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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

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WEDNESDAY, SEPTEMBER 9, 2009

AND

THURSDAY, SEPTEMBER 10, 2009

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

COMMISSIONERS PRESENT:

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

STAFF PRESENT:

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

Court Reporter:

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

1 PANELISTS PRESENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25

1 PANELISTS PRESENT: (Continued)

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

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

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

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

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

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

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Adjourn

08:43:00 1 OPENING REMARKS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

08:56:51 1 University School of Law.

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

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

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

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

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

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

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

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

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

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

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

08:59:58 20 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

09:11:49 9 Chief Judge Carr.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

09:30:05 1 the courtroom.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

09:38:37 8 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

09:46:00 4 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10:23:27 16 Commissioner Howell?

10:23:29 17 QUESTION AND ANSWER SESSION

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

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

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

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

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

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

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

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

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

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

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

10:26:19 6 that the Commission has.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10:34:27 8 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10:44:34 2 Several thoughts there.

10:44:34 3 COMMISSIONER WROBLEWSKI: Could I ask one quick

10:44:36 4 question because you mentioned appellate review a number of

10:44:39 5 times.

10:44:39 6 From where I'm sitting in Washington, it looks like

10:44:41 7 appellate review is not a significant force. And the reason I

10:44:45 8 say that is because literally over the past five years since

10:44:48 9 *Booker*, maybe a handful or two handfuls of cases --

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

10:44:53 11 COMMISSIONER WROBLEWSKI: If you could just explain

10:44:56 12 that to me a little more.

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

10:44:57 14 CHIEF JUDGE ROSEN: Maybe we're just a little more

10:44:59 15 sensitive when we do get reversed.

10:45:02 16 CHIEF JUDGE CARR: No, no, but speaking first,

10:45:03 17 myself, I'm always aware that this sentence may be reviewed if

10:45:09 18 I vary. I mean I have that sense. Does it happen very often?

10:45:16 19 And, actually, I was favored with the statement of our first

10:45:20 20 assistant public defender from whom you'll hear later, and she

10:45:24 21 mentions the low rate of appeal. I was astonished at how

10:45:28 22 infrequent appeals are.

10:45:30 23 I attribute that to one very simple thing: That even

10:45:33 24 when we vary, the prosecutors, who are the ones more likely to

10:45:40 25 appeal because we more often vary down, look at it and say,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 CHIEF JUDGE McCALLA: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11:25:30 9 Thank you.

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

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

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

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

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

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

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

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

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

11:27:54 1 limited ability to depart.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11:35:46 1 who's a first-time offender. His range is 18 to 24 months.
11:35:50 2 Now, take somebody at the same offense level with two prior
11:35:53 3 armed robbery convictions. He's a Criminal History Category
11:35:58 4 III, but he faces a range only six months more, 24 to
11:36:03 5 30 months.

11:36:04 6 It's incomprehensible to me how these two defendants
11:36:07 7 would actually have overlapping sentencing ranges. This
11:36:11 8 really strikes me as an injustice and really a poor use of
11:36:15 9 scarce criminal justice resources.

11:36:18 10 As we all know and has been discussed, incarceration
11:36:21 11 is incredibly expensive. I believe that people in Criminal
11:36:27 12 History Category I should be given more opportunity at
11:36:29 13 probation or some alternative sentencing.

11:36:31 14 I firmly believe, setting cases aside where there's
11:36:34 15 violence involved, that defendants should be given an
11:36:38 16 opportunity to demonstrate that they simply made a mistake.
11:36:41 17 Now, I become much less sympathetic to defendants who are
11:36:44 18 coming through the system for the second, third or fourth
11:36:48 19 time. For those defendants, they're not entitled to the
11:36:50 20 benefit of the doubt, so prison is absolutely necessary for
11:36:54 21 those type of offenders. But for first-time offenders,
11:36:58 22 proceeding immediately to incarceration even for relatively
11:37:02 23 minor offenses has always struck me as rash.

11:37:06 24 Third, the way in which mandatory minimums dovetail
11:37:11 25 with the guidelines sometimes poses problems. I don't believe

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

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

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

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

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

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

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

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

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

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

11:40:16 1 valve eligible.

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

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

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

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

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

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

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

11:42:10 9 QUESTION AND ANSWER SESSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11:58:23 12 Is that your experience?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:13:27 1 with the courts.

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

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

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

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

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

12:14:41 1 officer program.

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

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

12:15:08 10 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:25:05 8 Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:36:10 7 Thank you.

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

12:36:15 10 Commissionener Carr?

12:36:17 11 QUESTION AND ANSWER SESSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:45:08 1 branches.

