are token sentences that trivialize and minimize what we believe to be a very serious crime.

I come before you today to make a simple point: Child pornography is a serious crime. It merits serious penalties. The guidelines are not the problem. The problem is the lack of understanding and awareness about the true nature and severity of this crime and the harm caused by these offenders to child victims. The National Center for Missing and Exploited Children, we're a nonprofit organization. We've worked for the past quarter century in partnership with the United States Department of Justice, and we've been

battling this problem of child pornography for a quarter century.

In 1985, we created the first national child pornography tip line. In 1998, at the request of Congress, we created the cyber tip line, an online reporting mechanism, and have handled 744,000 reports from Internet service providers and from the general public about child pornography. In the aftermath of the Supreme Court's decision, *Ashcroft v. the Free Speech Coalition*, in 2002, we created what we call a child victim identification program, in which our analysts review images and videos of child pornography every day in an effort to locate, identify and rescue the child victims. Since 2003, we've reviewed 28 million child pornography images and videos and are currently receiving and reviewing 250,000 images per week.

In our view, the fundamental problem is that child pornography is misnamed and misunderstood. It is not pornography. It is not protected speech. It is not victimless crime. These are crime scene photos, images of the sexual abuse of a child. They are contraband, direct evidence of the sexual victimization of a child. The circulation of these images among offenders not only revictimizes the child, but it

drives the market for the production of new images.

Some have said, well, child pornography, isn't that really just adult pornography, 20-year-olds in pigtails made to look like they're 14. Well, not exactly. From the millions of images we have reviewed and the thousands of children we have identified, we have learned that the vast majority of the victims are prepubescent and that there's a growing number of infants and toddlers. Many of these children are abused violently in images depicting bondage, sadism torture, vaginal, anal and oral penetration, bestiality and sexual humiliation. These are not pictures of babies on the bath net.

Most offenders have not innocently or mistakenly downloaded a single image or even a handful of images. We find offenders who build libraries of images, collected and viewed for the offender's personal sexual gratification and more commonly traded, shared and/or sold online.

The Supreme Court of the United States has long recognized the harm. In *New York v. Ferber*, the Court wrote, pornography poses even a greater threat to the child victim than does sexual abuse. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long

after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. And that was 1982, before the birth of the Internet.

In *Osborne v. Ohio* the Court wrote, the victimization of children does not end when the camera is put away. The pornography's continued existence causes the child victims continuing harm. In *U.S. v. Norris* the Court said, the sheer number of instances in which a child's pornographic image may be possessed and distributed in the indelible context of the Internet is incalculable. Even after a single offender is prosecuted, the images they traded, sold or posted online continue to circulate to ever-widening circles of offenders. Each viewing, each possession, each distribution of an image revictimizes that child anew.

I am deeply troubled by the growing use of the term in courts across the United States "mere possession." In a victim impact statement cited in *U.S. v. Ward* the victim said, quote, “When I was told how many people have viewed these images [and videos], I thought my pulse would stop. Thinking about all those viewing my body being ravaged and hurt like that makes me feel like I was raped by each and every one of them.”

Like any other contraband, child pornography images are an illegal commodity that must be combated both at the point of production and at the point of distribution and possession. In *Ferber* the Court said, "The distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."

In *Osborne* the Court said, "It is surely reasonable for the state to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."

Some have argued that the sentences for many of these offenders are excessive because they, quote, just look at the pictures. Mere possession. We are deeply skeptical. In a 2009 article in the *Journal of Family Violence*, two researchers at the Federal Bureau of Prisons reported on a study comparing two groups of child pornography offenders. The first group included men convicted of child pornography possession, receipt or distribution but no hands-on sexual abuse. The second included men convicted of similar offenses, but with documented histories of hands-on crimes against children. The researchers' analysis found that

the Internet offenders in their sample were, quote, significantly more likely than not to have sexually abused a child via a hands-on act, and that these offenders tended to have multiple victims.

They found that upon being discovered, these offenders tend to minimize their behavior. They accept responsibility, but only for those behaviors known to law enforcement. They hide contact sexual crimes to avoid prosecution and to avoid shame and humiliation. The researchers also found that online criminal investigations, while targeting so-called Internet sex offenders, are resulting in the apprehension of child molesters who just happened to be using the Internet to access the content.

Now, we can't tell you with certainty what the number of child pornography offenders are who are mere possessors. We can't tell you how many are actual contact offenders, whether it's 40 percent, 60 percent, 80 percent or up, as was suggested by the Bureau of Prisons study. However, we know that a large share of the population is not merely looking at the pictures.

We also know that the number is far greater than recognized because few of the victims tell anybody. We are very pleased with the progress, and

the leading scholars and researchers now tell us that one in three child abuse victims in this country report their abuse. However, what we're seeing today from -- and admittedly anecdotal, this is not empirical research, but it's 28 million anecdotes. What we're seeing from our review of these images is that when there is a photo or a video that memorializes the sexual abuse of a child, the reporting drops precipitously. These children don't tell. They don't tell because they're ashamed or embarrassed or they've been threatened or manipulated. They don't tell mom, they don't tell dad, they don't tell anybody. And even if the offender cannot be proven to have victimized a real child, he's revictimizing the child in that photo or video.

Victims of online child pornography must deal with the permanency and circulation of the images of their sexual abuse. Once an image is on the Internet, it can never be removed and it becomes a permanent record of that abuse.

Researchers tell us that child victims experience depression, withdrawal, anger, other psychological disorders that continue well into adulthood. They frequently experience feelings of guilt and responsibility for their abuse, as well as

feelings of betrayal, powerlessness, low self-esteem. For children whose images are circulated online, their abuse is repeated with each new viewing. In the Adam Walsh Act of 2006, Congress noted, quote, that "every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."

We're concerned about the increasing numbers of downward departures in the aftermath of *Booker*. We're concerned about the increasing numbers of token sentences given to offenders, simply because it cannot be proven that they've committed the contact offenses. Congress did not base its enactment of these laws on the assumption that all offenders have to be physical abusers. The goal of these laws is to address this growing and deplorable form of child sexual exploitation and to stop it.

As you consider refining the guidelines, which Ms. Howell mentioned in the earlier panel, which we welcome, consider that these current base -- that the current base offense level for these crimes is modest. The entry level is a base 18. It's only enhanced by what these offenders actually do, if they have large collections, if they are violent or sadistic images, if the children in those images are

particularly young, if they're distributing them for profit or other purposes. In our view, weakening the guidelines and this continuing pattern of downward departures and token sentences is doing, and will continue to do, irreparable damage to the goal of stopping child pornography and will actually put countless real children at risk. It will also dilute the objective of deterrence at a time when technology is emboldening these offenders.

We urge the Commission to resist the clamor for change and to help us wake up the nation, including its judges, about the true nature and impact of this crime. The National Center for Missing and Exploited Children is committed to doing everything in its power to eradicate child pornography and is deeply grateful for your leadership on this issue and for the opportunity to share our views with you. Thank you, Mr. Chairman.

ACTING CHAIR HINOJOSA: Thank you, Mr. Allen. Judge Cassell.

JUDGE CASSELL: Thank you, Chairman Hinojosa and members of the Commission. It's nice to be back here as an academic, but hopefully not as just a pointy-headed Ivy tower academic. I want to report that I've been doing some litigation the last couple of

years on crime victims' rights, and I want to share with you some of the things I've learned about how crime victims are being treated under the current federal sentencing guidelines and to continue a discussion with the Commission about what the proper role of crime victims ought to be in the sentencing process.

I think that discussion has to begin with one overarching fact. I know there's been a lot of discussion about the extent to which judges are varying or departing from the guidelines, but the fact is 57 percent of the sentences, according to the Commission's data, are still within the guidelines. I think we can conclude from that that the sentencing guideline calculation then is the most important determinant of a federal sentence today. Now, should it be higher, should more steps be taken to solidify the guidelines, we can talk about.

But given that overarching fact that 57 percent of the sentences are still determined by the guidelines, how should we treat crime victims within a system that looks at guideline calculations? And here I think Congress has spoken to some extent. The Crime Victims' Rights Act passed in 2004 gave crime victims important rights in that process. It gave victims the right to be reasonably heard at sentencing, the right

to restitution, and the right to be treated with fairness throughout the process.

Now, the drafters of that legislation were quite clear about what Congress intended. Senator Feinstein, a Democrat from California, and Senator Kyl, a Republican from Arizona, explained that these changes were designed to provide due process for crime victims throughout the criminal justice system. They were designed to provide meaningful participation in the process and to make crime victims independent participants in the process, not beholden to prosecutors or others for information about how the system was working.

And more generally, these changes were designed to change the very culture of the federal criminal justice system that had too often ignored crime victims, treating them as mere witnesses in the process rather than as persons with legitimate interests in the outcome.

Now, against that backdrop of the Crime Victims' Rights Act, let's look at what the Commission has done to implement the congressional command to provide meaningful participation for crime victims. To its credit, in 2006, the Commission did adopt a policy statement addressing crime victims' rights,

§6A1.5. Unfortunately, however, as I predicted in testimony to the Commission in 2006, I think that policy statement has proven to be essentially meaningless. It does nothing more than direct judges to follow the law without clarifying what the law is. Proof of the ineffectiveness of the Commission's policy statement, or at least its lack of impact, is shown by the fact that in the last three years, it is yet to be cited in even a single published court opinion.

Now, speaking frankly, perhaps it was the Commission's intent to do little in this area and let others take the lead. I think there's a problem for the Commission with this do nothing approach. The first problem is it's simply inconsistent with the Commission's statutory charge. 28 U.S.C. § 994(a)(2) directs the Commission to promulgate policy statements on any aspect of sentencing that would further the purposes of sentencing. Giving victims the right to be meaningfully heard in the sentencing process clearly furthers the purposes of sentencing. 3553 directs courts to consider the seriousness of the offense when announcing a sentence; and, of course, who better than a crime victim to explain the seriousness of an offense.

Similarly, 3553 refers to restitution as

one of the things that a judge must consider when imposing a sentence, and here again, victims rights are important as part of that calculation.

The second problem with the Commission's do nothing approach is that unfortunately for crime victims, the Commission has already done something. It has adopted policy statements that appear to exclude victims from participating in the sentencing process. Let me give you a specific example.

Section 6A1.3, Resolution of Disputed Factors. The policy statement there says whenever there is a reasonable dispute about a factor, quote, "the parties shall be given an adequate opportunity" to be heard on that matter. The implication, of course, is that someone who's a nonparty, like a victim, shall not be heard.

Let me give you a specific example of a problem -- that is, a specific example of a case demonstrating these problems. This is the case of *In re Brock*, out of the District of Maryland last year, in which, in my view, the victim was denied a fair opportunity to be heard at sentencing.

I've given all the details in my testimony, so I'll just boil it down to this: The defendants pled guilty to assaulting Mr. Brock by

beating and kicking him, acts that left him unconscious and required his quick transport to a hospital. So the defendants plead guilty to that charge, and then both the prosecution and the defense agreed that the aggravated assault guideline should govern the sentencing. The only question being an enhancement for serious bodily injury. On the day of sentencing, however, the district court *sua sponte* ruled that the crime was not an aggravated assault, but rather was a mere minor assault. The basis for this conclusion was said to be a portion of Mr. Brock's medical records that the judge had read that morning. The prosecutor then asked for a continuance because there had been no notice that this was going to be an issue and didn't have an opportunity to present evidence showing that there was indeed aggravated assault. The court denied the prosecutor's motion for a continuance.

At this point, the victim in the matter, Mr. Brock, asked to be heard through counsel on the subject of what were, after all, the nature of his injuries. Mr. Brock's counsel cited then this Commission's policy statement, saying that judges should afford victims their rights. However, that was to no avail. The district court summarily denied Mr. Brock's motion and calculated the guidelines based

on a minor assault calculation.

Now, I should note this was the second indignity inflicted on Mr. Brock that day. The first indignity was that the district court had summarily denied his access for motion to relevant parts of the presentence report dealing with the guideline calculation. So having denied all these motions from Mr. Brock and the prosecutor, only at this point did the district court allow Mr. Brock to allocute something of a meaningless exercise, at least in terms of dictating or providing information about a sentence, since the sentencing range had already been calculated. And indeed the judge ultimately gave guidelines sentences to the two defendants.

Now, I recount these facts in further detail in my testimony because I don't want to be accused of coming up with some sort of academic hyperbole here, but the truth is that in federal courts today, crime victims are denied the right to be heard on the issue of whether they themselves have been seriously injured. As a matter of policy this make absolutely no sense whatsoever. District courts should be open to hear from crime victims on the extent of their injuries and on other factors that are important to the sentencing of defendants. They may be able to

shed light on the proper calculation of the sentencing guideline. I'm not here to argue that Mr. Brock would necessarily have proven it was an aggravated assault, but I am here to argue it would have been a fair process to at least give him that opportunity.

Now, the Commission should, therefore, adopt policy statements to ensure that victims are given a meaningful voice in the sentencing process, and in my prepared testimony I give some specific suggestions along those lines.

I just want to briefly draw your attention to the second part of my testimony on restitution. I know that this is a subject where you would be making recommendations to Congress rather than actual changes, but I just wanted to highlight for you the fact that the judicial conference has recommended to Congress changes in the restitution statutes, and I urge the Sentencing Commission to add its voice to the judicial conference on this subject.

Just quickly, here's the problem, the restitution statutes have narrow categories of restitution that are allowed: lost income, property offense, medical expenses, funeral expenses. A victim's loss has to fall into one of those categories or no restitution can be awarded.

Let me give you an illustration of the problem, a case that I handled, *U.S. v. Gulla*, an identity theft case in which the defendant had taken $50,000 in bogus credit card charges. Now, many victims had to spend considerable amounts of time. They ultimately were able to clear up the credit card charges, so they didn't lose any money. They didn't suffer property loss in terms of the restitution statute, but some of them had to spend a week of time working with the banks and others to try to resolve that problem.

It seems to me that we should look at what the goal of restitution is, which is to put the victims back into the position they would have been in if no crime had been committed, so we should provide compensation for their lost time. But that is not possible under the current restitution statutes, and there are many other illustrations of where victims have losses or have suffered harm that the district judge would like to provide some restitution for but simply is not empowered to do so because of this problem of the narrow pigeon holes that restitution has to fit into.

The solution here is to give district judges discretion to award restitution that is just and

proper to help restore the victim to the position the victim would have been in had no crime been committed. That's the kind of change the judicial conference has recommended at the behest of the Criminal Law Committee, and I would urge the Commission to support that recommendation as well.

I would be glad to answer any questions that you might have about the role of crime victims or other issues under the sentencing guidelines.

ACTING CHAIR HINOJOSA: Thank you, sir.

COMMISSIONER HOWELL: Thank you both so much for your very helpful testimony as we consider a number of issues that both of you have touched on. Mr. Allen, I wanted to talk to you about two different things in the child pornography arena. One is we've heard testimony from other witnesses at another hearing, and I have to say I can't remember exactly who it was, but it was very interesting testimony, and I wondered whether you could also comment to this.

We were told that there are changes that you're noticing in the types of child pornography images, that because of the -- you know, in order -- the urge or the desire from people who look at this stuff for new images all the time, it's fueling this market for new types of images, and that the trends

that people who prosecute these kinds of cases are seeing is that the children are getting younger and younger, and the types of activities in which they're depicted engaging in are getting more and more violent.

And I just wondered, one, whether you could comment on whether that is -- that is a trend that you're seeing. Because this is somebody who was talking about the images they were seeing in his or her own particular district, and I wondered whether you could give us more of a national or international perspective on this kind of trend and the types of images.

MR. ALLEN: That's absolutely the case, we are seeing younger and younger children being used. We're seeing more extreme, more violent, more graphic type images. It's not scientific, but our analysis of that is that there's a phenomenon that's taking place in which for the first time people can access this kind of content in the privacy of their own homes with virtual anonymity, with little risk; and what happens is there's a continuing quest for something new. Yesterday's images are not going to satisfy the collector today. So there's demand for new content all the time.

What we're seeing in terms of these

groups, for example, one of the things we've done, I mentioned in my written testimony, is we've tried to attack the commercial side of this, because what we were seeing was not only people accessing this stuff and paying for it, but they were using their credit cards.

A Texas case in which we worked with the Dallas police, and when the site was shut down, the operators had 70,000 customers paying 29.95 a month and using their credit cards, and so we brought together 31 companies, financial companies, Internet companies to try to follow the money. This is a legal use of the payment system. There are more of these offenders than law enforcement can possibly prosecute and bring to justice, so we're trying to use other means to attack the demand side.

But as it's moved from commercial to noncommercial, what we're seeing is these online groups in which one of the criteria for membership in the group is that prospective new members have to provide new content that nobody has ever seen before, and so our concern is that at some point for these offenders, looking at the picture is not enough.

And the other analysis we've done on the thousands of children we've identified, is that

70 percent of the perpetrators are people close to them, 27, 28 percent are their own parent, 10 percent are other family members, 30 percent are neighbors, friends, babysitters, coaches. So the concern is that a kind of contagion develops, and part of the -- of the ability in this era of digital technology for providing new content for membership in these sites simply to create your own. So what your other witness testified to is exactly what we're seeing, and we're really disturbed about it.

COMMISSIONER HOWELL: Let me ask one other question on this area, and it's something that we had a discussion about with the U.S. Attorney in Chicago, at our last hearing in Chicago, where he talked about something that we on the Commission also have felt that we needed to do, is more education of the judges about the nature of this crime, and we're going to be issuing, you know, fairly shortly, one of the beginning papers on that. And I was really interested to hear what -- what kind of educational efforts you think that we should be undertaking as a Commission, given our fairly small purview in this arena.

MR. ALLEN: Well, first, I'm enthusiastic. I heard that in the previous panel, your

suggestion about doing education for judges. It's enormously important. I was also gratified to hear from, I think, Judge Castillo that more of the judges are now actually looking at the evidence.

One of the -- perhaps the greatest barrier we have to overcome is that people don't understand what this content is, what it really is, and we can't show it to the public. And so that's why we hear these things about 20-year-olds in pigtails in cheerleader outfits made to look like they're 15. That's not what the problem is. And what the problem is is very serious.