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

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

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

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

12:46:33 1 anyway ...

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

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

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

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

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

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

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

12:47:38 2 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

02:20:19 1 are on parole.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

02:37:02 5 And, again, I understand that there is none in the federal
02:37:05 6 system.

02:37:05 7 The states face this, and, again, you are and can be
02:37:11 8 a messenger. We like to, I think, and I know because I get
02:37:16 9 asked when I sit in front of -- at a table like this to
02:37:19 10 legislators, and they'll say, Mr. Secretary, what are the
02:37:23 11 federal people doing about this? And what's the federal
02:37:26 12 sentencing guideline on this? And how many, you know, how
02:37:32 13 much crack do you have to have for it to be residue enough to
02:37:36 14 charge under the federal system? You know, what's drug
02:37:40 15 paraphernalia under the federal system?

02:37:42 16 And we turn to you, much like you were the -- I
02:37:48 17 guess, the sort of NASA of sentencing stuff, even though I
02:37:52 18 think we would all agree that any kind of sentencing is sort
02:37:55 19 of -- it's, you know, it's our best guess and how we go from
02:38:02 20 some sort of proportional sentencing so we don't just have the
02:38:06 21 death penalty for everything. Where does it come in at? But
02:38:11 22 you are looked to.

02:38:13 23 So as you take these testimonies, and I compliment
02:38:16 24 you for going around the country and doing that, in particular
02:38:19 25 for talking to states, any opportunity you can through all of

02:38:24 1 the sister agencies, whether it's the National Criminal
02:38:27 2 Justice Association, Council on State Governments, National
02:38:31 3 Governor Association, any forum that will help educate folks
02:38:36 4 like these and the public as to truly what goes on inside the
02:38:40 5 criminal justice system and the sentences for crimes and any
02:38:46 6 evidence-based knowledge that we get, what works and what
02:38:50 7 doesn't work, I not only urge you, I commend you in advance
02:38:53 8 for putting that forth.

02:38:56 9 Mr. Kennedy.

02:38:57 10 ACTING CHAIR HINOJOSA: Thank you, Mr. Brown.

02:38:58 11 Mr. Kennedy, sir.

02:38:59 12 MR. KENNEDY: I, too, am honored to appear before the
02:39:03 13 NASA of sentencing.

02:39:07 14 I'm also here with some trepidation because I am
02:39:11 15 about to strike, I think, a very discordant note in these
02:39:16 16 polite proceedings.

02:39:18 17 I'm genuinely optimistic. I got into what I do
02:39:25 18 25 years ago because, with no real intention, I ended up
02:39:32 19 wandering around in blighted communities in the very first
02:39:39 20 months of the then-young crack epidemic, and I was absolutely
02:39:43 21 appalled by what I saw. I was a naive white kid who didn't
02:39:48 22 think much about this stuff at all and was just horrified by
02:39:53 23 community conditions in those places.

02:39:56 24 And I still am. I don't care what works. I don't
02:40:02 25 come from any particular ideological or scholastic background.

02:40:08 1 I have no advanced degrees. It turns out a Swarthmore
02:40:11 2 undergraduate degree is all you need in the world of
02:40:14 3 universities.

02:40:14 4 When I got my chair at John Jay, they had to get a
02:40:18 5 waiver of requirements from CUNY to give me my job, which I'm
02:40:22 6 happy to say they did, but I am in this for change on the
02:40:28 7 ground, and for the first time since beginning this 25 years
02:40:35 8 ago, I feel like we are beginning to get it and that there
02:40:40 9 are, in fact, things that are within our reach that will make
02:40:43 10 really large, important, immediate changes in these
02:40:50 11 communities with respect to the kinds of crimes that Director
02:40:54 12 Brown was talking about, that we've been talking about today.

02:40:57 13 The discordant note is that those things don't
02:41:00 14 operate within the frame of the kind of conversations that
02:41:03 15 we've been having here. And federal judges sit for life, yes?
02:41:12 16 So I can name names here and not get anybody in trouble?

02:41:16 17 I'm friends out of my Boston work with Judge Nancy
02:41:20 18 Gertner in Boston, who I expect a lot of you know, and also
02:41:25 19 through work subsequent to the Boston time with Judge Steve
02:41:28 20 Robinson, who was U.S. Attorney in Connecticut at the time and
02:41:32 21 is now a sitting federal judge in [New York]. And Judge
02:41:36 22 Gertner teaches a sentencing course at Yale and asked me to
02:41:40 23 come up and sit in on that, which I did about six months ago.