I don't know how you effectively educate without exposing whomever you're educating to the content, so I think it's important to reiterate these points, that this has nothing to do with free speech and actually is not pornography. These are images of sexual abuse. And so the more that people at all levels -- not just judges, I think the American people don't understand that, I think most policymakers don't understand that, so we are enthusiastic about any effort to educate judges about it and educate others about it and, obviously, would be willing to advise or assist or help in any way we can.

VICE CHAIR CASTILLO: I do agree,

Mr. Allen, that education has to be a key part of this for judges. I am disturbed by the number of my fellow judges who are downwardly departing in this area, and I think not only do we need to educate judges, but I would like to see some kind of education out there for the general public. Most of these offenders don't even have a clue that Congress has enacted penalties that are along the lines that they face, and one of the first things that happens when these cases end up in federal court is that defense attorneys, rightfully representing these offenders, try and focus on the pathetic nature of some of these offenders, either because of their physical condition, mental condition. A lot of them will go out and get psychological reports first thing because they feel that there is an issue there, and a lot of times, frankly, there is, because these psychological reports come back to the judge showing some type of problem.

So I think a big education effort is really called for, and I think your testimony to us is helpful in that regard, so I would look forward to some type of future joint work together in this area.

MR. ALLEN: We would be honored to do that. And one additional thought that we see all the time is there's sort of two ends of the defendant

spectrum here. One is sort of the sad-sack who has no other options in life. The other, and even more difficult, is the pillar of the community, because the reality is what we're learning here is that these defendants do not match society's stereotype; and invariably these are defendants without prior criminal history, people who have families, who are married with children, who are gainfully employed, who are doing prominent things, and we get asked all the time why do you want to ruin this person's life. And I think what we argue for is perspective.

You know, it bothers me the recent case of a school teacher with thousands of images on a computer who, because there was no evidence of physical offense, was sentenced to one day in jail, well below the threshold in your guidelines. So, you know, our -- our message is not that they need to be locked away for the rest of their lives. Our message is that the penalties need to be serious and need to convey the seriousness of the crime, because if they're not, what we do is make it worse. What we do is feed the market, the growing market for this kind of stuff. So, Judge, we would be honored to assist in any way we can.

COMMISSIONER FRIEDRICH: Judge Cassell, I appreciate your testimony on enhancing the role of

victims at sentencing. I wanted to ask you a broader question regarding sort of the future of federal sentencing in this advisory guideline regime we're functioning under now.

Following *Blakely* and then again following *Booker*, you authored a number of decisions that really gave guidance to your colleagues across the country. You were one of the first judges interpreting those decisions and you accurately predicted, following *Blakely*, that the federal guidelines would be declared unconstitutional. You didn't, just like about anyone else, didn't predict the remedial opinion. But following *Booker*, you engaged in a number of decisions and debates with Judge Adelman regarding the proper weight to give guidelines. And, correct me if I'm wrong, but my recollection is your view was that the guidelines should be given considerable weight. You gave some strong compelling reasons, I thought, on why factors such as socioeconomic conditions of an offender should not be considered, consistent with Congress' directive in 3553(a) to the Commission.

Since you've left the bench, however, the Supreme Court has issued a number of more decisions further defining what it meant by advisory guideline regime and reasonableness review, and now we're in a

situation where, I think, that the case law is evolving much more like Judge Adelman's view, and the guidelines are just a factor.

I know you expressed in some of your decisions right after *Booker* the view that Congress shouldn't take any action, that the system could function, but you also expressed the view that the way to avoid unwarranted disparity was to give great weight to the guidelines, and in some courts across the country that's not occurring.

You mentioned the 57 percent statistics and that, of course, is a national average. The fact remains, though, that in certain regions of the country that statistic is much lower. So I'm interested, given the fact that you haven't been on the bench since *Gall* and *Kimbrough*, what your perspective is now, what you see as the Commission's role moving forward in trying to achieve the goals of the Sentencing Reform Act.

JUDGE CASSELL: I think we could be getting pretty close to a tipping point where the sentencing guideline scheme somewhat collapses. I suppose when the number drops from 57 percent to 49 percent, then we would have to say that, well, did we really have a guideline system at that point.

I mean, I understand that there are

additional add-ons. I understand that there are, you know, government-sponsored departures and so forth, so maybe that would be academic hyperbole to say we would just be at 49 percent. But I don't think anyone can deny the fact that we're seeing more and more judges around the country departing from the guidelines for what appear to be their own personal reasons.

Now, typically those are gussied up in a way that is very difficult for an appellate court to reverse or review. There is acknowledgment, a bow made to the guidelines, but I think we all have to concede that what's going on in many of these cases is the judge just has a personal sentencing philosophy that's at variance with -- variance is maybe a term of art -- at odds with what the sentencing guidelines' drafters believe and what other judges around the country, if they're following the guidelines, believe.

Child pornography may be an illustration of that. There seems to be differing opinions around the country as to how serious the offense is. Mr. Allen has articulated, I think, a pretty strong case in defense of the current regime that the Sentencing Commission has laid out, but I think there are some judges who don't buy into that and are now starting to vary or depart in ways that are,

essentially, unreviewable on appeal. I know as a practical matter they can be reviewed, but the reasonableness standard now is becoming, I think, so lax that it's very difficult if somebody knows what they're doing, and the federal district court judges do know what they're doing on this subject, it's very difficult to come up with any kind of a reversal.

So where do we go from here. I don't know, that's the difficult question. One is I guess we can just muddle along, but I think we all know what's going to happen if we muddle along, somebody is going to run an academic study to show that the system is now going back to the problems that produced the sentencing guidelines to begin with. We're going to start seeing racial disparities, geographic disparities, judge-to-judge disparities, which was the whole reason for the system to start with.

So what can we do to solve this. The grand bargain might be to see if we could somehow relax the mandatory minimums and make the guidelines a bit more binding. We live in the weirdest of worlds where if you're charged with a mandatory minimum offense, the judge has zero discretion; but if you're charged with anything else, the judge essentially has close to unlimited discretion. It seems to me there ought to be

some way to meet in the middle on that.

The other way to get there might be strengthen appellate review. I understand what the Supreme Court has done interpreting the statutes as they're currently drafted, but I do think that might be the kind of change that everyone could perhaps come to the table and agree with, that whatever we think about judicial discretion, it may not be best, ultimately, part at the district court level where it's essentially unreviewable and individual philosophies can drive the system. So that's one academic perspective on all this.

VICE CHAIR CARR: Judge Cassell, I spent a couple dozen years as an assistant U.S. attorney, and one of the things that I think a lot of line criminal prosecutors just weren't thrilled about was complying with the victim side of the Victim Witness Protection Act. It was sort of up there with doing the additional investigation necessary to draft a forfeiture account or to bringing the IRS into a nontax case. One thing that we're hearing anecdotally right now is that in order to get the sentences they were getting when the guidelines were mandatory, it's actually helpful if they make sure that they introduce the victim and the victim's side of the story to the judge. Do you think

it would also be useful if the judges should be schooled in the fact that I should be hearing from the victim and letting the probation office know I have to hear from the victim in order for me to do my job?

JUDGE CASSELL: Absolutely. I think that raises a couple of good points. One is I think that the sentencing process itself should be folding victims in automatically. One of the changes that I've recommended the Commission make in its policy statements is a requirement that victim impact evidence be included in the victim impact statement and that the probation officers affirmatively seek out victims and determine whether or not they want to provide victim impact information.

Should judges be hearing from victims more often? I think they should, although I would phrase it just slightly differently than the way you did. I don't think that this should be some sort of a ploy for prosecutors to get longer sentences. It's true that in many cases crime victims are asking for a longer sentence, but in many other cases they're not. Many other cases they want maybe restitution and that may involve putting the defendant on some kind of work release program or something like that.

Other times they simply want to be heard

about whether their injuries were serious or not and then let the judge make the appropriate determination of what to do in an aggravated assault case, having heard about the details of the injury.

So what I do think we need is to figure out ways to get courts hearing from victims more often, because that's, after all, the overarching factor, I think in 3553, is what is the seriousness of the offense. Nobody in the world knows that better than the victim of a crime.

ACTING CHAIR HINOJOSA: Judge Cassell, don't you think the present statute provides that opportunity from the standpoint of a probation officer is supposed to contact the victim? And I know in our district, when I sentence somebody, I have received a signed copy of all sorts of descriptions from the victim as to how they feel about this. They can attach, you know, financial losses. They can attach medical losses. There's questions that talk about injuries that are other than physical. And I insist on making sure the probation officer complies with that because I find it helpful with regards to the sentencing.

Isn't this more of a problem of lack of education on the part of some courts knowing that this

is required as opposed to more of any other type of problem that is created by this? I mean, it's more of a lack of knowledge about the act itself.

JUDGE CASSELL: I think you're on to something. I think there certainly are educational issues, but I guess the one thing I would caution against is it seems like every time the crime victims community goes somewhere, we're told, hey, you're parking yourself at the wrong door. We went to the advisory committee on rules of criminal procedures, as Commissioner Wroblewski knows, and we were told, well, this is an issue for the courts to work out. So the courts work out -- you know, start dealing with this, and they say, well, we're just following the Sentencing Commission guidelines. And then we come to the Sentencing Commission, and we're told it's an educational issue.

ACTING CHAIR HINOJOSA: One thing the Commission could do is when we talk about what we have put in there is basically provide training on the statute itself, and certainly the Criminal Law Committee can insist that the probation officers get good training about what their responsibility is. You know, it's hard for us to -- you know what the jurisdictional issues are there. But nevertheless, I

think it's a point well taken about there is a lack of education on the part of some courts as to what is required by the statute itself.

JUDGE CASSELL: I think there are educational issues, but I do think you have policy statements right now that envision a world in which crime victims don't participate in the sentencing process, and I've given some specific examples in my testimony. I think if you're going to say, well, we're going to at least wash our hands of this or stay out of it, then you ought to write those policy statements in a neutral fashion that does not bar crime victims from arguing that they have the opportunity to be heard.

I'd urge you to go even further and say, well, wait a minute, there's nothing wrong with hearing from victims on these guideline issues, let's bring them on in; let's listen to them. The truth is, it's not going to happen all that often. I mean, you know how many times crime victims come to your court to provide, you know, victim impact evidence and so forth. I don't know what the statistics would be.

ACTING CHAIR HINOJOSA: Well, the vast majority, as you know, of federal cases don't have individual victims. It's society as a whole that's a victim when it comes to immigration, when it comes to

drug trafficking. And that's something that we as judges have -- we have to remind ourselves that there are victims. It's society as a whole.

JUDGE CASSELL: Right.

VICE CHAIR SESSIONS: I really appreciate your comments about the broader picture, this balancing, perhaps, a more structured guideline system with the reduction or elimination of mandatory minimums, and, of course, the prerequisite -- or the given has to be that Congress gets involved in the discussion about the elimination of mandatory minimums; and if you can figure out how that can be done, please share that with us.

My question is, your recommendation in regard to release of information in presentence reports to victims, obviously, that's a very significant change from the way things work at this point. Confidentiality is just one of the problems, but more than that, it obviously is going to -- would require probation officers to be able to pick and choose what should be released, et cetera. If, in fact, you're just releasing how they make calculations in regard to drug quantities or loss amounts or enhancements, those, of course, are obviously subject to review from a judge and may very well be changed.

How do you do that? I mean, how do you actually in -- I mean, from a judge's perspective, and you certainly can testify to that, how could we change the system so that, in fact, information that would be of value to a victim can be shared from a presentence report?

JUDGE CASSELL: Obviously there are questions of how far do you want to go, and I understand they're competing concerns. The victim's movement, I don't think, would say, look, we want to know whether the defendant has been sexually abused as a child, so there are some boundaries here.

But let's start with what I think is the easy case. There's typically a single page in every presentence report that has the guideline calculation, the base level of 18, a couple of extra images, whatever it may be. I don't see any legitimate confidentiality concerns about turning over that particular page to the crime victim so the crime victim could say, hey, wait a minute, you're a calling this a minor assault, it was a serious assault, let me explain to you why. So it seems to me that would be the starting point.

I think related to that should be the offense conduct, because those calculations are

typically driven by the description of the offense which is found in another part of the presentence report. I think that's, frankly, what the victim's movement would like to see turned over to crime victims. Because then they could say, well, wait a minute, this sentencing guideline range is too low, we think it should be higher, we think it's about right, we want to argue for it within the guideline range and we want to argue for a below guideline range sentence.

Right now, though, we live in a world where crime victims are denied the one piece of information that everybody else in the room has, which is the single most important information about sentencing, what the guideline range is. Congress has demanded that crime victims be given a right to meaningful participation in the process. They cannot meaningfully participate without that core information of what the sentencing guideline range is and how it was calculated.

COMMISSIONER FRIEDRICH: Judge Cassell, are the guideline calculations, is that page sufficient or do you really need that offense conduct? I asked probation officers earlier about your recommendation, and one of them expressed the concern that some of the information that relates to the offense conduct -- or

statement, not the offense, comes from sources that they don't want revealed, and that's a concern, that that not be revealed inadvertently by a prosecutor who's responding to a request from a victim, and will individuals be less willing to help probation and speak to probation in their investigation. So I guess my question is would you be content with simply the guideline calculations or do you need that added more difficult information?

JUDGE CASSELL: Well, I think the victims' movement needs both pieces of information because otherwise it's just a black box. It's an offense level of 18. Oh, really? Why? Well, don't tell us because there might be confidential information. It seems to me that the better approach would be to say, okay, it's an offense level of 18, here's how we got there, and then let the government file a motion in the very, very rare case where there's confidential information.

I guess my experience has not been that, at least in victims' cases we've been talking about, that there is a lot of confidential information. As Chairman Hinojosa was talking about, yeah, there are a lot of cases out there, drug cases, you know, national security cases, other cases like that where you're

going to have confidential information, but the victim's cases aren't like that. Those are fraud cases, they're assault cases, you know, personal injury type of cases where there isn't likely to be a concern about confidential information in the ordinary situation.

So I would say the default rule would be victims get access to that and then let somebody make a motion if there's a problem. Remember that information is already going over to the defense attorney and the defendant, who typically would be the one person in the world who's most likely to go out and intimidate witnesses or do what the other problems are. So if we've figured out how to deal with giving that information to defendants, I think we can give it to victims also.

COMMISSIONER FRIEDRICH: How do you deal with the practicalities of the fraud case in which there's 5,000 victims?

JUDGE CASSELL: Just put it up on a website. That's what the Justice Department has been doing in some of the large fraud cases now, and I think is very successful.

ACTING CHAIR HINOJOSA: How do you respond to people who say this would philosophically

change the way we have viewed our criminal justice system, that the style of the case is the People of the United States versus the defendant, it's not the victim versus the defendant, and Congress or a state legislature has made a decision that a particular action -- act by a particular individual is a crime that's -- is a crime viewed by society as a crime, and that society as a whole is prosecuting that particular defendant, and that you've got the United States, for example, in federal court being represented by the U.S. Attorney, and then you've got the defense attorney, and then you also have the avenues provided by the Victim Protection Act and the different pieces of legislation that have indicated how the victim brings input into the system. And that this would totally change -- although a victim has a right to bring a civil case, for example, with regards to certain matters as to how they've been individually hurt, and that this would totally change the philosophical viewpoint that we've had in this country; that this is an action on the part of society as a whole versus a defendant; and that a victim is in some ways a part of the system that has had input, because you've made the report, officers have investigated this, have put it in all the forms, all this is available to the court with regards to what

happened in this case. There's an opportunity to go ahead and respond with regards to any information that is sent by the probation officer and requested, and that that's the input that the victim has had, but that this is a prosecution by the people as a whole, not the victim versus a defendant, and there's people who question wouldn't this change the whole view that we've had in this country about what this prosecution is.

JUDGE CASSELL: Yes, and I think that's a good thing. Call me a liberal on this, but I think times have changed.

ACTING CHAIR HINOJOSA: I don't know that it's liberal or conservative. There are some who argue this would be a totally different system that would be set up.

JUDGE CASSELL: I think that's exactly right. I think what those people are saying is we liked the world before 2004, but in 2004 Congress said, doggone it, the world is changing. There are competing points of view on this, and we're agreeing with the crime victims' community that crime victims are now going to have a radically changed role in the criminal justice process.

If you look at the legislative history, if you look at the statute, it's quite clear that the

kinds of things that you were describing are inconsistent with what Congress wanted when it passed the Crime Victims' Rights Act. They wanted meaningful participation for crime victims in the sentencing process, and indeed in every part of the criminal justice process, but I'm talking about sentencing today because that's your mandate.

Let me make one other point, though. Maybe you say, look, I don't want to change the world, I'm kind of a conservative, we're a conservative institution here, we want to take it one step at a time. I'm really not arguing for all that much. Let's look at the *Brock* case that I talked about. Everybody figured out the sentencing guidelines, and then when they'd done the real work, they turned to Mr. Brock and said, do you want to be heard. It doesn't take any more time to say to Mr. Brock, well, we'll hear you at the start of the process; and if you've got a few points to make about the sentencing guidelines, go ahead.

That really doesn't change the world all that much, but it does in this sense: It gives Mr. Brock a real fair opportunity to be involved in the process and a real fair opportunity to perhaps make a substantive difference in the sentence that's

ultimately imposed in that case. It wouldn't have taken the judge any more time to hear from him first instead of hear from him last, and I think it would have been better for all concerned if that's what would have been done in that case, and I urge the Commission to draft some policy statements to make sure that that's the routine practice around the country rather than leaving it up to judge to judge to figure out what are they going to do to hear from crime victims.

VICE CHAIR SESSIONS: Can I just follow up on that just for a second. Take the *Brock* case, you just said, well, have Mr. Brock testify at the very beginning and his testimony would be relevant to both -- well, to the guidelines factors. To what extent would the defendant then have the right to cross-examine Mr. Brock because his testimony is being used against him to increase his penalties?

JUDGE CASSELL: Right. And there are procedural due process issues whenever victims are providing factual information that goes to the heart of the sentence, and the victims' community is prepared to give, obviously, due process. We would urge the Commission to provide due process.

Now, that gets to be a pretty complicated question, does due process require

cross-examination of Mr. Brock? Maybe, maybe not. You'd have to look at the circumstances in the case. I would be prepared to argue that it does not necessarily involve cross-examination of Mr. Brock, but it might in some cases, so potentially there is going to be that -- you know, some sort of need to accommodate the defendant's due process interests.