02:41:44 24 It's a day-a-week seminar, so this was six hours in
02:41:48 25 which she and her class went over two lightly disguised real

02:41:54 1 cases that she had presided over. They were two drug dealers
02:42:00 2 from Roxbury, which is one of Boston's most dangerous sort of
02:42:04 3 drug and gang neighborhoods. And it was the kind of
02:42:08 4 conversation that we've been having today, so what's right and
02:42:11 5 what about the guidelines and what do the guidelines actually
02:42:14 6 mean and what's discretion and what do we do post-Brown and
02:42:17 7 all that kind of thing.

02:42:18 8 And her students, these Yale law school students,
02:42:23 9 were scary smart. So we had this extremely sophisticated
02:42:27 10 discussion about this, in which their sentencing suggestions
02:42:32 11 ranged by more than a factor of ten from the relatively
02:42:36 12 lenient to the very high. And it came to my part of the day,
02:42:42 13 which was about hour and a half before we broke, and I said to
02:42:46 14 Judge Gertner and then to Judge Robinson, so let's say any of
02:42:52 15 the proposed answers had been followed. Is there any
02:42:56 16 conceivable answer with regard to sentencing in these two
02:42:59 17 cases that would make a meaningful difference in public safety
02:43:05 18 in Roxbury, Massachusetts?

02:43:07 19 And first Nancy said no. And then I turned to Steve,
02:43:09 20 and Steve said no. And then I turned to the students, and the
02:43:14 21 students all said no. And at some level, this is an outrage,
02:43:18 22 right? We had spent the entire day debating two matters which
02:43:24 23 everybody agreed that no matter what we did, it wasn't going
02:43:29 24 to change things in Roxbury.

02:43:33 25 And that is our normal experience in law enforcement.

02:43:37 1 It's why the stuff that I'm going to be talking about a little
02:43:39 2 bit later on has been developed.

02:43:42 3 If our ordinary system activities produced the
02:43:45 4 results that we wanted, that would be fine, but they don't;
02:43:49 5 and it is the routine experience of people in law enforcement
02:43:54 6 that they do their more ordinary work, their traditional work.
02:44:01 7 And these are my friends. I'm in awe of these people. They
02:44:05 8 work really hard. They mean it, and at the end of the day,
02:44:08 9 they may have done a good day's work and they're proud of what
02:44:11 10 they did, but does it change things in a meaningful way at the
02:44:16 11 community level? It does not.

02:44:18 12 And I worked with some of your people in San
02:44:22 13 Francisco who had taken down the worst drug crew in Hunters
02:44:28 14 Point, San Francisco. They did a beautiful job. This was a
02:44:31 15 monstrous drug crew. They dismantled it, and Bayview-Hunters
02:44:38 16 Point is just as dangerous now as it was then. This is the
02:44:42 17 way our world usually works.

02:44:43 18 There are things -- I was going to say appearing, but
02:44:46 19 it's better than that -- they have appeared that don't work
02:44:50 20 like that, and I see fundamentally two bright spots. And one
02:44:58 21 is this new school of police management that's most
02:45:04 22 represented in everybody's imagination by what's happened in
02:45:08 23 New York City, so beginning with Bill Bratton in the mid '90s,
02:45:12 24 but well after that now, multiple commissioners, multiple
02:45:15 25 mayors.

02:45:17 1 NYPD has brought homicide in New York City down over
02:45:21 2 75 percent and with commensurate declines in most other crime
02:45:26 3 categories. They have done it by changing the culture inside
02:45:30 4 the police department. This is a police department that goes
02:45:33 5 to work every day and says we are going to affect crime. We
02:45:36 6 are going to have strategies. We're going to have tactics.
02:45:40 7 We're going to have immediate, up-to-date information. We are
02:45:43 8 going to make plans and deploy our people accordingly; and if
02:45:46 9 what we're doing doesn't work, we're going to come up with
02:45:49 10 something that does.

02:45:49 11 And it's incontrovertible to my mind that NYPD is at
02:45:55 12 the center of good news in New York. That same basic
02:46:00 13 framework is now being applied all across the country, and
02:46:03 14 there's a very clear record that when the people who manage
02:46:07 15 police departments in this way grab these departments in new
02:46:10 16 places by the scruff of the neck, two years later, things are
02:46:13 17 really different. And the most recent example of this is,
02:46:16 18 once again, Bill Bratton in L.A., which is much, much, much
02:46:21 19 safer than it was just a couple of years ago.

02:46:23 20 The second school is the stuff that I've been
02:46:28 21 involved with, and it's a set of stand-alone strategies aimed
02:46:34 22 at group related, including gang violence and at community
02:46:38 23 drug markets. They're a little bit different, but they're the
02:46:41 24 same. They bring together partnerships of law enforcement,
02:46:44 25 community people and service providers. They identify and

02:46:48 1 engage directly with the stand-out offenders that drive gang
02:46:53 2 violence and populate these street drug markets.

02:46:56 3 The community says you are important people. You are
02:46:59 4 doing wrong. We need you to stop. The service providers say
02:47:03 5 we will help you, and law enforcement says we've put together
02:47:07 6 something new and different, and we absolutely promise to you
02:47:11 7 that if you cross the line we have just drawn, the house will
02:47:15 8 fall on your head.

02:47:18 9 That's not ordinary system activities, right? So the
02:47:23 10 basic trick in the gang work is to say directly to a city full
02:47:29 11 of gangs the first gang that kills somebody after we have this
02:47:32 12 conversation, we're going to use existing law to dismantle
02:47:36 13 your group.

02:47:39 14 The point for this conversation, I think, is it's not
02:47:42 15 new law. It's not necessarily high-level sanction. There's
02:47:46 16 usually a little bit of federal enforcement in it, but it's
02:47:49 17 mostly state. The point turns out to be, and this is sort of
02:47:55 18 classic deterrence theory, if they know it's coming, if they
02:47:59 19 know it's credible, if they believe it and if the sanction
02:48:03 20 rises to a level that they care about, they're not going to do
02:48:06 21 it. And it turns out in practice that knowing for a fact that
02:48:11 22 you're going to get a low-level state conviction tomorrow if
02:48:16 23 you do this thing means more than a three-strikes penalty five
02:48:21 24 years from now.

02:48:22 25 The trick in the drug work is actually not to

02:48:26 1 prosecute them at all, which seems absolutely inside out; but
02:48:30 2 it turns out that -- again, this is just using existing tools
02:48:34 3 in different ways -- if you find all the drug dealers in a
02:48:38 4 drug market, you get a state case against all of them, you
02:48:43 5 arrest the violent and instigators and some of those go
02:48:46 6 federal, but, again, usually the federal enforcement is a
02:48:49 7 small piece. If you then say I am your mother, your parole
02:48:56 8 officer, your probation officer, you have to do right. We
02:48:59 9 have this case hanging over your head. We're going to tell
02:49:03 10 you ahead of time, and if we know you've gone back out to the
02:49:06 11 corner, we're going to activate the case, that's enough to
02:49:09 12 stop almost everybody. And this isn't theoretical. This is
02:49:12 13 fact. This is, as it turns out, the way this works.

02:49:16 14 So we've got a kind of crystalline example of the
02:49:21 15 contrast here out of Hempstead, New York. So we've been
02:49:26 16 working with Kathleen Rice, who's the county district attorney
02:49:30 17 in Hempstead, for a couple of years now.

02:49:33 18 She came into office, there's a drug market called
02:49:36 19 Terrace and Bedell which draws injection drug users and others
02:49:42 20 literally from all over Long Island. It's three blocks in
02:49:45 21 Hempstead, New York. And it is *Blade Runner*. I mean it was
02:49:47 22 really bad.

02:49:49 23 And Kathleen instigated something that ended up being
02:49:54 24 called Family Affair, which was a kind of Swiss watch,
02:49:58 25 classic, climb-the-ladder drug investigation. It started with

02:50:01 1 two street buys on Hempstead, brought in the DEA, brought in
02:50:07 2 the Justice Department, Nassau County, Hempstead police, her
02:50:10 3 office, Eastern District of Manhattan U.S. Attorney's Office.
02:50:15 4 They followed the chain all the way back to Colombia and ended
02:50:20 5 up with I've forgotten how many state indictments, but 29
02:50:24 6 federal indictments, including a bunch of the cartel guys.

02:50:27 7 And the year after Family Affair, drug activity, as
02:50:32 8 measured by drug arrests, at Terrace and Bedell went up nine
02:50:37 9 percent, and this is unfortunately the world we usually live
02:50:40 10 in.

02:50:40 11 They did the High Point thing a year later. There
02:50:43 12 were about a dozen arrests. They were all state arrests, I
02:50:47 13 think. I don't think there were any federal prosecutions in
02:50:50 14 there. The bulk of the dealers got this door number two
02:50:54 15 option, and drug crime in the area went down 74 percent in the
02:50:59 16 next year, and year-to-date the last update I got, there have
02:51:05 17 been to date drug arrests in the area: none.