ACTING CHAIR HINOJOSA: I would like to say that I've had witnesses testify and nobody has ever -- that are victims and they've been cross-examined. It never dawned on me that there would be no cross-examination and nobody seemed to object to it, and it worked quite well and it was certainly before I made the determination on the guidelines. It wasn't that they had access to what the guideline determinations were, but they wanted to be heard, they wanted to present evidence with regards to what their losses were and how they felt about it, but they were cross-examined and it didn't seem to work poorly.

JUDGE CASSELL: Right. I mean, I guess it would depend on what they're saying. If they're saying my medical records show I suffered a broken arm or something and the defense wants to dispute that, that's fine. If Mr. Brock wants to go on to say and I think this guy should get ten years in prison or

something, cross-examination on that seems to me to be inappropriate because that's the allocution phase of the victim impact statement. Just as the government, you know, doesn't get to cross-examine a defendant, or something like that.

VICE CHAIR SESSIONS: Traditionally the victims are participating in the allocution part at the very end, and the reason that you object to this is that the testimony of the victim has no bearing upon the offense levels.

JUDGE CASSELL: Right.

VICE CHAIR SESSIONS: In our court, victims always will stand up and make a statement, and only if they have something to say which would impact the offense level would there be a right of cross-examination.

JUDGE CASSELL: Well, it may be a question here of sort of administering things. Maybe if the judge waits to calculate the guideline until the victim allocution is completed or makes a provisional calculation. I mean, there are different ways of dealing with this. The problem is when something happens like what happened in the *Brock* case, the victim says, wait, no, I want to be heard, I was injured; and the judge says, doggone it, no, I'm not

going to listen to you. That's the problem that we have, and I think the Sentencing Commission should make clear that's not the right way to do it.

ACTING CHAIR HINOJOSA: Did the judge say that or did the judge say I already have the medical information? The judge just bluntly said I don't want to hear from you and I'm not interested in whether you were seriously injured?

JUDGE CASSELL: Yeah. I mean, I want to be fair to the judge, it wasn't a one-sentence, I'm not going to listen to you. There was more involved.

ACTING CHAIR HINOJOSA: There was an explanation as to what he had already looked at, I guess.

JUDGE CASSELL: The explanation was -- and again, I'm summarizing here, and to be fair to the judge, you should look at the whole transcript, but I think a fair summary is this: A victim impact statement had been filed in written form that morning, and the judge said, well, I've read that. But the attorney for the victim had some specific reasons for wanting to be heard on the aggravated assault issue, including reasons for believing that the hospital records -- the judge had pulled a piece of the hospital record out that said the victim's report of pain was

moderate or something. So, well, it's only moderate pain, it's not aggravated assault. The victim wanted to be heard on why that piece of the record was being taken out of context, talking about a later point in the hospital admission rather than the earlier part; and the judge said, I'm just not going to listen to you.

Also remember, the Department of Justice wanted to be heard. They wanted a continuance to try to get some of the hospital information there, but they were denied that opportunity as well. So then maybe you chalk this up to just, well, bad judge, bad result. Again, maybe I'm being unfair to the judge here, that might be a conclusion that some people draw, but I think there's a larger issue lurking here in that the judge is just following the standard operating procedure in this country, which is to figure out what the sentencing guidelines are and then bring the victim in at the last minute as kind of window dressing, and that's not the way we should be doing things.

COMMISSIONER WROBLEWSKI: Isn't the best process the one that Judge Hinojosa mentioned earlier, which is that the probation officer, as part of the presentence investigation, reaches out to the victim and reaches out to the defendant, reaches out to all

the people involved, collects the information, it's put in the preliminary presentence report, there's an opportunity for both sides, for both parties, to object to it. In your vision, there would also be an opportunity for the victim to object to it. There's notice of -- everybody has process that way. If there's continued dispute, then there may have to be evidence brought in, but that would be the normal and, I think, the better process, wouldn't it?

JUDGE CASSELL: I think it would. It actually would be -- maybe I could get some of the defense attorneys in the crowd here today to endorse some of this because it provides additional notice to everyone. Now, the one footnote to that is I think, you know, in the *Brock* case the victim was represented by counsel. I think we have to recognize the fact that the vast majority of crime victims cannot afford legal counsel, at least until we have a *Gideon v. Wainwright* moment for crime victims in this country.

So I think the Commission's guidelines have to understand that the *Brock* case is atypical in one sense, he was represented by a very able attorney, Russell Butler, who is in the Maryland Crime Victims' [Resource Center] that knows how the Crime Victims' Rights Act works. If victims are getting thrown out on

victim impact statements because they didn't follow some procedural requirement that they're unaware of, I think there has to be accommodation for them, just as we accommodate *pro se* litigants in other aspects of our justice system.

ACTING CHAIR HINOJOSA: I don't think we have any more questions, and thanks again for sharing your thoughts and for taking time from your schedules to be here, and it's nice to see you all.

... The hearing was adjourned at 4:58 p.m.

THE UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Wednesday, October 21, 2009

The public hearing reconvened in the Mineral Room at the Hyatt Regency Denver at Colorado Convention Center, 650 - 15th Street, Denver, Colorado, at 9:08 a.m., the Hon. Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

Acting Chair: Judge Ricardo H. Hinojosa

Vice Chair: William B. Carr, Jr.
Judge Ruben Castillo
Judge William K. Sessions III

Commissioners: Dabney Friedrich
Beryl A. Howell
Jonathan J. Wroblewski

STAFF PRESENT:

Judith W. Sheon, Staff Director

Brent Newton, Deputy Staff Director

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ACTING CHAIR HINOJOSA: Good morning. This is the second day of our public hearings here in Denver. On behalf of the Commission, again, I would like to thank all of the participants who have taken time from their busy schedules to be here and share their thoughts with us.

This morning we are very fortunate with our first panel to have three district court judges to share their thoughts with us with regards to the status of federal sentencing in the United States. We have first Judge Robert W. Pratt, who has served as a district judge in the Southern District of Iowa since his confirmation in 1997 and as chief judge of the District of Iowa since in 2006. Prior to his appointment, Judge Pratt was in private practice. He also earned his BA from Lawrence College in 1969 -- well, I didn't have to say the year, right -- and his JD from Creighton University.

We also have Judge Fernando Gaitan, Jr., who has served as a federal district judge on the Western District of Missouri since his confirmation in 1991 and has served as chief judge of the district since 2007. He previously served as a judge on the Missouri Court of Appeals and the 16th Judicial Circuit

Court of Missouri. Chief Judge Gaitan holds a bachelor's from Pittsburgh State University and law degree from the University of Missouri Kansas City.

We also have Judge Joan Ericksen, who has served as a federal district judge in the District of Minnesota since her confirmation in 2002. She previously served as an associate justice of the Minnesota Supreme Court and as a judge in Minnesota's Fourth Judicial District Court, and she has also served as an assistant U.S. attorney for the District of Minnesota in the past, and she received her BA from St. Olaf College in 1977 and her JD degree from the University of Minnesota Law School.

For some reason they decided to put your years in this particular panel, which they didn't do with regards to the other panel, so I'm sorry if I read some of these years. Is there a particular order that you all want to start in? Judge Pratt, did you want to go first?

JUDGE PRATT: That would be fine. Judge Hinojosa and the rest of the commissioners, thank you for asking me to be here. Anytime anybody has to listen to me, I am grateful, and this is such an important subject that all three branches of government recognize, that any input I can have in it, I'm

grateful for, so I tried to prepare my written testimony in response to the questions that Ms. Grilli sent me. And it's such a broad topic, that I guess focusing on what I think is, quote, most important is difficult at best.

The broad question about how federal sentencing can be improved is, to me, the most important. And the Commission, I know, has little to do with this, but it is a broad question about how we can improve it, and the stickler for me in all this, I think I agree with almost everyone who thinks that the guidelines are better now post-*Booker*. Having said that, instances of incredible injustice continue to arise, at least in my court from my personal experience, almost all of them related to either mandatory minimum sentences or even, more importantly, sentencing enhancements where I'm not in charge of this sentence.

While I think all of the work that's gone into, I think it was Justice Scalia that said you junior legislators, all of the work that has gone into your work is really frustrated, in my view, by the Congress intervening and doing away with the advisory guideline system in effect by mandating sentences. The best I can do is, you know, come down to people who

appear in front of me.

And I guess timing is important here. Let me give you an example, because that's -- that's, to me, the most important part of sentencing is, you know, the individual assessment that we know that defendants are entitled to. We had a young man profiled in my paper, the *Des Moines Register*, on Sunday, Reed Prior. He was the son of a successful high school football coach and educated at Roosevelt High School in Des Moines, Grinnell College, University of Iowa, a school teacher from a family of educators. He got into the drug addiction in college, had a drug felony, quote, unquote, in Iowa, one in Arizona, never spent a day in jail. Arrested in Iowa 1995, before I was on the bench. Our Senior Judge Longstaff gave him a mandated life sentence. Last December President Bush commuted the sentence.

The story which I consider compelling, Fred Fielding, counsel, was quoted in the article as saying the system failed this man. He spent the last 23 years of his life in Greenville Prison educating prisoners, you know, GED, et cetera, et cetera. I've had numerous Reed Priors that have appeared in front of me where the government is in charge of the sentence, and I'm very frustrated when that happens. What I

tried to say in my presentation was I think we're now at the point where, for the first time, the United States Attorney, the charging authority who has this broad discretion that we all know about, now has to answer the question that Justice Sutherland posed in *Berger*, what's just.

In our previous two sentencing regimes, that of where the judge could give any sentence from nothing to the maximum, the U.S. Attorney played no part in [it]. In the second regime, mandatory guidelines, the U.S. attorney was responsible for proving sentencing facts in the law. We now have a sentence where I think the U.S. Attorney has to ask themselves, at the end, is this a substantively just sentence. And I think if the Congress can do away with these mandatory minimums and we can get back to trusting judges, with the input of the Sentencing Commission, I think we're going to have a much better system.

So if I could concentrate, as I think I must, on a couple of areas, mandatory minimums and sentencing enhancements are the most important part of, quote, sentencing reform that I think can make our system better. Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Pratt. Judge Gaitan.

JUDGE GAITAN: Mr. Chair, members of the Commission, their staff, my fellow judges and guests, I come to you this morning not from Kansas City, which is where I sit most of the time, but from New York City. I was there participating in an ERISA panel for which, as many of you may know, is a very esoteric area of the law, which required a lot of preparation for me, and I wasn't sure why they asked me to be there, except they found a half a dozen cases that I decided they found intriguing, and so they wanted to talk to me about that. But when I got the invitation to come here, I just could not pass this opportunity off; and so with the help of staff, I was able to schedule it so I could do them both.

I didn't submit a written opening statement because I, quite frankly, didn't have the time, but between New York and Kansas City -- excuse me, and Denver, I put something together, and I'd like to just read from it briefly.

First, the reason why I couldn't pass is the work that we do in sentencing as district judges probably ranks among the most important functions that we are required to do. It's gut-wrenching, and, sure, we face hardened criminals almost daily in sentencing -- well, pretty much daily in sentencing

responsibilities. We also face citizens who made bad choices, not necessarily because they're bad people.

As stated, I began my career as a United States district judge in 1991, having served both on the state trial and appellate court for nearly 11 years. In contemplating my transition to the federal court, I knew it would be a challenge, especially when I knew I was coming from a situation where the trial judges in state court were operating without the benefit, or lack thereof, of sentencing guidelines, where we had more discretion to exercise and more flexibility to exercise in our sentencing decision, where we could base our decisions on the unique features of the individual and the crime. Probation officers provided us with the history that we needed, and then we had to sit down and make those tough decisions. At the end of the day, I was able to look myself in the mirror and say my decision was reasoned and fair.

I was not sure how that was going to work in the federal system, and it indeed did change. The sentencing guidelines did not allow me that independence. They were complex and difficult to comprehend. In some cases unreasonable in their calculation of sentencing ranges as applied to certain

defendants. There were too many times, especially in drug cases, when I was compelled to sentence young defendants to punishment that was extremely difficult for me to comprehend and dispense, yet I had to look these defendants in the face and pretend the punishment was just, when I did not believe it to be so.

While the guidelines provide some flexibility in the form of departures and variances, these variances were only possible when I could place the defendant or the facts outside the heartland of cases as defined by the guidelines in many of those cases. These opportunities proved difficult for various reasons. The guidelines were seen by the attorney general, the assistant United States attorney general and the appellate courts as sentencing bibles with few exceptions, and only where extraordinary circumstances existed as judged by some appellate courts.

Hence, as a judge, I felt like a small or nonplayer in the critical sentencing decisions. I relied upon the probation office to compute the appropriate guideline range. Thereafter, defense counsel would argue for some perceived crack in the guideline wall to give their -- to argue either for a downward departure or a variance. The assistant United

States attorneys would usually argue for the high end of the range, unless they felt some compassion for a particular defendant. Unless there was a particularly heinous crime, I would exercise what little discretion I had to sentence the defendant at the low end of the guideline range.

In other cases, if the defendant cooperated at a level acceptable by the U.S. Attorney's Office, the AUSA would file a 5K1.1 motion, giving the court the opportunity to sentence below the guideline range. That sentence, however, must be based upon a degree of cooperation as assessed by the AUSA. The appellate courts usually favored the government's assessment of that cooperation when an appeal was taken. However, it did provide me an opportunity to pronounce a sentence, a fair sentence, if I could state the degree of cooperation to support that variance. However, that's a very difficult task for me unless that cooperation was shown by that individual testifying in that case in front of me; otherwise, I had to rely again upon the presentence report, and oftentimes these presentence reports are the product of the probation officer talking to the U.S. attorney.

This all changed after *Booker*, *Rita* and *Gall*. Now I am again a major participant in the

sentencing process. The sentencing guidelines are an invaluable starting point, they always have been, but now I am free to consider the very important factors raised by 18 U.S. Code § 3553(a), which mandate the imposition of a sentence sufficient, but not greater than necessary.

This is clearly more work than sentencing under the guidelines required, but now I'm pleased to be able to pronounce a sentence which is reasonable and unique to the defendant before me, and not one that is designed to fit a hypothetical defendant. It is a great feeling to know that my nearly 28 years of experience as a trial and appellate judge can be put back into play in this very important judicial procedure.

On this 25th anniversary of the Sentencing Reform Act, it is time to be reflective. My comments are not meant to demean the accomplishments of the Commission, rather they are to point out there is still work to be done. I was not part of the federal system before the Reform Act was adopted. I've read of the disparity in sentencing by some judges. The Sentencing Reform Act, however, created disparity too by shifting power from the judges to the prosecutors. We have seen that they too cannot resist the urge in

some cases to abuse their power.

For instance, the prosecutors can, and some do, use their power to leverage a plea agreement with defendants, oftentimes threatening to impose statutory minimums if they fail to cooperate. At least the judges played a neutral role in the sentencing process.

The current system post-*Booker* provides that needed balance. It requires the court to consider the guideline applications to the defendant as a starting point; however, it gives the court flexibility in considering relevant 3553(a) factors.

Lastly, statutory minimums in some cases continue to result in sentences greater than necessary and fail to meet the statutory mandates of sentencing. As far as I can tell, there's no rhyme or reason for their existence, except possibly as through political exercise. They can create very unjust results, which cause the public to disrespect our system of justice.

I can recall some years back I was compelled to sentence a 21-year-old to more than 25 years in prison as a ringleader in a drug conspiracy. In a telephone conversation that was wire tapped by law enforcement, he boasted of his leadership role to a confidential informant. However, it was doubtful to

all that he was a true leader; however, the government was not willing to accept another view because the defendant did not cooperate. He did have a criminal history, but not one deserving of that kind of sentence.

The Commission must use its considerable influence with Congress to eliminate such injustices. I won't ramble on, but I did travel from New York City to attend this hearing because I believe your outreach is an indication of your sincerity to embrace the post-*Booker* mandate of sentencing, to think outside the box, to look at alternative sentencing which may include less incarceration and more treatment.

As the Commission gathers new data reflecting post-*Gall* sentencing, I believe our sentencing judges will benefit from other experiences in interpreting those 3553 factors. I do want to thank the Commission for giving me this opportunity to share my observations as a sentencing judge.

ACTING CHAIR HINOJOSA: Thank you, Judge. Judge Ericksen.

JUDGE ERICKSEN: Thank you very much. I appreciate the opportunity to be here today. I did leave Minneapolis at 4:00 a.m. because I thought it was so important to be here and take this opportunity to

speak to you at what is not only the 25th anniversary of the sentencing guidelines but the precipice of a whole new way of looking at one of the most important functions that our court system performs, which is the punishment of offenders.

The first chief justice of our country observed something that is still true today, which is that the courts derive their power from the trust and confidence that the public gives to the courts. We have no military power. We have no other way to impose our will other than by persuading the people over whose lives we have so much power that we are doing what is fair and what's just, and that's what they look to us for.

There are two basic approaches to fairness, as you know. One is a rule-bound perhaps mechanical approach that minimizes disparities among people. That has the advantage of taking the decision-making away from individuals and making the results more predictable, and in that way it is sometimes perceived as fair.

Another approach to fairness is highly individualized and depends on the wisdom of an individual decision-maker. That has the obvious advantage of enabling people to feel that they have

received individual justice. It has the obvious disadvantage of creating not only disparities, but of opening up, and in this case, sentences to what the Eighth Circuit has referred to as capricious, ire-driven, I forget the rest of the words. So these are problems. The beauty of the common law and the beauty of our system of justice is that it provides an opportunity to balance those two views of fairness and to obtain correction when we go too far in one direction or the other.

The guideline Commission, in my view, is now faced with a question about what you are going to do now with 3553(a) factors. I hope that I can give you some observations that supplement what you've already heard from other judges. I trust that you've heard the standard the guidelines are too high with drug offenses; you've heard that the child pornography guidelines are irrational; you've heard about the mandatory minimums; you've heard these things.

Let me tell you the approach that I think we are in danger of getting to if there's not some change in approach. I go out to sentence a defendant. Defense counsel always says now, yes, these are the guidelines, but you have to look at the 3553(a) factors, as if the guidelines don't have anything to do

with those factors. Now, I have before me a copy of 3553. I have also in front of me a copy of the guidelines. They overlap. And we are in danger of allowing people to say judges don't have to pay any attention to the guidelines anymore because now there's 3553, as if 3553 doesn't take any account of the seriousness of the offense, the history and characteristics of the defendant, the educational opportunities and needs of the person, the desire to decrease recidivism.

Because the guidelines were mandatory for so long, there was less focus on the reason given for the guidelines, and people thought, well, the guidelines are the guidelines because somebody has done -- put it all in a machine and the machine has spit out what is the average, and so we're trying to eliminate racial disparity, eliminate cross-region disparity and kind of make these things all the same; and that doesn't strike people as being fair enough, and it doesn't strike people as taking enough account of things like the way different states approach particular crimes.

As a parenthetical, I'll tell you in Minnesota, it is a crapshoot whether you go to prison and lose your dog, your house, your wife, your

educational opportunities or whether you go to drug court and basically get a thank you letter for your good efforts. And people think, well, this is ridiculous. They can't really tell the difference between state court, federal court, tax court, administrative law judges. All they know is it's utterly random, so they think it depends on what a good lawyer you can hire what your result is. Well, obviously that's not fair.

So you look at the factors. I have tried to take a look at where these fit in the guideline grid, and you've got a two-dimensional grid, you've got a three-dimensional person; so if I were on the Commission, I would say to myself do I want the guidelines to venture into the third dimension.

Number 1 of 3553(a), the nature and circumstances of the offense, that's basically your Y axis, your vertical axis. And history and characteristics of the defendant, that's basically your X axis, but this is very imperfect. Let's take a look at some of the problems with the Y axis.

Back to drugs, the drug quantity is too much of a driver in some cases. It doesn't really get offset when you subtract for role in the offense. So what, if you start with an offense level that puts you

up, let's say take a 34, you know, 151 to 188, you're a first-time offender. You've got a reduction for your role in the offense. You're still 97 to 121. Even if you didn't have any idea how many drugs were involved in the total conspiracy, you get as many points knocked off, but it still really doesn't get you down to something that's meaningful, because you still lose your dog, your wife, your house, your cat, and everything else.

And we have cases where prosecutors are trying to root out a drug organization, but it's still a pretty artificial group because there are tentacles that go out. A drug organization isn't necessarily something that's very self-contained. So you get these people who are looped in, and if they were in state court, they get absolutely nothing; and then because they're in federal court, they get these really outrageous sentences.

Now, that's not to say there aren't some drug offenders who deserve to get really long sentences, and the challenge, of course, is to figure out which ones deserve to have the hammer come down on them and really are a danger to public safety and which ones are not.

When I was a state court judge, we

figured that there were about ten people in Minneapolis who were causing most of the crime, and if you could quit coming down on the other thousand and come down really hard on those other ten, it would have a great impact on crime in the city.

Okay, in the Eighth Circuit we have a particular issue, which you've probably heard about from the probation department, if not you will, 2K2.1(b)(6), this any firearm that -- it's not just the firearm involved in the offense of conviction, it's any firearm at all involved in any previous felony conviction. I think the Eighth Circuit might be a little bit different in its application of that. One of our judges recently issued an opinion on that and kind of said this is ridiculous, and I hope it gets reversed, and in *Mosby* it got affirmed, so that was probably more trouble than -- than -- anyway, that was probably a bad risk.

So, child pornography, that's a tough one. It's a tough one. One of my colleagues said to me yesterday, you know what, Joan, if I went home tonight and I looked at child pornography on my computer, I would get more time than if I went home and abused a child. You go home and abuse a child, you're in state court and you get whatever you're going to

get, which is a lot less than if you look at the pictures.

Now, I don't think a lot of judges actually look at the pictures, and so it's easy to say, well, it's just an exercise of your First Amendment, or whatever it is. Nobody's saying this isn't a serious crime, but that's an area that perhaps should be open for more individualized sentences.

Okay, so there we have it. On the X axis, the only thing that goes into the guidelines right now is your criminal history. So what about the end characteristics of the defendant? There's no room for that. There's no guidance for that whatsoever. You're completely out there on your own. You're back to this opposite -- one of the extremes of justice, which is to say just do the best you can. And we have a guidelines Commission to guide us, and we have no guidance whatsoever on that. So far you're supposed to not pay any attention to the things that now 3553(a) says you're supposed to. The education, the family circumstances, all these things that are specifically prohibited under the guidelines have to be taken into account by us, and so they're going to have a big, big, big impact on what the actual sentence is.

And I don't think judges want to be

completely without guidance. Judges, same with everybody, will try to find some sort of guidance. It will be informal, and the Commission can either participate in that, the guidance that will develop with respect to how to handle some of these individualized characteristics, or you can abdicate that and say, look, we're going to do our limited part and we're going to leave it to you to figure out how to do the human overlay to the guidelines.

And I realize that in saying the human overlay, that would be -- that sounds somewhat disrespectful of the work of the Commission, which has been outstanding in terms of -- I mean, as a document, there is hardly anything you can think of that isn't somehow taken into consideration.

I mean, even let's take the criminal history, how unfair it is that you get two points if you're on a prior criminal justice -- you know, if you're on probation or something. You can be on probation for some absolutely miniscule nothing state crime, but we have, courtesy of the sentencing guidelines Commission, the actual opportunity to say, no, your criminal history is overstated. It doesn't help you on safety valve. It's kind of a wonderful document, but it is perceived as mechanical, because

the bottom line is you go to the back page and you take a human being and you say you are on this grid, and nobody likes to be there. It's sort of like if you were to call up 1-800 Give Me Justice, and all you got was press one for first offense, press two if you -- you know, enter the amount, how frustrating that would be, because you think this is my life, I want to talk to a human being. And now after *Booker*, you get to say give me an operator; and the operator, we want to have some connection to the guidelines, to the grid, not be off all on the operator's own, but yet give that human interaction that I think people deserve and they expect.

So that's my -- that's my general observation, is that you can either say, all right, we are going to be limited to the policy objectives -- or to the place where 3553(a) relegates us to, which is one factor, or we can try to work with the statutory factors, so that when lawyers come in and say you've got the sentencing guidelines on the one hand and you've got the statutory factors on the other and they don't have anything to do with each other, we can work with that. I think that would be a realistic goal for the Commission, and it would be very helpful for those of us who have to actually sentence people every day.

I have a personal issue about the approach on revocations of supervisory release, and I know that there's -- the basic divide is do you punish people for the crime that they commit while they're on supervised release or do you punish them for the breach of trust. Right now it's a punishment for breach of trust. I think post-*Booker* it might make sense to take another look at that because under [§ 3553](a)(2)(D), the court is to look at providing the defendant with needed educational and vocational training, medical care, other correctional treatment in the most effective manner.

Well, as you know, we have absolutely none, none, none -- I mean, no, no, no power when it comes to the Bureau of Prisons, so we don't have the ability to say to the Bureau of Prisons you have to educate the person, you have to do any particular thing with them. So what we can do is say that is part of the supervised release; and if a person violates supervised release, then you get some pretty nothing sanctions. I mean, those guidelines are really low. So -- and as is appropriate, if you're not really intending to punish them for the crime.

But here's kind of my point: You get these people at the front end, and they say look at me

as an individual, I need education, I need an opportunity to be a father to my children, I need an opportunity to make good on my promise to myself to be a better person, or whatever it is. If you're going to take a chance on a person like that, and there is a lot of move toward alternative sentences and this kind of thing, then you kind of need a sanction to be hanging over their head for if it doesn't work; or if we're wrong, if we decide to take a chance on somebody because we believe them and it turns out they're not believable, we need to go back and do something about that; and under the current structure, we don't.

I had a fellow not long ago who I sentenced for assault, and I put him on supervised release, stop having contact with your wife and don't assault her and don't threaten her or anything, and then he got out and he threatened to kill her. Well, the guidelines were four to eight months, or something, for that. You're probably sitting there thinking, oh, no, it was probably six to twelve. Anyway, whatever it was, it wasn't enough to cover a threat to kill.

And so then you're left to the tribal authorities, I guess, to deal with that, or maybe the U.S. Attorney's Office is going to bring another charge. But I got out the transcript from when I had

sentenced that person, and I said, I will not take any excuses. If you get out and you have any contact with her, I will not listen to you telling me that you had to or you had to see your kids or any of this. I will send you back to prison. So then he comes back and boy, oh, boy, I gave him that six months like nobody's business.

So it involves a stepping back, I think, and a rethinking of the mission and goal of sentencing guidelines. There's a very important goal. I think we need them. I think in the old days, when I was a prosecutor, we had no guidelines and it was sometimes frustrating to hear people come in and say I've had a religious conversion, and, you know, they'd pick a judge and they'd just say that all the time to that judge; and you just sit there and go, oh, please, you know, I'm going to have a religious conversion myself if I hear that one more time.

So you don't want to go back to those days. And, you know, we're all fallible. I know, because I spent some time, I suppose, as a juvenile court judge, I'd get a lot of I see the light, I need to now go be a father to my eight children who I've never seen. And I got less of that after I said, okay, well, that's good, let's start by having you pay your

child support arrearages out of your prison wages.

But it's a process and we want to be able to take people's individual circumstances into account and we're duty bound to do so, and we want to do it in a responsible way; and we would like to be able to use the guidelines in a positive way, not just rail against them the way the judges did -- I was there when they came into effect, and after *Mistretta* there was much gnashing of teeth and rending of garments and the sky was falling. And people got adjusted to that, and now I think that we're in danger of a swing over to, well, we don't have to pay any attention to the guidelines, we'll just do whatever we want, and I think the dangers of that are obvious.

So that's about all I have to say. I will be happy to answer any questions.

ACTING CHAIR HINOJOSA: Thank you, Judge. We're open for questions.

VICE CHAIR SESSIONS: I'd be glad to start. You're from Minnesota and you must know that Judge Murphy, who was chair of this Commission, actually declared the guidelines unconstitutional.

JUDGE ERICKSEN: I know. We all thought that was pretty good of her to take the job as chair of the guidelines Commission after having done that.

VICE CHAIR SESSIONS: Absolutely. Well, you suggest that we provide guidance about personal characteristics, which should play a part of the ultimate sentence; and, of course, some people would say those personal characteristics are so individualized, they are hard to compartmentalize. And yet what you're also saying is that judges want some form of advice or guidance in how you factor those in to the offense characteristics. My question is how do you do that?

JUDGE ERICKSEN: I think it would be more on the order of advice and guidance and information than putting it into a number form. Because we now look to the guidelines for guidance. We're more interested in what's the empirical research, what do the people who study this have to say about it. Why is 46 months an appropriate sentence. How believable is it that somebody can make a change after two convictions, three convictions. What's the real difference, historically and psychologically and from a penological point of view, between somebody who's got one conviction and two or three. You know, what -- it's more an information-providing service than factoring it into the two-dimensional grid.

VICE CHAIR SESSIONS: Aren't we talking

apples and oranges there, though? You're again talking about why did we select 48 months as opposed to some other number, and what you're suggesting is that we need some additional information; but I'm talking about those human characteristics, such as family ties, community ties, various other human characteristics. Those are not something that can be compartmentalized into -- into numbers.

What you, I think, are suggesting is that we do studies about how judges should consider such things as family ties and connections. Is that -- is that what you're asking for? Or is there some other way in which family ties and connections could be actually considered into the ultimate weighing of numbers?

JUDGE ERICKSEN: I don't know that the Commission has the ability to do actual research, but I think that you have the ability to collect research that's out there and make it available to judges; and perhaps the Commission would be a good clearinghouse or source of that sort of information; because if it's not done, we're out there to just make it up on a case-by-case basis. So I agree that it is a very different task than coming up with the 46 to whatever.

And it might be that it is so at odds

with the approach that has been traditionally taken by the Commission, which is to come up with something that's a numbers range, that it wouldn't work. But, you know, we have to come up with a number and somehow or other a number has got to be arrived at, and it's a softer analysis, and the information would be presented in a different way, but that's not to say that it wouldn't be helpful.

But it would be hard to then make a color-coded chart and show whether judges were or were not in compliance with the recommendations in that regard, so I'm not suggesting that it be made to fit into something where it wouldn't fit.

ACTING CHAIR HINOJOSA: What responsibility do you think that we as judges, when somebody throws 3553(a) at us, which we all look at -- and, frankly, you know, I did five years without guidelines in the mandatory system and then now. When I looked at 3553(a) after *Booker*, which is when I really opened the book up, I really felt comfortable that all those factors were issues that I considered under all three systems. You know, the first system I'm bridled by my own decision, being concerned that maybe somebody was going to get a different sentence because it was me as opposed to somebody else.

But when you read the 3553(a) factors written by Congress, they also then wrote the Commission statute which talks about some of those factors and what weight, if any, should be given to some of those factors. What responsibility do you think that we as judges should have with regards to looking at that statute and the factors that are listed there as to what, if any, weight should be given to those when we make decisions and then going ahead and factoring that in as Congress wrote it?

JUDGE ERICKSEN: Well, I don't think we have any choice but to try to follow the statute. And I'm glad you said about waiting until after *Booker* to really dissect the statute. I mean, I think that's not at all uncommon. I think a lot of us went, whoa.

ACTING CHAIR HINOJOSA: I will have to say I was not uncomfortable when I did it because it's common sense. I mean, two of the seven are the guidelines in the policy statements; then is restitution, which we have to consider by statute; consider the sentence available, which we were all doing; unwarranted disparity, we were all trying to avoid; and, you know, consider the sentences available, well, we certainly knew what the lowest and highest was; and then the (a)(2) factors, three of which are

protection of the public and the fourth is the one that you read. And then sufficient but not greater than necessary, I don't know any judge who thinks that they have imposed a sentence greater than necessary. Certainly you want to make it sufficient, but sometimes you wonder if it was sufficient.

And, you know, so you're left with these common-sense statements that are made as to what we normally would consider with regards to a sentence. But Congress wrote those and they also, at the same time that they wrote those, told the Commission some of these issues about somebody's prior history and background and said some of these you cannot consider at all and some for some reasons you might and others you might not. And do you think we also, in addition to 3553(a), as judges should also open that part of the statute book and try to determine when somebody says consider these factors, to see did Congress give me some guidance here?

JUDGE ERICKSEN: Well, yes, I do.

ACTING CHAIR HINOJOSA: Because it's not in 3553, but it was passed at the same time by Congress when they established the Commission and told them in coming up with these guidelines, which should consider 3553(a) factors, there are some things you shouldn't

consider at all and there are some that you might or might not. And so do you think we should read those together and try to determine what that means?

Sometimes I get judges who tell me, no, that was just for the Commission, as opposed to some of them might feel, well, you can't really read 3553(a) without having actually read what Congress was telling the Commission, because they felt the Commission had to consider 3553(a) factors, and they were giving them some guidance, and is that really guidance to me now also as a sentencing judge?

JUDGE ERICKSEN: Well, I think it is, unless you're going to run afoul of the admonition not to presume the guidelines to be reasonable. And so I think that judges should do that and should be encouraged to do that, I guess, and then you could make the decision about whether it was a factor adequately taken into consideration by the Commission. But that's an analysis that I don't see a lot of judges actually making, or an argument that very many lawyers are making to us.

I mean, it really is more here's the guidelines, do with them what you will, but now look at my guy and make a decision *ab initio* about the seriousness and how to prevent recidivism and all these

other things. So it should be tied to the Commission, and because it's changed now, it might be helpful to have an explanation from the Commission about how the guidelines are meant to cover some of these, these issues. As I said before --

ACTING CHAIR HINOJOSA: Or not cover some of them because the statute says you're not supposed to.

JUDGE ERICKSEN: Right, right.

VICE CHAIR CASTILLO: If I could just follow up on one thing, because I think you're hitting the nail on one critical part, and that is the characteristics of the defendants. There, I think, is a disconnect. You're saying on the one hand we should be providing information on the characteristics of the defendant, that is, either our own research or compiling the research and making it available.

Are you saying that we should do that in the manual every year? When we issue the manual, are you saying we should be posting that on the website, making it available to judges so that it's available for sentencing proceedings? How do you envision that playing out?

JUDGE ERICKSEN: I guess I see it more as a website option, because I don't see how it would

fit into the guidelines manual.

VICE CHAIR CASTILLO: Okay.

JUDGE ERICKSEN: Unless you take here's the book and then there's going to be like a rubber overlay that has all this other stuff.

VICE CHAIR CASTILLO: Right, exactly. But then I want to throw up a question not only to you, Judge Eriksen, but your fellow panelists, can't let them off the hook that easily. It seems to me that there is a big disconnect right now in the post-*Booker* world, if you look at Chapter Five of the sentencing guidelines and you look at what it says about the individual personal characteristics of the defendants, we're losing a lot of judges just when they look at Chapter Five, and it says that age is normally not to be considered, but yet the 3553 factors direct you to the personal characteristics of the defendant. So if you have a defendant in front of you who's 65, depending on the offense, age could be very relevant.

And so would you all -- here's the question. Do you all agree that if you were sitting on this side of the aisle, you would take a red pen to Chapter Five and start rewriting it? That's the question. So, Bob, I'm sure you've thought about this.

JUDGE PRATT: Yeah, I have. Well, to

concentrate, Judge Castillo, on the age issue for just a minute, you know, personal experience brought me to brain maturity. Why do kids that are 25 and are kids -- I mean, this is how individual judging is, and if you'll permit me, my son -- one of my sons graduated from Marquette University in May of '04. One of his best friends was killed in January of '05, the same time *Booker* came down. It was such a compelling tragic snowstorm in Milwaukee, wasn't wearing a seat belt. It got me surfing, you know, why don't kids buckle up. I apologize for this stream of consciousness.

Well, Brian Michael Gall came to me four months later, and I had been reading about brain maturity. You know, when you have more than one kid in an automobile, the chances of a fatality -- this is NIH studies, the chances of a fatality increase exponentially. So, you know, I got to reading about brains don't fully develop until they're 25 years old. I thought this might have something to do with the offense conduct.

So, you know, I think sentencing is so fact driven, Ruben, as you know. I mean, that's what the federal tradition is. But here's what I think the Commission can do, along with what Joan was saying.