02:51:11 18 This stuff is doable. It uses existing law. It
02:51:15 19 uses existing tools outside the framework of the way we have
02:51:22 20 been thinking about crime control for the last 40 years, so I
02:51:29 21 always go back to the '67 President's Commission Report, which
02:51:33 22 I'm sure everybody on this side of the room has read in their
02:51:36 23 first semester. We all do. And it's got this classic wiring
02:51:39 24 diagram of the criminal justice system. It spreads over two
02:51:43 25 pages, and it begins with arrest and processes and all these

02:51:46 1 tributaries.

02:51:48 2 Ever since the '67 report, we have thought, there are
02:51:53 3 two ways we do crime. We do crime through the criminal
02:51:56 4 justice system. We need to get the system issues right. That
02:52:00 5 includes, as first among equals, sentencing and sentencing
02:52:05 6 policy.

02:52:07 7 Other way we do it is we fix communities. We do root
02:52:10 8 causes. We eradicate racism and develop the economy. This
02:52:14 9 new stuff just doesn't operate in that framework. It doesn't
02:52:18 10 get the system issues right. It doesn't especially focus on
02:52:22 11 sanction severity. It certainly doesn't fix these communities
02:52:28 12 in terms of root causes. What it does is hone in on the
02:52:33 13 center of the problem, which invariably turns out to be a
02:52:37 14 relatively small number of people whose names we can figure
02:52:40 15 out and creates around them a kind of structure of service
02:52:49 16 support and sanctions and community engagement that in
02:52:52 17 practice, in fact, works.

02:52:56 18 So when I look at the kind of conversation that I
02:53:03 19 know has been going on at the federal level around sentencing
02:53:06 20 policy for quite a long while, I have the following concerns:
02:53:13 21 So, one is that it for the most part is not engaged or
02:53:19 22 supportive of these things that we now know work. And to the
02:53:25 23 extent that the Commission can create that bridge and that
02:53:29 24 conversation, I think that would be enormously valuable.

02:53:33 25 So you're going to have U.S. Attorney Fitzgerald here

02:53:38 1 tomorrow. He has been the mastermind of one of the jewels in
02:53:43 2 the crown for all of this in Chicago, the Chicago Project Safe
02:53:47 3 Neighborhoods intervention, which has brought homicide into
02:53:51 4 Chicago's most dangerous neighborhoods down 37 percent.

02:53:55 5 The enforcement intervention, the federal enforcement
02:53:58 6 intervention in that is to tell returning parolees coming into
02:54:03 7 those neighborhoods you are a federally proscribed person.
02:54:07 8 Please sign this document that you have been put on notice
02:54:09 9 that you face a five-year mandatory minimum for your next gun
02:54:12 10 possession.

02:54:13 11 Gun prosecutions haven't gone up. Gun sentences
02:54:18 12 haven't gone up. They now know what they face, and they are
02:54:24 13 so changing their behavior that they've had almost 40 percent
02:54:29 14 reduction in homicide. That is something that is within the
02:54:32 15 purview of the U.S. Attorneys of the Justice Department to do.
02:54:37 16 It's not a sentencing guideline. It's not a sentencing
02:54:40 17 decision. It's a policy and action change, and it's turned
02:54:45 18 out to be very difficult to engage with the federal apparatus
02:54:49 19 around those issues, as opposed to these other issues.

02:54:54 20 Another big concern I've got is that federal
02:55:04 21 enforcement -- unjustly to some extent, but it's still the
02:55:08 22 fact -- has become identified with the rise in the American
02:55:13 23 prison population, which is, as we all know, extraordinary.
02:55:17 24 Now, it's been driven by state enforcement. It's not driven
02:55:20 25 by federal enforcement. The symbolism, however, is what it

1 is.

02:55:25 2 And in the communities I work in, people are so
02:55:28 3 outraged by the way they're being policed and the way law
02:55:35 4 enforcement is engaging with them, that we are observing a
02:55:41 5 systematic principled withdrawal of these communities from law
02:55:45 6 enforcement. This gets read from the outside a lot as witness
02:55:49 7 intimidation, and there is a certain amount of that.

02:55:51 8 My experience is mostly it's not intimidation.
02:55:54 9 Mostly it's anger, and it's anger at everybody going to
02:55:58 10 prison, that one in three black men going to prison and
02:56:02 11 everybody getting violated and going back to prison on
02:56:09 12 technical offenses. It's the intrusion of supervision into
02:56:13 13 family life. It's all of these things.

02:56:16 14 But the result of it is that we are seeing what
02:56:21 15 really reads to me as the collapse of civil society in these
02:56:25 16 communities. If, in technical philosophical terms, civil
02:56:32 17 society is the turning over of crime control and coercive
02:56:36 18 authority to the state, they are taking it back, and we are
02:56:39 19 seeing homicide clearances go down into single digits in these
02:56:44 20 communities. People who are shot won't give up any
02:56:49 21 information. The street rules say you deal with business
02:56:51 22 yourself. You're getting these Hatfield-and-McCoy vendettas.
02:56:56 23 It's like Sicily.

02:57:01 24 And federal law enforcement -- rightly or wrongly and
02:57:04 25 to some extents it's wrongly -- federal law enforcement is

02:57:08 1 identified in that community narrative as at the core of
02:57:16 2 what's going on, and the issues that were spoken about earlier
02:57:19 3 in which people who are actually moving and shaking and have
02:57:22 4 things to give up end up being treated better than low-level
02:57:25 5 folks who don't have anything to trade is highly, highly
02:57:28 6 visible at the local level. It inflames people when they see
02:57:32 7 people -- who I'm thinking back to Judge Simon's story, again,
02:57:38 8 about his case -- when they see low-level people going to
02:57:41 9 prison for 18 years on a street crack conviction, they are
02:57:46 10 angry, and they are voting with their feet about their
02:57:51 11 engagement with the rest of the culture.

02:57:55 12 And if there were a way for federal law enforcement
02:57:59 13 and for federal sentencing to reflect more some of these newer
02:58:04 14 ideas and to back out of some of the things which are
02:58:10 15 infuriating these already very damaged neighborhoods, it would
02:58:14 16 be terrific.

02:58:16 17 So I've backed into being a deterrence theorist
02:58:19 18 through my work. I didn't start out that way. This is just
02:58:22 19 the stuff that I've been working with, and that's the way it's
02:58:25 20 gone. But the sort of old, old conversation about deterrence
02:58:30 21 went: We need to produce deterrence through the routine
02:58:35 22 workings of the criminal justice system. That's about
02:58:39 23 observation and apprehension and prosecution and disposition,
02:58:42 24 and in that system behavior and especially the higher-end
02:58:48 25 sanctions end up being enormously important. That makes

02:58:52 1 perfect sense.

02:58:54 2 It turns out that it's a lot easier to get deterrence
02:58:58 3 by going to somebody whose name you know who's tearing the
02:59:01 4 place up, preferably with his mother -- everybody laughs at
02:59:06 5 this point, but this is what we're doing; it works -- and say
02:59:09 6 to them your name's on a list. You're doing wrong. Your
02:59:14 7 community and your loved ones need you to stop. Here's the
02:59:17 8 number to call if you get help, and if you don't listen, you
02:59:21 9 are on a special list at the U.S. Attorney's Office, and
02:59:25 10 here's what's going to happen to you. And our experience on
02:59:27 11 this is most of the time, that works.

02:59:30 12 If it doesn't work, you don't need a 20-year hit.
02:59:34 13 You need something. You need it predictably, transparently,
02:59:41 14 and briskly. And you get that, you can dial things way back
02:59:44 15 and get better outcomes.

02:59:46 16 Thank you.

02:59:46 17 ACTING CHAIR HINOJOSA: Thank you, Mr. Kennedy. Any
02:59:48 18 questions?

02:59:50 19 QUESTION AND ANSWER SESSION

02:59:50 20 COMMISSIONER HOWELL: Yes.

02:59:52 21 Mr. Brown, I found your -- Secretary Brown, I'm
02:59:57 22 sorry, I found your testimony very interesting, and I think
03:00:02 23 the statistics that you cited about the number of parolees
03:00:08 24 going back into the system because of technical violations is
03:00:12 25 something that we're looking at at the federal level, and how

03:00:17 1 many individuals on supervised release are being put back into
03:00:22 2 prison because of technical violations with their supervised
03:00:26 3 release terms.

03:00:27 4 It's a similar kind of study that you've cited, and
03:00:30 5 we're finding some of the same things, that a substantial
03:00:32 6 number of -- I don't remember the percentages offhand -- but a
03:00:36 7 substantial number of people are in prison, in federal custody
03:00:40 8 right now because of technical violations of their supervised
03:00:42 9 release terms, which leads me to ask you, Mr. Kennedy,
03:00:45 10 something that puzzles me about the studies that you've cited,
03:00:50 11 and the statistics sort of speak for themselves, that if you
03:00:53 12 bring in a gang member and say we have this, you know, the
03:00:57 13 house is going to fall down, to use your expression. If you
03:01:00 14 do something wrong, there will be this immediate prosecution
03:01:05 15 and risk of long-term incarceration and that helps deter them
03:01:10 16 from doing it, from further engagement in criminal activity,
03:01:15 17 or at least they've moved their criminal activity to a
03:01:19 18 different place -- and that's another question -- but why is
03:01:21 19 it that it works there and not in a situation where somebody's
03:01:24 20 on supervised release or parole, where they clearly have this
03:01:28 21 cudgel over their head if they violate their conditions of
03:01:31 22 release, that we have so many technical violations that are of
03:01:36 23 such severity that judges are feeling like you've broken my
03:01:39 24 trust. I'm sending you to jail. I've warned you before, and
03:01:42 25 I've got to stick to my word.