When you get these common law fact situations that are unique to us, I think if the Commission took this factor relating to the history and characteristics of a defendant and said, you know, what does this -- what -- how does this impact empirically on how a person behaves, acts, et cetera, you know, I think that could be very helpful.

Vocational factors, you know, the parents, the socioeconomic background, all of those factors, you know, to me, the kind of community input that the defendant has before they come to us, personal characteristics, has this person cared about his or her community before violating the law. I mean, that's particularly true in white collar and in child porn cases, you know, do we give them any credit for having positive impact on us before they get to us. The guidelines don't do that now. I think they should.

I apologize for my rambling, but I think it's so fact driven that each case that we get, you know, opens up an area for the Commission to study and to give us help about, you know, how we can better do our jobs.

COMMISSIONER HOWELL: Can I just follow up on Ruben's question, because that is one of the key questions that we've been trying to explore at these

hearings, and it is on our priority list that we want to pay close attention to on our next amendment cycle, is reviewing the departures in Chapter Five and seeing if they need to be updated, totally gutted, rewritten, and so on, in order to bring what judges are looking at as variances now back into the guidelines framework in one manual.

So, I mean, you know, there are -- the rest of you haven't really answered that question, which is there are some people who think that that is just a waste of time, you know, the cow's out of the barn, whatever that expression is, and so don't bother; and then there are others who think it is worth our attention, not just preparing research papers that we post on our web and literature reviews, but actually making the effort to make the guidelines manual relevant to a 3553(a) factor analysis, looking at offender characteristics.

JUDGE PRATT: I think a judge who does that ignores the instruction of the Supreme Court. Departures are an integral part of the guideline. You can't get the correct advisory guideline, which is the command of the Supreme Court, unless you take into account these departures. I think lawyers who come to me on departures and say, you know, this is a departure

area, you know, 5K2 Diminished Capacity, whatever, or if you can't consider it there, please consider it in a variance, but I think that we should keep the departure analysis, Ruben's circuit notwithstanding, that I think it's a healthy way for us to analyze.

And after all, until you tell us or the Congress tells us differently, that's part of what must go into our analysis. If we don't, I think that's at least some kind of procedural or maybe substantive error.

COMMISSIONER HOWELL: Do the other judges agree, waste of time or worth our effort?

JUDGE GAITAN: Well, if I may say a few things. I'm not as willing as perhaps my colleagues are to give up my new-found discretion, but I certainly agree to the extent that it has been spoken to, that we should look to the guidelines first. And I personally see the value of any modifications to the guidelines, or I hadn't thought about this web site to the judges, as providing us with the big picture of what's going on in the world. Although I think we still have to be focused on the narrow picture in terms of what's going on in front of us with the particular defendant.

And the review, which came up last evening, about how do the appellate courts look at

this, I may be wrong, but I think the analogy ought to be similar to a Social Security appeal review. I mean, unless there's no facts to support the decision of the judge, then the decision of the judge ought to be upheld. And that's going to vary a lot, depending upon the explanation.

When I have these types of sentencings where there -- I tell lawyers at the plea, if they believe that they're going to want to argue a variance from the guidelines, then I want a sentencing memorandum. I want to have them think this thing through and present it to me in the posture where they've looked at the guidelines and the guideline applications and why they believe the guidelines don't apply or some variance from the guidelines should be appropriate, both the defense and the government. So I have a chance to study these things in advance of the sentencing so that when they make their arguments at sentencing hearing, it can be a more complete discussion about the potential for a variance.

To the extent that I disagree, I think that I ought to still be able to make that decision based upon the facts in this case, having considered the guidelines.

Again, I think the guidelines have been

very, very important. They provide the needed balance that maybe didn't exist before, but I still think the fundamental task rests with me; and I'm afraid if we do too much tinkering with this issue in the guidelines, then the appellate courts will start using their substantive and procedural review to start tinkering with pre-*Gall* decision-making, looking at proportionality as a variance, how much we vary from the guidelines based upon some considerations that have taken into account in review of Chapter Five that, you know, may not be appropriate in my case.

COMMISSIONER FRIEDRICH: Judge Pratt, among the offender characteristics that you recommended the Commission should reconsider including in the guidelines is socioeconomic status of an offender. And as you know, that was one of the forbidden factors that Congress directed the Commission not to consider, and the reason was at the time supporters of the Sentencing Reform Act felt very strongly that the rich and the poor should be treated alike. And one could certainly make the argument with respect to socioeconomic status that sort of high-status offenders should be sentenced more leniently because of the reputational harm they suffer. On the other hand, you can argue that the poor and disadvantaged should be sentenced more leniently

because they haven't had the advantages, they haven't had the education, they don't have the support systems as other offenders, so it cuts both ways. And we know from census data that there is a direct correlation, unfortunately, between race and socioeconomic status.

So the question I pose is if we inject those sorts of considerations that Congress forbid or even those like education and family circumstances and other things that could be used as proxies for race or socioeconomic status, aren't we going to get into a situation where unwarranted racial disparities creep into the system? And shouldn't that be something the Commission should be very concerned about doing?

JUDGE PRATT: No question about it. And I think the biggest driver of this are the mandatory minimum sentences where the government -- where the prosecutor's in charge of the sentence. Two weeks ago I gave a woman, lost her father at nine, dropped out of high school in tenth grade, rural Iowa, a, quote, drug felony. She was so serious that the judge gave her 180 days probation, 1999. The second drug felony, 2003, they arrest her. She pled guilty to another judge. I subsequently let her withdraw the plea. They come in with an 11(c)(1)(C), 30 years. No history of violence, never a chance in life. We should have reserved a

prison cell for her when she started. No chance. Thirty years I've got to give her or she can go to trial and get life.

So, you know, the prosecutor, why doesn't the prosecutor look at that and say, you know what, is she a threat? All these 3553(a) factors, you know -- I've got to veer over to Judge Hinojosa for a moment. I don't know of any judge that I've ever talked to who hasn't given a sentence that is greater than necessary due to the mandatory minimum sentences. And, you know, I think these socioeconomic background, you know, here's my institutional view, Commissioner, after people get out of prison, before they start supervised release, and I tell them at sentencing supervised release is at least as important as this incarceration, I want you to come and visit me. Because I talk to people when they get out of prison. When I take a young person of color who's had no chance in life and I throw them into prison in their 20s, I'm going to make a better criminal out of them because they're going to learn all kinds of bad stuff from, you know, the people they associate with. So socioeconomic background to me is important when I think about I'm putting them -- I'm taking them from having had no chance, terrible socioeconomic circumstances, I'm now

going to place them with professional criminals.

COMMISSIONER FRIEDRICH: But from a guidelines perspective, not the prosecutor's, I guess I'm confused about what we can do. We have to be very careful. In fact, we can't, I don't think, statutorily. We've been forbidden from considering it, and I think for good reason.

ACTING CHAIR HINOJOSA: The question then becomes what does that mean for us as judges, if Congress told us not to consider race, sex, national origin, creed and socioeconomic status?

JUDGE PRATT: I didn't know that Congress told us that.

ACTING CHAIR HINOJOSA: Well, they certainly told the Commission. And I think we all can certainly agree that race, sex, national origin and creed should not have anything to do, and they also added to that list socioeconomic status.

JUDGE PRATT: Right. But I think the opposite has happened with the guidelines. The incarceration of minorities has tripled since 1987. I mean, I don't consider -- I mean, the unfortunate demographics of our country are people of color have a very difficult time succeeding economically. The fact that they come from poor socioeconomic backgrounds and

get longer prison sentences is the reality of the guidelines, and it would be the reality with or without the guidelines. I think the guidelines are good here because they give me a, quote, starting point, as Justice Stevens said, and I pay attention to them, but I also take into account the fact that they may not have had the best advantages in life starting out. I don't think that's an error to do that. You know, because you use reason to get there, it doesn't mean that it happens to be wrong. I think that's logical, that you give somebody a break because they had no chance in life.

ACTING CHAIR HINOJOSA: Well, on the race issue, frankly, at this point we're at 45 percent Hispanic, but that's due to the fact that immigration cases have become the highest number of cases that are being prosecuted. Actually, the numbers of Whites and African Americans has gone down as far as the percentage from 1987, in all likelihood because of the fact this fiscal year 2009, we're actually at about 45 percent Hispanic, and so the racial makeup there is driven by the fact that about 30 percent of the cases are now immigration cases.

JUDGE PRATT: Right. And 80 percent of our docket in my district is guns, drugs or

immigration, and, you know, 60 percent of the docket are minorities. So, you know -- but I think the guideline is good and helpful, but I don't think it's an error to take into account their poor economic social background. Is that what you're suggesting?

COMMISSIONER FRIEDRICH: But at the same time you take the approach that you take with respect to socioeconomic background, at the same time some of your colleagues will take the approach that this high-status offender who comes from a great family, they're all sitting in the courtroom, has a great education, has a lot of potential, has suffered great reputational harm, that defendant should get a break. So there's no evenhanded approach to this, and it's a policy decision that Congress has made that should not be considered because of the impact it has with regard to race.

JUDGE PRATT: Let me get back to something that was said last evening. All three branches of government have an input into the sentencing, the sentence that is ultimately arrived at. The fact is that we district court judges who sentence people are products of U.S. senators. I don't expect that a person who was a legal aid lawyer like myself would look at a defendant with the same lights that

somebody who practiced at a white shoe law firm would. I'm different. That person is different. The idea that we're going to see the facts through the same lens and, therefore, arrive at the same sentence, is to do away with the humanness that each one of us have. You wouldn't need a judge if we're all going to arrive at the same sentence.

JUDGE ERICKSEN: Well, I do think that gets back to the importance of having guidelines and guidelines that are credible, because otherwise you will have sentences all over the map that are excessively based on those individual characteristics. And so part of what I was trying to say before is that it would be helpful for the credibility of the guidelines and, therefore, the diminution of the possibility that there will be absolute lack of consistency for similar crimes, if we can understand why the guideline prevents -- why it protects the public, you know, what empirical research. Not just an average of other sentences, why does this basic range of sentences protect the public; why does this give adequate deterrence; how does this reflect the seriousness, rather than just here's a number and people don't really understand how it was arrived at.

So my plea, in part, is for actions that

will enhance the credibility and the usefulness, the extent of which the guidelines are used and relied on because of just exactly what you're pointing out. You're going to have people who have one background who are going to say I don't care how many chances you have, I'm going to give you this one last chance, and I'm going to give you a big speech and you're going to listen to this speech, and I'm personally going to have an impact on your future; and other people are going to say I gave you a chance and now it's over. And so that's part of what goes into that.

And on the credibility of the guidelines, I think it's not useful to say, look, you can't take these things into consideration, when we are supposed to take them into consideration. It's fair enough to say this is outside the range of what the guidelines contemplate, but I don't see how you can take into account -- and right away for them, you know, we've got the brown 2008 book. I don't know how you can put into the 2009 or 2010 book already what to do with somebody who's got fetal alcohol syndrome. Fetal alcohol syndrome is rampant in the prison population.

What are you supposed to do with people who worked their way up through the juvenile delinquency system, and then -- you know, first they

started as children in need of protection and services, then they were delinquents, then they're this. How are you going to factor that in? I don't think you can do it, and I think that any attempt to quick rewrite 5H1. -- 5H, I guess, would be -- would be able to really do justice to it. But I also think that to say, look, we're going to pretend that we can still tell you that you're not allowed to take these things into consideration, when that's not really true, isn't useful either.

ACTING CHAIR HINOJOSA: But what we as judges, I don't think, have done, is that you have 5H but you also have 5K2.0, including 5K2.0(a)(4) that tells you that there may be a discussion about ordinarily this is not relevant, but you may have a case where you have what you just pointed out and, therefore, the guideline advice is in those cases our advice doesn't fit with regards to 5H and you can use 5K2.0(a)(4) to find a way to come up with what you think is the appropriate sentence.

Because I think it was understood by Congress when they wrote the statute that there would be departures. In fact, they provide for them. But this one about socioeconomic is, to me, one that Congress has included with race, sex, national origin

and creed. And for whatever policy reason, they write the laws, and as judges we uphold the law. And we may have a personal view that this is a tough situation for us to do, like with mandatory minimums, but other than safety valve, we are stuck at the mandatory minimum with regards to a sentence because we uphold the law; and, you know, these are issues that, frankly, that's why I asked the original question, and I think -- did you have a question?

COMMISSIONER WROBLEWSKI: I know we're running out of time, and I find this discussion very interesting and enlightening and your testimony, so I have a series of questions, and, frankly, it's to all of you, and I'll try to make it short and, hopefully, the answers can be short and we can move on.

There was a judge who testified at one of our earlier hearings that the vast majority of the concerns around the guidelines really has to do with severity. If you took all the severity levels and divided them by three, that most of the people who are advocating for advisory guidelines would be advocating for mandatory guidelines and vice versa. Do you agree that severity is the biggest problem?

Secondly, Judge Gaitan and Judge Pratt, you both talked about prosecutorial discretion. In a

world where prosecutors' decisions do have an impact on the sentence, should there be a policy -- a consistent policy from the Attorney General as to how to exercise sentencing discretion; and if so, what should that be?

Third, data collection in our world of advisory guidelines, are you comfortable with a much more robust data collection system along the lines that Judge Nancy Gertner has suggested where it wouldn't just be getting data from districts, but it would be getting data perhaps from -- that are tied to individual prosecutors, individual judges, individual defendants, much more real time, we'd have a much better sense of recidivism and all the rest.

And then finally, if you were given two choices, the current system, which has advisory guidelines and mandatory minimums, a sort of bifurcated system, or a simpler guideline system that's mandatory, lower severity with wider ranges, but allowed also for some departures like we used to have, which of those choices would you take?

JUDGE PRATT: Well, I think the three primary criticisms of the guidelines are harsh, rigidity, too much prosecutorial power, so take your pick. I think perhaps severity is the biggest complaint. I guess that was your first question.

Second question, DOJ policy, should there be something consistent, yes. Unlike the -- you know, I guess the policy during the last administration was always seek the highest sentence possible. I think that's at odds with the role of the Department of Justice. But I think --

COMMISSIONER WROBLEWSKI: I think more fairly it was seek a guideline sentence and charge the most serious readily proveable offense.

JUDGE GAITAN: They always recommend the highest, that's the problem.

JUDGE PRATT: I agree with you on that. With the collection of data, I was on the IT Committee with Nancy. She pushed that for years. I don't see -- I think it would be used for the wrong purposes, and I don't see what it would gain. Maybe I don't understand it; and she's an incredibly bright, articulate judge, so perhaps there are underlying reasons I don't understand.

There's one study on this that's not yet published by the *Indiana Law Review*, in fact, they used the District of Massachusetts as their model, that may have some of that data.

The fourth question about the current system versus one where you have -- the way I

understood your question, Mr. Commissioner, was the alternatives were the current system versus a system of mandatory guidelines with robust departure practice. I'd take the current system.

VICE CHAIR SESSIONS: I think what he was suggesting is broader guideline ranges, many fewer offense levels, so that judges have overlapping discretion between zones. And the thing that he left out is that in return for that kind of structure, there might be a reduction in the number of mandatory minimums.

JUDGE PRATT: And how do we get around the Sixth Amendment problem?

COMMISSIONER WROBLEWSKI: I'm assuming that the government would be required to prove the aggravating factors. If there were a simpler system based for drug cases, drug quantity, fraud loss [or] loss, other cases and other aggravating factors that would be proved to the jury.

JUDGE PRATT: I'd still take the current system.

JUDGE GAITAN: I'm going to go with the last first. I agree, I'm not ready to scrap this system yet. I think it's going to work and it's going to work fine. We just need more time, more

experiences. With the collection of data, as I said earlier, I'm a little hesitant about that if it's used for other than advising the judges, you know, what's going on in the country. I think it otherwise might be used for purposes that would be contrary to the advancement of the system we have now, which I do like.

Going to prosecutorial discretion, under the current system, I don't care. They can come in and make their argument, just like the defense comes in and makes their argument, and then I make the decision. I don't like the situation where they come in, they have all the marbles in their hand, and I have none. Severity is an issue for me.

ACTING CHAIR HINOJOSA: On behalf of the Commission I want to thank you all, and each one of you has given this a lot of thought. And, Judge Ericksen, I hope you don't think this in any way is disrespectful, because I certainly appreciate what you have said today, and you came in, you got up at four o'clock in the morning, but, you know, you mentioned a minor participant in a drug case at 151 to 188 months, and Judge Castillo and Judge Sessions were actually on the Commission when they came up with the mitigating role cap. And if this was somebody who was truly a Category I and qualified for safety valve, as

well as minimal participation and then the reduction based on the mitigating role cap and acceptance, they probably would end up at 46 to 57 months, which you might still think is a lot, but it would be different than the calculation.

But I have to say that each one of you has given this a lot of thought. It's clear by the work that you have done and certainly by the sacrifice that you made by being here today. Did you have a question?

VICE CHAIR CARR: Judge Eriksen, did you want a shot at Commissioner Wroblewski's quartet of questions?

JUDGE ERICKSEN: Well, thank you very much for the opportunity. There's something to be said for broader guideline ranges and less precision, because we only have limited resources, and so you don't want to take all the resources and put them on something that's not going to be actually determinative of the sentence.

If I could just say one thing that was at the very top of my list of things that I wanted to say and I didn't have a chance to say it, one of the big heartburns for us is 4B1.2(a)(2) on career offender, where you look to the elements of the

underlying offense. It's not fair, it's not just, and perhaps if the government had to prove up, at least they'd prove up what the underlying offense was. But this is an area where if you have a good lawyer in state court and they can get you pled to bank larceny instead of bank robbery, you have got a huge leg up on the poor sucker who had a bad lawyer in state court. So it leads, in my view, to a lot of disparities and there's not much that we can do about it, but I think that focus on the elements is hugely problematic.

And on the safety valve, as I mentioned before, the guidelines are in many ways a wonder. I had to work through the Minnesota state guidelines, and [there was], I think, maybe a 20 percent compliance rate with those because you just couldn't work with them. And safety valve is certainly useful. The problem with safety valve, again, is you run into sometimes with the state court -- I mean, it's the interaction between the federal and the state that sometimes gives rise to some of the issues. But I appreciate the comment and the opportunity to speak.