03:01:44 1 I can't in my own mind resolve that apparent
03:01:48 2 conflict.

03:01:49 3 MR. KENNEDY: So which of the six different answers
03:01:51 4 do you want?

03:01:53 5 COMMISSIONER HOWELL: I'd like to hear all of them.
03:01:55 6 I don't know if you have working theories about that or not.

03:01:58 7 MR. KENNEDY: Fortunately, we've got better than
03:02:00 8 that.

03:02:00 9 So there's a bunch of things going on here.

03:02:02 10 In the gang work, what's turned out to be crucial is
03:02:06 11 dealing with the gang. And this is another thing that's very
03:02:09 12 hard for traditional law. We deal almost entirely legally
03:02:16 13 with individuals, absent the RICO and continuing criminal
03:02:21 14 enterprise cases and things like that which are, in practice,
03:02:24 15 real outliers. Almost all of our law is with individuals.

03:02:28 16 We don't work like that. We say the group's driving
03:02:32 17 this. The group's accountable. We know who the group is. We
03:02:35 18 know who's in the group. We're speaking to the group, and our
03:02:38 19 message to you is anybody in the group shoots somebody, we're
03:02:41 20 going to figure out a way to sanction the entire group. You
03:02:45 21 tell the one guy that he can go forth and sin no more. He's
03:02:49 22 not going to be able to do that.

03:02:51 23 If you say to him if anybody in your group shoots
03:02:55 24 somebody, we're going to figure out a way to, for example,
03:02:58 25 violate you on your next dirty urine. When the kid next to

03:03:03 1 him picks up a gun to do some stupid boyfriend respect
03:03:06 2 shooting, it turns out that our guy tells his guy to put his
03:03:11 3 gun down because he's got no stake in his buddy's respect
03:03:16 4 beef, but he does have a stake in not getting violated the
03:03:18 5 next time he drops a hot urine.

03:03:21 6 So the gang work works through turning the internal
03:03:27 7 group dynamic back on itself. And as an empirical question,
03:03:31 8 it turns out that really works.

03:03:34 9 That said, what -- if you're, outside this stuff
03:03:41 10 we're talking about, if you're a parolee on ordinary parole
03:03:46 11 supervision, the time you go back isn't the first time you
03:03:51 12 violate your conditions. What happens is you violate your
03:03:53 13 conditions and you get told not to do it, and you violate your
03:03:55 14 conditions and you get told not to do it, and you violate your
03:03:59 15 conditions and get told not to do it. And, finally, somebody
03:04:02 16 gets tired of this and sends you back, at which point with
03:04:04 17 some justification, you find these guys saying who changed the
03:04:07 18 rules? Nobody ever did this to me before.

03:04:09 19 You probably know about Project HOPE in Hawaii, which
03:04:14 20 is former U.S. Attorney now Judge Alm's turning of the same
03:04:20 21 set of ideas basically back on meth supervision. When he
03:04:24 22 started sitting probation on these meth users, he saw this
03:04:28 23 pattern. His agents would bring somebody to him. He'd have
03:04:32 24 failed his 12th urine analysis, and Judge Alm was being asked
03:04:38 25 to do something. He said, this is crazy. Why didn't we talk

03:04:41 1 to him the first time?

03:04:42 2 So he's now got this caseload where he's saying to
03:04:46 3 them the game's changed. You're not going to get 12. The
03:04:49 4 first time you violate, pack your toothbrush.

03:04:53 5 Normally, his choice is we send you back for the
03:04:57 6 balance of your sentence, which seems disproportionate which
03:05:00 7 is why you get 12 before somebody finally does something. He
03:05:03 8 says we're going to put you back in for two days. Every
03:05:06 9 single time, two days. They put it in place, and the random
03:05:10 10 control results on this are about to come out. My information
03:05:14 11 is that they're seeing 50 percent reductions in offending out
03:05:18 12 of a meth population. And, again, it's not about sanction, it
03:05:23 13 turns out. Almost always, it's about the predictability and
03:05:27 14 transparency and consistency of what's going on. And in
03:05:32 15 ordinary criminal justice structures, it turns out to be
03:05:35 16 almost impossible to make that happen, but there are ways that
03:05:38 17 you can kind of patch it together in a special project kind of
03:05:42 18 way, and you get hugely different outcomes.