JUDGE GAITAN: May I ask a question? When you look at disparity of sentencing, are we looking at disparity of sentencing throughout the federal system or are we looking at it in comparison

and contrasting it with the state system as well?

ACTING CHAIR HINOJOSA: Well, the mandate in our system of government is that Congress passes laws for the federal system, and that they were -- in the Sentencing Reform Act, one would assume they were talking about disparity within the federal system.

JUDGE GAITAN: I ask that because I heard a comment last night that referenced the state system, and I was wondering if that was something that you looked at remotely maybe.

ACTING CHAIR HINOJOSA: And in Texas that would be difficult because, depending on what part of the state you live in, there may be a different way of looking at things; just like Judge Eriksen pointed out, in certain parts of Minnesota your sentencing might be different than in other parts. So the Sentencing Reform Act was taken to mean disparity within the federal system. That would be my answer.

JUDGE PRATT: Judge Hinojosa, with the disparity, I'm wondering is the Commission's view that, you know, the statute says persons that have been convicted of similar conduct, I think, you know, mandatory -- I had a principal of a Catholic school solicit a police officer in eastern Iowa, ten-year

mandatory minimum. In state court they would have gotten eight months. When we look at disparity, is it the Commission's view that we should be looking at federal disparity between defendants, or when the statute references conduct, are we to look at what happened -- what would have happened had that case been prosecuted in state court? Are we to look at that or not?

ACTING CHAIR HINOJOSA: In your case you had a mandatory minimum. There's nothing that you could do about that, and that was congressional decision by law. There was nothing that involved the guideline determination there other than by law you had to give that defendant -- impose a sentence of ten years, even though you felt that in the state system it would be a different one.

JUDGE PRATT: Let's take a nonmandatory minimum. I have a lot of cases where the -- you know, they get a year in state court, and they get a ton of time in federal court.

ACTING CHAIR HINOJOSA: Right, but this is a federal system, and in some other state court they might get a lot more time than ten years; and so the issue becomes the question that Judge Gaitan asked, is this disparity within just the federal system or are

you going to start looking at different states and how different parts of different states sentence individuals.

VICE CHAIR SESSIONS: And if you're looking at proportionality under the 3553(a), it clearly is within the federal system as opposed to the state.

ACTING CHAIR HINOJOSA: Thank you all very much. I hope we haven't held you too long. We'll take a short break here.

(A break was taken from 10:26 a.m. to 10:42 a.m.)

ACTING CHAIR HINOJOSA: Next we have a view from the Defense Bar, and we're very fortunate this morning to have Mr. Raymond P. Moore, who is the federal public defender for the Districts of Colorado and Wyoming. He previously served as an assistant federal public defender for the District of Colorado, and he also has served as an assistant U.S. attorney for the District of Colorado in the past, and he received his bachelor's degree from Yale College and his law degree from Yale Law School.

We have Mr. Nick Drees, who has been the federal public defender for the Northern and Southern Districts of Iowa since 1999. Prior to doing that,

prior to having taken this job, he was an assistant federal public defender in the Southern District of Iowa and an assistant public defender in Polk County, Iowa. He has his degree from Harvard College and his JD from the University of Chicago.

Then we have Mr. Thomas Telthorst, who started his solo practice as a criminal defense attorney here in 1997. He currently practices a split between CJA cases and state cases, and he also has served as assistant district attorney in his county. And he holds his B.S. from West Point and he also served as an armed cavalry officer until 1992, and he earned a JD from the University of Kansas.

Do we have a particular order that you all wanted to go in?

MR. MOORE: We decided to begin with me and go to my left, if that's fine.

ACTING CHAIR HINOJOSA: Yes, sir, it is.

MR. MOORE: First I want to thank the Commission for providing me an opportunity to address these issues. As I sat through much of this hearing, and I can't say that I've been at every speaker, but I've tried to take in as much as I could, I've heard some things about perhaps where we've been, and I've heard some consideration given to where we may go or

what may transpire next. I want to focus my attention, if you would, not on those issues, but on where we are, because we are in an advisory guideline system.

And it hardly comes as a surprise that my position is that we are in a better system, and we much prefer the advisory guideline system to the one that came before it. It enables the courts to consider all of the factors regarding an individual and his circumstances, the offense and its circumstances, and to craft a sentence that is sufficient but not greater than necessary in an individualized case.

As I tried to process what's gone on over these last two days, I suppose I came to this conclusion: The guidelines, up to now, have been created, assembled, drafted, with an eye towards the system that was relevant at the time, and that was a mandatory system. And much of its pronouncements have been, in fact, consistent with that background. You shall; you shall not. This is relevant; that is not. We're not in that era anymore. And perhaps the simplest way of saying it is in the older days, the currency of sentencing was familiarity with the commandments of the guidelines. Today the currency of sentencing is persuasion. And I think that, at least I urge you, to consider bringing the guidelines from the

currency of commandment to the currency of persuasion.

I don't see it as an accident that many of the people who have spoken to you today have asked for more information, because information is the tool by which the currency of persuasion can be applied. And we may, as different people from different perspectives, have different concepts of what shape that information should be; but I'm not hearing, whether I listen to district court judges or circuit judges or even U.S. attorneys, anyone that doesn't want more data, more information. We may disagree about what that data means, what form it should take.

Certainly I would like to see more empirical data, what is a particular guideline based on, are there studies that say this is, in fact, a harm. Is it based on the need to protect the public in a particular instance. If there's not empirical data to support the guideline and the choice as to why this is an appropriate sentence, then say so. If it's a policy determination, then say so. If it's driven by congressional directive, then say so, and say whether you agree or disagree.

This type of information enables judges and the participants, the advocates in a particular sentencing case, to answer some of the questions that

come up as to, well, how does the guidelines -- or should the guidelines be followed in this case, should we have a variance, should we have a departure. You get a better understanding.

It's hardly a surprise to me that the areas in which there seems to be the most disagreement is the area in which people have difficulty understanding: Child pornography. Why is it that whether you're a first offender or a Category VI offender, everybody seemingly ends up 97 to 121, even after acceptance. It doesn't matter if you go to trial; it doesn't matter if you plead guilty; it doesn't matter if you've got a criminal history. It seems difficult to understand, as Judge Hartz had difficulty understanding, the theory of the 2L guideline, which clearly you can tell from my written statement I think is too harsh.

But I ask for more information than that. I think it would benefit the judges to go back and have information about the bell curve of sentencing. We talk about it. We talk about whether the judges are within whatever word you want to choose, the norm, the bell curve. And the Commission does great reports. They come out periodically. I yearn, as you can tell from my introduction, for a return to

the old days where data was given to the judges at the moment of sentencing that was pertinent to their sentencing. I don't have access to and have not -- and don't pretend to have access to the IT capabilities that the Commission has, but I believe that if we had an immigration case and the judges could, whether it was included in the presentence report or on a website or immediately accessible, get the data that pertains to that particular case, and the more information that could be given, the better, that that would be useful in the currency of persuasion.

I looked at the appellate issues and, in fact, I find that the process, in my opinion, is working. Judges are being asked to explain and give their reasons and their rationales under the procedural arm, and information would certainly benefit that.

Judges are being asked, at least in the Tenth Circuit -- or perhaps a better way of saying it is we've seen in the Tenth Circuit a couple of cases where sentences have been reversed on substantive unreasonableness, one where the sentence went up and one where the sentence went down. And in both cases what I find interesting is that the author and judge, Judge Murphy in one case and Judge Holmes in another, went in search of information, looking at the

background, the career offender or the ad hoc group that studied matters pertinent to American Indians and those offenses, what the history of the guideline was. It was not simply we disagree. It was not simply we don't understand and won't follow. It was, again, looking for information. At each step, at each stage that seems to be pertinent. Better information, better guidelines, and I firmly believe that and urge the Commission to move in that direction.

Beyond that -- and I'm just going to touch on other matters. I've been told that I can prattle on forever, and I've never been able to come up with a defense to that claim. But in either event, I touch on the subject of departures because it's been discussed here. My recommendation, my request, is that you scrap it. And [re-approach] it from a different perspective.

Again, if the issue is persuasion, you lose the battle before it even begins by dictating thou shalt not, when everybody does and everybody must. Defense lawyers, in my opinion, are not going to go down the road of departures as they're presently formulated because it's a task of avoidance getting around the thou shalt nots. Even, with all due respect, to comments that Judge Hinojosa has made with

regard to 5K2.0, what I might think the heartland is is one thing. What my particular judge might think the heartland is is a second thing. And I tend to have found that the circuit tended to view the heartland as a broader geographic area than we did; and so even with the best of intentions or approaches, you're still constantly trying to get around or look at case law.

I compare it to trying to get to the top of the Empire State Building. Why would I take the stairs when there's an elevator? Ultimately, when I say get rid of it, what I'm referring to are these restrictive, prohibitive types of statements. Embrace the concept of information and say, for example, this may be a grounds for departure; and say when, why, explain.

Some things obviously we've encouraged, or I've encouraged. Role in the offense -- you don't have to put numbers on everything. Role in the offense should be an encouraged departure. I recognize that there is some, shall we say, touchiness to the subject of perhaps my suggestion that those raised on American Indian reservations, that should be listed as something that could be a grounds for departure, and I stand by that. I am no bleeding heart. I am, however, despite my pedigree, one who was raised in the projects of the

East Coast and knows firsthand poverty; and what can occur on reservations, not even close. And to say that that doesn't affect matters is, in my opinion, simply difficult and not true.

I urge the Commission to speak affirmatively with respect to equalizing matters in the area of immigration, which is, as you know from looking at the statistics, a big issue in this district, even though there is no border.

Finally, I want to thank the Commission for the work that it's done with regard to crack. I hope that if we as a nation are successful in moving forward with statutes or other improvements or cures for the problems of the past, that the Commission would make those retroactive.

Additionally, I would hope that it could speak to its experience, and I recognize that this is a personal request of mine or quirk of mine, to look at what's happened with regard to how the crack amendment litigation was handled and whether there is a preferred way or a nonpreferred way of going forward, whether it should be consolidated, whether it be with a defender office or with a small group or proceed as it did here on an ad hoc basis, the court made its ruling -- or its decision with regard to that. I stand -- I accept

that, but it is very difficult trying to make sure people in institutions on the one hand who believe or perhaps have a cellmate who's telling them, don't worry about it, the defender office is taking care of it or your CJA lawyer is taking care of it, and get the word out, well, in this district you have to apply *pro se* before anything can happen. That was a difficult effort to, if you would, herd the cats.

Very quickly, very briefly, three additional matters that are not the topic of my statement. One, you brought up the *Rausch* case. I will tell you that I've invited to lunch, and she's seated in the back, the woman who -- Virginia Brady, who was counsel for Mr. Roush. And so if there is some concern about that case, she will be at the lunch and able to answer any and all questions. I do think, though, that that was not a poster for matters getting out of hand. Evidence was submitted, stacks of it, affidavits, Bureau of Prison policy statements, statements from people who suffered from kidney disease and failure in the Bureau of Prisons and what was being done. Those decisions -- that decision was based on an analysis of evidence in a contested hearing. It was not simply just brushing the guidelines aside, in no way, in no shape, in no form. And two matters, the government,

not once at the imposition of the sentence objected to the procedure or to the sentence, and at no time did they file an appeal.

Second, with regard to Mr. Gaouette's comments about the split, if you would, in the roster of our judges, I would say a couple of things. First, I have the utmost respect for Mr. Gaouette, for the difficult job that U.S. attorneys do and for the U.S Attorney's Office in this district. Over the years our relationship has been governed by a mutual respect and collegiality, and I do nothing by my statement now to suggest anything to the contrary. I think sometimes people on different sides of the aisle have different perceptions of things. I can guarantee you that there have been times when my staff has felt that they had a compelling 3553 argument, got a guideline sentence and said, all that matters is the guidelines. And I can also guarantee you that there are U.S. attorneys who think that they have a mind-run guideline case, they get a variance and say, all they care about is 3553 and not the guidelines. We have different perceptions.

There is not judges gone wild in the District of Colorado. It simply is not what's happening. There are judges who have been put in one camp, the guideline camp, if you would, who have done

things like set hearings on the child pornography guideline because that judge can't understand what that guideline is trying to accomplish. Another in the camp of guidelines has recently concluded that one-to-one is the appropriate ratio in crack cocaine cases.

The judges who have been referenced as perhaps being more less guideline, is perhaps a polite way of saying it, give guideline sentences often. We have a difference of perspective, and that's all it is; but I can assure you if judges were simply saying the guidelines don't matter at all, it's a simple appeal. It's a very simple appeal, and it would be reversed in this circuit. I have no doubt of that.

Finally, Judge Hartz put a question to you to put to me, for you to put to us, and I will briefly answer it. I will also tell you that I talked for a little while with Judge Hartz in the hallway afterwards. I don't think he knew I was here. I don't know that that would -- in fact, I do know that would not have changed his question at all, I don't suspect.

Why do we file these substantive appeals, substantive reasonableness appeals? First, and I don't mean to be snide, but simple answer, our clients have the constitutional right to appeal; and when they choose to exercise that right, we can, do and

will advance that right as vigorously as we can.

Second, substantive unreasonableness is the law, and so whether a guideline sentence -- where a guideline sentence can be viewed as substantively unreasonable in our opinion, we will advance that as well. We do our job and there are those in our appellate unit who I know would have other reasons, additional reasons, but I think that suffices.

I've taken too much of your time. I concede the floor to Mr. Drees.

ACTING CHAIR HINOJOSA: Thank you, Mr. Moore. Mr. Drees.

MR. DREES: Thank you for inviting me today to talk with you. It's an honor to be here. In fact, it's such an honor that I've been bragging about it for the last couple of weeks; and sadly, my three teenaged children haven't been as impressed by it as I thought they might be. But I've also mentioned it to our CJA panels. My office administers four CJA panels around the state of Iowa, and we try to have once-a-month lunch meetings with continuing legal education components to it. And so during the most recent of those two meetings, I asked the panel, if you had ten minutes to talk with the U.S. Sentencing Commission, what would you tell them. And their

answers were remarkably consistent, both between the panels and consistent with the types of things you've been hearing here for the last day and a half.

They asked me to ask you to please continue to do whatever you can to eliminate mandatory minimum sentences. They asked you to amend the drug guidelines. They asked you to reduce the penalties in child pornography cases, and they also wanted you to know that in their view the advisory guideline system is working. It's an improvement. It has increased the fairness and honesty of federal criminal sentencing. So I pass that message on to you from the CJA panels in Iowa.

You've heard previous testimony, both today and in other regional hearings, particularly from U.S. attorneys, saying that the advisory guideline system, contrary to working better, is actually fostering increased disparity around the country. For example, in Chicago, Mr. Fitzgerald acknowledged that there have been benefits to the advisory guidelines system, but he also, he and others, have claimed that sentencing disparities have grown under this system, and they blame it in part on the idiosyncrasies of the judges or on the personal sentencing philosophies of the judges. And Mr. Fitzgerald said that variances

have, in fact, increased in what he called contested sentencings, that is, a sentencing to which the government objected. And then yesterday Mr. Jones, the U.S. Attorney from Minnesota, also said the same thing, that disparities have increased because they are up in these contested sentencings. The data, however, don't support this claim regarding contested sentencings.

First off, and most importantly, as Judge Hinojosa said in Chicago at the end of the U.S. Attorney's session, the U.S. Sentencing Commission's data on which the U.S. attorneys were relying for making this claim don't have a category for contested sentencings. And second, probably the closest category from the United States Sentencing Commission's data from which you might extrapolate this group of contested sentencings is the nongovernment-sponsored below-range sentences.

And I apologize in advance for bogging us down in some statistics to come, but this is an important point that I think we need to address. The third quarter preliminary report on sentences says that there were 9,110 nongovernment-sponsored below-range sentences. And so you might assume that the government objected in all of those 9,110 nongovernment-sponsored below-range sentences and, therefore, those are

contested sentences, but that assumption would be incorrect.

Table 6 of the report talks about the attribution of the sentences, the variances; and those are based upon the statement of reasons that the judges submit after imposing sentence. And of those cases in Table 1 that are classed as nongovernment-sponsored below-range sentences, the government did not object to the defense motion for a downward variance in 1,738 of the 4,137 instances reported there. That is, the government did not object in 42 percent of those cases, instances, where the defense filed a motion for a downward variance.

Another category in Table 6 includes 2,368 cases in which the court checked no boxes in the statement of reasons. In other words, in over a quarter of those nongovernment-sponsored below-guidelines cases, we don't know the source of the variance or the source might even have been the government in those cases. We simply don't know. But since 68 percent of the 21,213 cases in which the attribution box was checked or identified as government sponsored, again, 68 percent of the cases were government sponsored, and the government didn't object in that 42 percent in which the defense filed the

motions, it's reasonable to assume at least, that some part of that 2,368 cases for which there's no checkmark was sponsored by the government, or at least the government didn't object. And so I wanted to address that issue.

And another part of the data that -- another part of the cases that the data don't catch are the Rule 35 motions that come later where the sentence is below the guideline range, and another, still another, but, granted, a much smaller set of cases, would be those, and I assume that we have all seen them, where the assistant U.S. attorney comes into court for the sentencing and, based upon a recommendation from someone higher up in his or her office, the assistant U.S. attorney dutifully says I object to this downward variance; but everyone in the court can tell that the assistant really doesn't object, his or her heart isn't in it, but he or she is responding to directions from up above.

We said, and I said in our written testimony that we submitted, that I don't believe that the current Department of Justice under Attorney General Holder would purposely mischaracterize statistics, but I have to begin to question that because in Chicago, Mr. Fitzgerald, when alerted to

this issue, said that he would see that it gets corrected; and then yesterday Mr. Jones brought up the same data, and Mr. Hofer indicates that the data on which Mr. Jones was relying were seriously flawed. And so we'll follow up on this with a letter to the Commission and also a letter to the Attorney General on what these contested sentencing issues mean.

My own experience in my preparation for this hearing leads me to believe that the advisory guidelines do not cause unwarranted disparities. In fact, in my view, they often prevent unwarranted disparities. In my experience, the most pronounced and unfair disparities are caused by first, prosecutors exercising their discretion, particularly in cases where there's a mandatory minimum involved. And second, the failure of some of the guidelines to recommend a fair and rational sentence.

After *Booker*, of course, judges can reduce these disparities to some extent. And not all disparities should be avoided, because after all, the Sentencing Reform Act said that disparities that are based upon the purposes of sentencing are not only inevitable but they are desirable. The Sentencing Reform Act also directed the Commission to reduce unwarranted disparities but said the Commission should

maintain sufficient flexibility so that there can be individualized sentencings.

So there has always been differences among districts and there always will be. Some interdistrict disparity is warranted, some is not. As I mentioned, my office administers four CJA panels and we cover two districts. We cover the Southern District of Iowa, where my home office in Des Moines is, and we also cover the Northern District of Iowa, and the districts are basically split by Interstate 80 that runs east and west across the state of Iowa. And for the most part, the two districts have similar demographics, similar rates of crime and similar types of crimes; but in the past ten years as federal defenders, in comparing the two districts, I've concluded that the prosecutors in the Northern District of Iowa create unwarranted disparities, and they do this in a number of ways: first by overcharging; second, by seeking unduly severe sentences; and third, by manipulating some of the rules to their advantage. And in the written testimony I've given some examples of how this happens in the Northern District, but I'd like to point out just a couple of them.

Sometimes this happens in relation to mandatory minimums and it occurs when the mandatory

minimums require an absurd result that is beyond the ability of the court to repair it. Dane Yirkovsky, for example, was living with his girlfriend, and instead of paying rent, he decided he would help her remodel the house that they were living in. And one day he was pulling up some carpet and he discovered a bullet under the carpet. He didn't think anything of it and he put it in a box and left it there, and that's where the police later found it. So he was charged with being a felon in possession of a bullet in the Northern District of Iowa. He had on his record a couple of prior burglaries and an attempted burglary, which qualified him as an armed career criminal, and the district court sentenced him to the 15 years in prison that that statute requires for possessing a single bullet. He appealed, naturally, and the Eighth Circuit affirmed the sentence, and the Eighth Circuit said we recognize that this is an extreme penalty under the circumstances of this offense, but our hands are tied by the mandatory minimum sentence that the Congress has imposed in this case.

Another instance where I think the U.S. Attorney's Office in the Northern District of Iowa creates unwarranted disparities is in their selection of charges. As you all know, the safety valve has a

list of statutes to which it applies, and in small town Iowa and even in some of the smaller cities in Iowa, you don't have to walk far or drive far before you get to a playground or to a school or to a library, so you're within easy distance of one of those protected zones under 21 United States Code § 860, so the prosecutors in the Northern District of Iowa add that charge when they can to the drug indictments; and if they get a conviction on that charge, it disqualifies someone who might otherwise be eligible for the safety valve, and so that is a manipulation of the rules that I believe is unfair.

You've also heard in previous hearings about §1B1.8 of the guidelines, the provision that provides for immunity when a defendant gives information to the government; and you've heard that in some districts of the country, that immunity attaches shortly after arrest, and it goes back to when the person was arrested, if they start cooperating then. In other districts, for example in the Southern District of Iowa, where I practice most often, that immunity attaches after you have a formal written proffer agreement with the government.

In the Northern District of Iowa, it's a different and, in my view, a worse system because they

don't use §1B1.8. People who cooperate with the government in the Northern District of Iowa in the proffer agreements, it says anything you say is going to be used against you, including at your sentencing. So people sometimes decide to proffer, although as you might imagine this policy is a big disincentive on proffering. And when they do proffer, the information they implicate themselves on sometimes boosts the sentence up above where they might otherwise have been.

Back in 2001, we raised this issue as a ground for a departure in *U.S. v. Buckendahl*, and Judge Bennett agreed that that should be a basis for a departure because it created this interdistrict disparity; and the testimony from our experts and from others included that the Northern District of Iowa rarely, rarely uses 1B1.8, and that it is maybe one of three or four other districts in the country that refuse to use §1B1.8.

So Judge Bennett ruled in our favor, the government appealed, and the Eighth Circuit reversed and said that no, this type of interdistrict disparity is not a basis for a departure, the Commission took this into account, and so it's not a basis for a departure.

After *Booker* the issue was raised again

as a basis for a variance. Judge Bennett ruled in our favor again, it went to the Eighth Circuit, and the Eighth Circuit again reversed and said, no, it's not a basis for a variance either, this type of interdistrict disparity. And so that's where it sits now, the U.S. Attorney's Office in the Northern District still does not grant 1B1.8 protection, and it is not a basis for a departure or a variance, but we will most likely continue to raise that issue.

Finally, the U.S. Attorney's Office in the Northern District of Iowa withholds the § 3553(e) motion in some cases in order to reduce the judge's discretion to give a reduction for substantial assistance. I cited the *Moeller* case in the testimony. And there Mr. Moeller had been involved in drug trafficking, and his sentencing range was 78 to 97 months, and he had cooperated early on in the case. He gave information that lead to a search warrant of a codefendant's house, he gave three proffer statements and he also testified at a codefendant's sentencing; and when it came time for his sentencing, again, he was looking at that 78- to 97-month range, the government filed a 5K1 motion and recommended a 20 percent reduction, which would have taken him from 78 months down to 62 months, just two months above the five-year

mandatory minimum. And the government refused to file the 3553(e) motion that would have let the court go below the mandatory minimum. Judge Bennett, again, asked the government many questions about why they were doing this, and in the end he ordered that they file the motion. They did. He sentenced the defendant to 50 months. The government appealed. He was reversed again because you can't compel the government to file that motion unless there's some showing of bad faith on their part. So that, again, is the status of the situation in the Northern District.

The Northern District also will file a 3553(e) motion on some counts in an indictment and not on other counts, again to control the judge's discretion to go below a mandatory minimum.

And I've heard it asked at the hearing yesterday, and I've seen it in other transcripts of regional hearings, whether we see low-level offenders coming through the system and going to prison, and the answer is that yes, we do.

There are a lot of methamphetamine cases in Iowa and so we see people who have been serving as couriers or mules. We see people, sometimes girlfriends of men, who are involved in methamphetamine transactions who get pulled in to maybe make a delivery

or to make some phone calls. They get pulled in and are subject to the mandatory minimum sentences.

We also, as far as low-level offenders go, last year in May had nearly 300 low-level offenders sentenced to incarceration in Postville, Iowa. The folks who were working at the meat packing plant there, who were trying to earn a living for their families, were threatened with aggravated identity theft charges and the two-year mandatory minimum that that entails unless they agreed to an 11(c)(1)(C) plea to five months in jail, and virtually all of them agreed to that deal. They had no choice. Unfortunately, earlier this year -- well, fortunately from the defense perspective but unfortunately for those defendants, the United States Supreme Court eliminated the basis for the threat that the prosecutors used in the *Flores-Figueroa* case, where the Supreme Court said that the government has to prove that the defendant knew he was using an ID that belonged to another real person, but those 300 defendants went to jail.

And to add insult to injury, and to just digress a little bit here for a moment, some of them were held by the government as material witnesses, and they were released before the trial, but the government wanted them to be material witnesses for Sholom

Rubashkin, who was the owner of the Agriprocessors meatpacking plant, and that trial is going on right now. It was transferred to Sioux Falls, South Dakota, about 300 miles or so from Postville. The added indignity of the situation is that these people have been staying in the United States. Many of them, when I spoke with them, wanted to just go back to Guatemala. But they've been staying here to be material witnesses, and recently I learned that they have to go to Sioux Falls to be witnesses in this trial, but under the statute, the government cannot pay for a hotel room for them because they are in the United States illegally. So the government is trying to find homeless shelters and other places to put these material witnesses up. That's the most recent thing I've heard, the most recent bit of indignity forced upon these people.

Getting back to methamphetamine cases briefly, another group of people are the folks who do "smurfing," and smurfing is when you go to the local convenience store, you go to the drugstore and you buy some pseudoephedrine for the person who's going to manufacture the methamphetamine and you make that delivery. And there are a number of those cases pending right now in the Northern District of Iowa where people have been out smurfing and they are facing

sentences for that conduct.

The guidelines for actual methamphetamine were increased some time ago when Congress increased those mandatory minimums, and then when the pseudoephedrine issue came on the scene, the penalties for pseudoephedrine were linked to the guidelines for actual methamphetamine. It's a one-to-two ratio. So some of these low-level offenders who were just involved in smurfing are getting sentenced at levels similar to those who are actually doing the production of the methamphetamine.

So that brings me finally to guideline changes that we would request. And the first is to remove the link between mandatory minimums and the drug guidelines. That link creates the type of injustice that I've just mentioned. And we also ask that you at least cut two levels off of the current drug guidelines because, as with the crack cocaine guidelines, those guidelines are above the mandatory minimum levels. And if you believe that you can't amend the drug guidelines at this point and to delink them from the mandatory minimums, we ask that you at least publish a report with an alternative guideline proposal in order to educate Congress and to continue educating Congress on the seriousness of this issue.

We ask also that you expand the safety valve to cover all mandatory minimums and to at least cover people in Criminal History Category II to avoid the imposition of mandatory minimums on people who sometimes still have relatively minimal criminal records.

In Iowa you get an DWI, driving while intoxicated offense, and then you lose your license, and if you then get a license under suspension conviction and get sent to jail for 30 days, that's two criminal history points, and then you don't qualify for the safety valve. And making this change would also help avoid that manipulation of including a charge under 21 U.S.C. § 860 for conducting drug activities in a protected zone.

I ask also that you amend the guidelines that are prone to manipulation. For example, amend §1B1.8 to say, at least in the commentary, that the Commission does not have a policy of approving unwarranted disparities that are created by the disuse of that guideline. Just a commentary would go a long way toward correcting the Eighth Circuit's interpretation of what the prosecutors in the Northern District of Iowa do.

And then reduce the child pornography

penalties. Judge Easterbrook and many other judges have talked about how severe those sentences are. In the Iowa districts, as in most districts, these defendants who are charged with possession of child pornography or receipt of child pornography have little criminal history, in my experience, and usually have no contact defenses, and the studies have shown that they rarely recidivate; so when judges are sentencing these people below the child pornography guideline level, they are merely following the empirical data and the purposes of sentences, as they are supposed to.

In fact yesterday, Mr. Jones testified and he submitted written testimony. That testimony said, quote, “I cannot help but wonder if the rate of government-sponsored below-range sentences [and] the increasing rate of contested below-range sentences imposed by the court, in some instances, are signals that perhaps, the present guidelines should be reevaluated.” And that's precisely what we ask you to do, is to reevaluate the child pornography guideline in light of what the judges are doing.

And Judge Loken, sitting here yesterday, said that in his experience, you get a child pornography case and the three and four enhancements, the sentences are, and he said, horrendous. And Judge

Loken also said that the Eighth Circuit had looked at the *Gall* decision, the decision issued by Judge Pratt, who was on the previous panel. And Judge Loken said yesterday that they thought that case was an outlier, but Judge Pratt in that that case calculated the guidelines, he applied the 3553(a) factors, and he decided that probation in that case would have provided sufficient punishment. And the Supreme Court agreed that probation is punishment. And Mr. Fitzgerald in Chicago said that the instances of straight probation that have been imposed have increased since *Booker* and that has reduced certainty of sentences, certainty of punishment, but the data doesn't support him. We've provided that data on page 16 of my testimony.

In fact, probation for all offenses, as well as probation for fraud offenses, has been reduced from 2003, reduced again to 2008, and reduced to 2009. And so we ask the Commission to provide guidance on probation and on other alternatives to imprisonment, and we ask you to continue to correct the misimpressions that often arise on these issues.

And thank you again for having me come today.

ACTING CHAIR HINOJOSA: Thank you, Mr. Drees. Mr. Telthorst.

MR. TELTHORST: Thank you again for inviting me to Denver. I am humbled to speak at this venue. Whenever I take on a guideline case, or really any case, for that matter, I'm always interested in the big picture story behind the case beyond just understanding the evidence against my client, the crimes that he might have committed, and try to look at the root causes of what caused him now to be sitting in the federal jail across from me, across from the glass wall; and over the years I've distilled out some pretty common denominators that tend to bring my clients under the purview of the guidelines; and as I share these issues with you, I know that none of them is going to surprise you. We don't have to be sociologists or psychologists to figure these out. They're pretty common. They're issues like poverty, sexual abuse, including fetal alcohol and drug abuse, sexual exploitation, greed, absent fathers, addictions, low self-esteem, just generally dysfunctional families.

And when I come to understand my clients more as human beings and not just as people who have maybe broken the law, I usually find that I'm more successful in sentencing if I can speak to the court on a human level and, of course, under the advisory guidelines that's easier to do now, or at least my

words have more relevance to the court than I think they used to. And I wonder if perhaps the guidelines might be modified in a way to address some of these root causes.

My thinking is that ultimately all of us are going to be accountable for the sentences that are imposed against criminal defendants. That includes the judge, the prosecutor, the defense counsel, the community at large, everyone is going to be accountable, because in five years, ten years, twenty years, at some point in the future these people are going to be released back into our communities. And even if they're deported, my experience is a lot of times they'll be back in our communities; and all of us, if for no other reason than we're taxpayers, we're going to be accountable for what we did back at that original sentencing hearing. We're going to be accountable for what efforts we provided these people for rehabilitation, what sort of meaningful programs we afforded them in prison, how well we tailored the length of their sentence to be proportional to the seriousness of their crime. I think we're going to be accountable for what we did to address the problems of the families that are left behind.

Just this year I've had the wife of a

client come in with, I think, probably three children under the age of three, two or three, and she had maybe one on the way, and she was trying to understand why her husband couldn't be released on bond in the federal system, and she was asking me how she was supposed to buy diapers and pay for food, and how we could maybe help her out. And I think these sorts of issues, although they don't directly come under the purview of the guidelines, I think they're relevant to the guidelines and, again, I think they're issues that we're all going to have to address.

I'm just coming to a point in my practice where I've been around long enough to start to see the second generation of some of my client's families come into court, and that troubles me, and I think it should trouble the Commission as well.

I don't want to come across as a liberal ideologue here to suggest that sentencing should all be about rehabilitating people and helping their families, but these are relevant concerns. When I think of ways that we might address these issues, I think of some of the issues that I mentioned in my written testimony. For example, broadening the sentencing zones in the guidelines would be a pretty simple means of giving judges the power to recognize that individual

defendants are human beings and not just the intersection of an offense level and a criminal history category score.

I wonder if the Commission might be able to suggest a broader range of programs in prison, along the lines of RDAP. RDAP can be great but pretty restrictive in terms of the people for whom it's available. How is it that an illegal alien is not entitled to the same break for drug counseling as somebody who's a United States citizen. I'm not sure I understand why an alien should be treated differently in terms of that, and I wonder if there might be other programs that could give incentives for prisoners to reform themselves, to take their own initiative, to make themselves better people. Again, in five years, ten years, 15 years, these people are going to be living in my community, and I want them, just from a completely selfish perspective, the community in which I want my children to grow up, I want it to be safe. I want prisoners to come out of the system who have been reformed and who are going to have productive lives, and I don't want their children to have turned into criminals while they've been away; but, of course, as we all know, that's typically the cycle that we see.

Another big step, I think, toward

addressing these long-term view issues would be eliminating mandatory minimum sentences. As I mentioned in my written testimony, mandatory minimums are blunt instruments. They can't distinguish well between the mule or the girlfriend of the drug dealer or the wife of the drug dealer, and I've had all these kinds of cases, suddenly somebody is subject to a mandatory ten-year sentence or a mandatory 20-year sentence, and it's hard for me to explain to those persons why that is. And oftentimes those low-level participants, say the girlfriend, she's in the worst position to earn a 5K because she really doesn't know very much in terms of a proffer. She can't help herself and dig herself out of that mandatory minimum as easily as maybe the head guy of the conspiracy can.

Other than bringing up this long-range view of the guidelines, I don't have a whole lot more to say. I think I'll conclude here. I came to Denver not just to speak to you, but to listen to you and hopefully to understand better some of your concerns about the guidelines. Again, I thank you.

ACTING CHAIR HINOJOSA: Thank you, sir.

VICE CHAIR CASTILLO: I was trying to think of an analogy, Mr. Moore, when you say why should you take the stairs to the top of the Empire State

Building, but I don't even think I want to touch that. Instead, what I want to do is kind of reconcile your written testimony with your oral testimony. Your oral testimony is just get rid of departures. On the other hand, your written testimony, at page 19, which would have my support, is to really make some good changes to the departure language. So how do you reconcile those two things? And, before I give you the opportunity to respond, why do you think that we're going to put in thou shall not language in new departure language, when I don't think I've heard anyone suggest that.

MR. MOORE: Okay. First, perhaps I spoke too quickly. I did and do recall saying that they should be replaced with open-ended things, such as role in the offense and more positive or permissive types of departures. So I don't see a reconciliation other than perhaps in the interest of trying to stay within the bounds of the allotted time. I may have clipped where I should have watered.

In terms of why do I see, I don't see anything. I'm not suggesting that I have the ability to suggest that the Commission, in its consideration of departure issues, is leaning more in one direction than another. I'm not suggesting that you've signaled it. I'm simply suggesting that the current structure was a

much better fit for the older system, and I would hope that there is enough recognition of the current system being a different system with a different currency that we could move not just a little bit, but firmly, solidly and aggressively towards open-ended departures, encouraging departures and explaining the philosophy of those items in detail, rather than just, you know, saying we think this may or may not be.

If there's -- many of these things that we can talk about, almost all of them, have been the subject of study by someone or another, and that information hasn't really been anything that anybody got any oomph out of. You can pull this together. And at least if there is a clear understanding of the Commission's view on, you pick it, role in the offense, the disparity between fast-track programs in districts that have them and districts that don't, or any of a number of other things. It may be that, in fact, defense attorneys will find that maybe there is some value in taking the stairs every now and then. There is some exercise, if you would. It would certainly line up more with current law. It would certainly give the Commission more persuasive authority, and I think it would help the system as a whole. And I hope I've answered your question.

VICE CHAIR CASTILLO: You have. Thank you.

COMMISSIONER HOWELL: I want to thank you all for testifying. All of your testimony was enormously helpful, and again, I mean, we've heard from public defenders around the country and, once again, I have to say that your written testimony was excellent and provided a lot of food for thought, as all the testimony we've received has in all of our hearings. So I want to thank you in particular for the amount of work and the great analysis that you all have provided and provocative food for thought.

I also want to thank you for helping to make more complete the record on the *Rausch* case. I think the eyebrow-raising statement in the U.S. Attorney's testimony about the extraordinary downward departure in that case or variance in that case did prompt, you know -- or did invite elaboration on what that record was, and I appreciate that.

I want to turn to a question and call upon your persuasive arguments or discussion of a law enforcement issue that when taking your testimony as a whole, all three of you, what you would really like is to have no mandatory minimums and elimination of the mandatory minimums and under an advisory system. The

concern that law enforcement would have is if you have an advisory system, no mandatory minimums, how are you going to persuade defendants or offenders to cooperate and cooperate promptly. And that was part of the -- you know, to sort of echo or take on sort of a twist on Jonathan's question about which would you prefer, current system or a mandatory advisory system with no mandatory minimums, part of the thrust of the second option is to continue to address significant law enforcement concerns about being able to follow a chain in a conspiracy to actually get people to cooperate and find, you know, higher level individuals or a full -- all the culprits in a particular offense conduct.

So my question to you is, what's the response? If the Commission adopts your recommendation and tells Congress let's eliminate mandatory minimums and, by the way, everybody is really happy with just an advisory system, what should the Commission do when asked by policymakers about the significant law enforcement concern?

MR. DREES: Well, if I could, I'll begin just with a note on deterrence because I'd seen it at one of the earlier hearings, where a witness said that these types of high mandatory minimum sentences really deter crime, and that's contrary to my experience in

meeting with clients who are facing these types of sentences. If I go in and I meet with them and I explain the guidelines to them, particularly in a drug case where the guidelines are so high, their reaction is shock and disbelief, and they say to me, you must be mistaken and I want to get a real lawyer instead of a public pretender representing me in this case.

And so in my view, in my experience, there is not that kind of deterrence from the severity of the sentences; and I think the studies bear that out too, that it's not the length of the sentence that matters, it's the certainty of punishment, whether that's probation or a jail sentence. And so I don't think it's solely the mandatory minimums that create that incentive for people to cooperate once they've heard about the federal sentencing system.

COMMISSIONER HOWELL: I would grant you that, but then under an advisory system, not only do you not have the mandatory minimums, but you don't have a definite certain sentence of what you're going to get.

MR. DREES: You don't. But in an advisory system, you could still have that incentive to cooperate, that you're going to get a reduction in sentence if the government moves for the reduction or

you've provided substantial assistance. You'd still have that incentive, or the defendants would still have the incentive in an advisory system to give assistance in order to reduce their sentence down, even without mandatory minimums.

MR. TELTHORST: May I add to that? I think your question assumes that mandatory minimum sentences should be available to law enforcement as tools of leverage against defendants to compel their cooperation, and I don't know that that's necessarily a good assumption.

But I echo Mr. Drees's position that if you take away all the mandatory minimums -- and let's say we have a big drug case and the guideline sentence is going to be 25 years, and the prosecutor comes to me and says, well, I'm going to file this 851 and we're going to start the discussion at mandatory life, and if you want to cooperate, you can come. And the evidence is overwhelming against my client, she sold drugs to undercover police officers for six months, whatever the case might may be, my hands are pretty well tied. I don't have a whole lot of choices, it's mandatory life or cooperate and come down from that. And I think the thought process in a defendant's mind is going to be the same with or without that mandatory minimum

sentence. Whether we're talking about 25 years or life, we're talking about a really, really long time away from someone's family, and I think there will be more than enough motivation for defendants to continue to come forward and cooperate and try, at least, to reduce that heavy sentence.

MR. MOORE: And my position echoes those of my colleagues. Make no mistake, I question whether or not the linkage between law enforcement purpose and the purpose of sentencing has perhaps been over-emphasized through the course of the years, but what I would suggest is simply this: That the advisory system can work, and there is fear, there is doubt, and I suppose I embrace the comments of Judge Tacha in saying give it time, it will work.

To the extent that people want reduction in time, I don't know that I have defendants who would say are you -- you know, faced with the government is going to recommend a lesser sentence for you, that they would balk at that and somehow respond to that less than if there was a mandatory minimum there. They might say, well, can you argue. Yes. But to say that they would change their behavior solely on the basis of the presence or absence of whether there was a mandatory minimum, I'm not sure that I believe that.

People don't want to go to prison. People look at defense lawyers as not being the ones carrying the power stick in sentencing. They look to the government as being the ones who can make a difference in their recommendations.

Now, whether any of that is right or wrong, I don't share your fear that eliminating mandatory minimums would leave law enforcement powerless. I simply don't believe it, and I think that -- that the advisory system can work.

VICE CHAIR SESSIONS: I have a couple questions for you -- just, actually, one question Mr. Drees, but before I say that, I should tell you that my wife was raised in Des Moines and she turned out okay, so from that I assume you're just fine.

You raised some criticisms of our statistics. Two criticisms in particular, the first is that we don't capture the wink and the nod that prosecutors give, and I assume that that's probably with good cause. The fact is, if all of a sudden the judge tried to make the assessment that that prosecutor really is agreeing that you'd find fewer winks and nods and, you know, that would be quite counterproductive.

But the real concern that I have is that your -- your dealing -- your description of how we

captured the 300 individuals, illegal aliens, that were arrested in northern Iowa. And, you know, I have trouble understanding exactly how you described what offenses they were convicted of, but it appeared that they were assessed in our statistics in totally inconsistent ways. And is that true and is that -- is it raising some questions about our quality control in regard to these kinds of sentences?

MR. DREES: No, I don't think so. But to get back to the wink and nod issue, that wasn't intended as a criticism of your statistics. It was just to try to be thorough in explaining the data, that there are these other, granted small, groups that you can't capture that, I agree.

VICE CHAIR SESSIONS: Well, you're not suggesting that we change the SOR to reflect the fact that the prosecutor has either winked or nodded or is silent?

MR. DREES: No.

VICE CHAIR SESSIONS: You don't want that?

MR. DREES: No, I'm not suggesting that. I just wanted to state as completely as I could the possible cases that were involved.

VICE CHAIR SESSIONS: So in regard to

those 300 individuals, I really didn't understand that paragraph that you had.

MR. DREES: The point there was that most of these 300 people were offered this five-month deal to plead either to a Social Security fraud charge or to a fraudulent visa charge or to use of false information on their I-9 form. But the data -- and I don't know how it arose, the data reflected this inordinately large number of immigration cases out of the Northern District of Iowa. We do have a good number of immigration cases, but it wouldn't be the 292, or however many were reflected in that data. And so I don't know how that issue arose, but those were categorized as immigration cases, and I think they were also categorized as below the guideline immigration -- well, no, only one percent below the guideline immigration cases, and it gave the appearance that immigration cases in the Northern District of Iowa have this median sentence of about seven months, which isn't the case. We get a good number of the 16-level bumps for prior aggravated felonies.

VICE CHAIR SESSIONS: You also said the average sentence was like 16 months, or that we said that in our statistics, and of course it was five months, so I couldn't figure out how in the world we

arrived at that. Are you suggesting that there was some quality control issue in regard to collecting that data?

MR. DREES: I don't know whether it was from the Commission or whether it was in the hurly-burly of that whole one-week-long processing of all of these defendants who came through that maybe the statement of reasons had some box checked for immigration cases when, in fact, they weren't.

ACTING CHAIR HINOJOSA: Fraudulent documents with regards to immigration status is an immigration case. There would be no other way to call that other than an immigration case. They were being charged with fraudulent documents with regards to their immigration status, which is an immigration case. They weren't crossing at that point illegally, but the case is an immigration case. That's what the whole prosecution was about. And so you can also break down what we call immigration cases by guideline. They would not be under 2L1.2, but they would be under whatever guideline applies with regards to the fraudulent document with regards to your immigration status. It isn't that they've been classified incorrectly, because they are immigration cases. That's what this is all about.

VICE CHAIR SESSIONS: But I thought that in your draft, in your letter, you said that not all 292 got immigration. There was some immigration, there was some Social Security, there was some Y, X and Z, and they all had different sentences, and it didn't seem to jive with what you had said happened.

MR. DREES: That's right. There were some Social Security fraud cases.

ACTING CHAIR HINOJOSA: But it's all related with regards to the charge under fraudulent documents with regards to immigration status.

MR. DREES: Even though it was 42 U.S. Code § 408, or whatever it was for the Social Security charge?

ACTING CHAIR HINOJOSA: I have not seen the charges. I'm just saying that however they came, they would be put into that particular document. It isn't like somebody at the Commission would have automatically called them immigration cases unless they came from an immigration guideline.

Now that we're talking about examples, you spoke about the one bullet case. And I guess just to clarify the thinking of what got into the prosecution, how did they get into the home in the first place? Were they looking for something else?

Did they have a search warrant with regards to some other potential violation of the law that brought them into the home where they found the matchbox with the one bullet?

MR. DREES: I think Mr. Yirkovsky's relationship with his girlfriend went bad and they had a falling out of some sort. And I believe it was a dispute over some property issue between them, and that's what brought the police in and got them searching.

COMMISSIONER FRIEDRICH: Mr. Moore, I have a couple questions for you. You've expressed disagreement with the illegal reentry guideline and say that's something we should focus on. And as you know, in the past we've struggled with this, how to change. We get a lot of comments from all sides that there's problems with that guideline. So my first question is, I'm very interested in how you would recommend that we do change. Should we continue to focus on the severity of the prior record? Should we be looking at other things like how many times an individual has been in the United States illegally? What would your specific suggestions be in that regard? Go ahead.

MR. MOORE: Okay. First decide what purpose of sentencing you're trying to advance. Is it

simply punishment? Is it recidivism? Is it how frequently people return to the United States? Is it promote respect for the law? Whichever one of those or combinations of those outcomes you choose will probably influence which way you go with specific offense characteristics.

But if I were being critical in a broader sense it would be this: One of the things that's always troubled me about that guideline is that it seems to be just divorced from the whole concept of the rest of the guidelines. You hear, and you hear often, about offense conduct. It's all about offense conduct, sentence for real behavior. And you look at this and, frankly, the behavior, the conduct of reentering the United States, is the same. It's the same whether I've got an aggravated felony or I have no felony. It is the same. It is essentially coming over by boat, by land, I suppose by air, and breathing.

So we're not really, in the current guideline, in my opinion, punishing anything that has to do with offense behavior. I think what we're doing is that we're looking at bogeymen. We're saying years ago you did this and, therefore, you're scary; and, therefore, we want to give you more time to give you an incentive to not come back because we believe that

you're going to do it again.

Now, what's curious about that, is that when you look at these types of things on the criminal history category, which is really kind of projecting along that same vein, recidivism, how much time does the person need, when is his sentence relevant or not relevant, there are time cut-offs; but over in the illegal reentry, there are none.

I think what you should look at is any number of things. I think you should look at, perhaps, how long ago, I think, that they were deported and when they came back. How many times? Perhaps what are they doing while they're here. Are they reentering the United States and working or are they reentering the United States and fulfilling the bogeyman fear? There are any number of things, but I suggest that they be things that's tied to the conduct and what purpose it is you are trying to achieve.

And right now, all I can do is guess at it. My guess is similar to Judge Hartz's, that it's some kind of a projection about what's going to go on in the future, and I don't think that we as a country have ever really embraced this kind of punish you for what you might do over punish you for what you've done.

ACTING CHAIR HINOJOSA: Mr. Moore, I

think what's unfair about that statement is that the statute itself is worded that way. It used to be when I came on the bench, the most you could get for that offense was two years. Congress amended that statute to read two years, up to ten years if you have been convicted of a felony before you were deported, removed or whatever that list is; and it's up to 20 years if you were deported or removed after a conviction for an aggravated felony, and then there's a definition in the statute of an aggravated felony. So this isn't something that just came out of nowhere. It's in the law itself.

MR. MOORE: Sir, I don't suggest that it came out of nowhere. I do suggest that what Congress decided to do and the bases upon which it decided to increase the statutory maximum, does not necessarily mean that that is something that the Commission must embrace in determining what is the appropriate sentence. Because just as those statutory maximums at one end are two or tens or 20s, in each instance, even when it went from two to ten to 20, it also was zero. And so for those who are persons who have committed an aggravated felony, it is zero to 20 and, therefore, in that range there must be brought to bear some way of distinguishing these people other than by saying this

offense constitutes that on the -- and just arbitrarily putting a number on.

I don't know what the basis is for the 16-level enhancement. I know that when the guideline was originally created, it was an offense level 6 and that now for some defendants, for reasons that I don't know, and it may be my ignorance, the severity has increased by 400 percent. I just don't think that this linkage to Congress set the maximum means that we must move our sentencing policy in the exact same direction if there is a philosophy that suggests going in a different direction.

ACTING CHAIR HINOJOSA: Congress itself went from two to 20 years. What percent is that? Is that 1,000 percent or what percent is that? So there was a policy decision made by Congress with regards to that particular violation of the law. And I say from experience, because I was on the bench when it was two years was the maximum. And so let's say I was in a totally discretionary system, no guidelines, am I to ignore the fact that Congress has told me that this person with this particular kind of conviction before they were deported or removed, I should treat them the same?

MR. MOORE: No, sir, but their bad math

must not be your bad math either. I just simple say that purposes of sentencing is more than simply Congress setting maximums. This is why I ask for more information. This is why others ask for more information. This is why information in the form of empirical data, something other than simply Congress raised the number, would enable defense attorneys, prosecutors, district court judges and appellate judges to better understand, appreciate and respect the guidelines; and if our opinions on that matter are different, then we just simply share different opinions.

MR. DREES: And if I might just follow up briefly, it's in those situations where the Sentencing Commission has followed congressional directives, the Supreme Court has said that your determination is --

ACTING CHAIR HINOJOSA: This isn't a directive, it's the maximum. It's the law. It's been changed. It's not a directive. This is a change in the law with regards to what the maximum was from two to 20 years.

MR. DREES: And you have interpreted that as a directive that you must, in turn, increase the guidelines.

ACTING CHAIR HINOJOSA: Well, do you just pretend like it wasn't changed?

MR. DREES: I'm not saying that you have to just ignore it.

ACTING CHAIR HINOJOSA: That's the question here. Let's say we didn't have guidelines and I'm just the judge looking at what I need to do. One of the 3553(a) factors is consider the sentences available. And for certain people that's two years, for other people it's up to ten years, for other people it's up to 20 years. And do I pretend like that's a factor that I don't consider?

MR. DREES: No. I'm saying you don't ignore what Congress has said, but one of the functions, as I understand it, of the Sentencing Commission, is to educate Congress and to educate the lawyers and the judges and the public on the purposes of sentencing, and that's the type of empirical information that I believe Mr. Moore was seeking, is what is the purpose of the sentence in these immigration cases. Why do we impose a 16-level increase on these people? Does it serve some purpose of retribution or deterrence or rehabilitation or simple incapacitation. But it is the Sentencing Commission's function, I believe, to educate us on that

and do that by performing your own studies or looking at studies performed by others.

VICE CHAIR SESSIONS: Well, not to look at history, but when I was on the -- when Ruben and I were on the Commission at the very beginning, when those changes were made, they were all getting 16. Everyone was getting a 16-level increase. And what actually that guideline did was substantially reduce the penalties for all of the persons who received less than the 16-level bump, historically.

Now, your point about the empirical study is -- remains the same, there's some question as to whether judgment of commissioners also becomes a relevant factor in that regard, but historically, the fact is, the way we got there is because of a dramatic reduction in penalties, not an increase.

MR. MOORE: And I recognize that. I appreciate that and I respect that. By the same token, the rate of departures really isn't changing -- the departures below-guideline sentences, really isn't changing, and that signal means something.

ACTING CHAIR HINOJOSA: What is changing about that particular guideline, to answer some of the questions, is if I'm not mistaken, that's one of the guidelines that has the least departure variance rate

that is not government sponsored. When you compare it to some of the other guidelines and the nongovernment-sponsored departure variance rate, that one shows up, when you look at immigration cases, at a lower percentage.

You know, I'm not disagreeing with your views or how you're classifying the punishment here. I'm just saying that when you look at departure variance rates in immigration cases. I do believe that it's different than it is in other cases.

MR. MOORE: Well, I think that there are hiccups in the system that may account for that. I mean, obviously --

ACTING CHAIR HINOJOSA: There may be some, and it will certainly be something that we all should look at.

MR. MOORE: There are states that have massive contributions to the statistics relative to others, and so if those are fast-track states, then you would, of course, see the numbers sliding in the direction to which you've just referred. And so I hear you. I agree with you. I don't have it all broken down in my head.

ACTING CHAIR HINOJOSA: It's not just the government sponsored. I do believe also that the

within-guideline sentences are at a higher percentage in those type of cases than they are in the others, without including the government-sponsored departure variances. And I may be wrong, because obviously I deal with immigration cases, as well as with a bunch of other cases in my court, but it is something that I've looked at.

MR. DREES: And we'll certainly accept your invitation to look further into it and submit something further on that issue.

ACTING CHAIR HINOJOSA: As we will continue to do. Does anybody else have any other questions? Thank you all very much, and I do have to say that it's always good to hear from federal defenders and prosecutors because we obviously, as district judges, rely on them in the courtroom. And on behalf of the Commission, I want to thank all of the participants who, for the last day and a half, have participated in this public hearing. I also want to, on behalf of the Commission, thank the entire staff, Judy Sheon, the staff director, as well as all the members of the staff, for their hard work with regards to this particular regional public hearing, which went off as well as all the other four have gone.

We know it's not easy and we know it's

difficult to get it all set up and to put all of us in place, and so we certainly appreciate it very much, and certainly each one of the members of each one of the panels thanks you for your time and all of the thoughts that you have shared. And I hope that everyone takes the fact that if we do ask questions or make comments, that it's all part of our job with regards to how we try to arrive at guideline amendments and guideline promulgations that satisfy the 3553(a) factors and the statutory requirements that the Commission has, as well as conduct all the other work we do, which is data collection, training, research, reports to Congress; and the fact that you all are here make our job easier.

MR. MOORE: All that I would say is that we take no offense and appreciate the opportunity to engage in discussion.

ACTING CHAIR HINOJOSA: Thank you all very much.

... The hearing was adjourned at 12:02 p.m.