03:05:47 19 COMMISSIONER WROBLEWSKI: But isn't that precisely
03:05:49 20 what the federal role is often intended to be, this sort of
03:05:53 21 specialized criminal justice enforcement program, which is
03:05:57 22 sort of the high impact intervention, you know, what's going
03:06:02 23 on here in Chicago with gangs and what's going on in other
03:06:05 24 places, where you bring people in and you have -- because I
03:06:09 25 think I'm trying to challenge you just a little bit on "the

03:06:12 1 sanction means nothing." I recognize the sanction is not
03:06:16 2 sufficient based on what you're suggesting, but it's
03:06:20 3 important.

03:06:21 4 MR. KENNEDY: Yes.

03:06:22 5 COMMISSIONER WROBLEWSKI: It's part of the cause.
03:06:23 6 You bring people in. You identify the right people. You say,
03:06:26 7 look, we're watching you, and if you go off track, you,
03:06:30 8 meaning the gang, we're bringing you all in and you're going
03:06:34 9 to federal court, and you're going to get a significant, a
03:06:37 10 very long sentence.

03:06:39 11 And with Project HOPE, it's the first time, you're
03:06:42 12 going to get something and it's going to be swift and certain.

03:06:45 13 MR. KENNEDY: Right.

03:06:46 14 COMMISSIONER WROBLEWSKI: So the sanction is part of
03:06:47 15 it.

03:06:48 16 And if the federal government could on the
03:06:50 17 enforcement side, you know, look to the strategy that's been
03:06:53 18 successful here and other places, I take it, again, part of
03:06:58 19 that -- and, again, we're just talking gangs, to some extent
03:07:02 20 drugs, but largely gangs, violent gangs -- I take it you would
03:07:06 21 endorse that approach.

22 MR. KENNEDY: Oh, yes.

03:07:08 23 COMMISSIONER WROBLEWSKI: I mean what's going on in
03:07:10 24 Chicago, you endorse.

03:07:11 25 MR. KENNEDY: What's going on in Chicago is

03:07:12 1 brilliant, but the Chicago sanction is relatively low level.
03:07:17 2 The felon in possession federal mandatory is five years, and
03:07:22 3 they're not using it that much, which is the great outcome you
03:07:26 4 get when you get this stuff right.

03:07:27 5 So I would never say the sanction doesn't matter. It
03:07:33 6 matters at any level, I think -- I know -- less than the
03:07:39 7 predictability and the transparency of what's going on.

03:07:42 8 COMMISSIONER WROBLEWSKI: And the intervention.

03:07:45 9 MR. KENNEDY: And the other pieces as well, yeah.
03:07:48 10 And to some extent, you get individual and community backlash
03:07:55 11 from the more extreme sanctions, and that's something I think
03:07:58 12 we should really take seriously.

03:08:00 13 VICE CHAIR CASTILLO: So what your espousing, what
03:08:02 14 I'm hearing, is an interactive crime control policy by the
03:08:07 15 police and local law enforcement, much more deferred state
03:08:11 16 prosecution, very selective federal prosecution, but when it
03:08:16 17 does occur, it has to be swift and certain.

03:08:20 18 But what you're telling us as a Sentencing Commission
03:08:22 19 is we can lower the sentences without having different
03:08:26 20 outcomes.

03:08:27 21 MR. KENNEDY: I believe that's correct, yes.

03:08:29 22 VICE CHAIR CASTILLO: Because what was most
03:08:30 23 disheartening about your written presentation is when you used
03:08:34 24 this Hempstead example, where you had this Family Affair drug
03:08:41 25 indictment, 29 federal indictments going all the way back to

03:08:45 1 Colombia, to the source of the drugs, and what you say in your
03:08:49 2 written testimony is that drug activity increased after that
03:08:53 3 indictment. So I take it replacement drug rings just came
03:08:57 4 into being, and then once this interactive High Point strategy
03:09:02 5 was used, it finally reduced the market.

03:09:05 6 MR. KENNEDY: Yes. And one of the core dynamics
03:09:10 7 there is that as part of this work, you go through what's
03:09:15 8 pretty close to a reconciliation conversation with the
03:09:18 9 community. These communities are viciously angry at us, and
03:09:23 10 they are viciously angry at us in a way that is explicitly
03:09:27 11 racialized.

03:09:29 12 We don't -- none of us are comfortable in engaging in
03:09:34 13 this. It's scary. We have to take seriously ideas that seem
03:09:37 14 crazy to us. These are communities that believe that you and
03:09:41 15 I are part of the conspiracy to bring the drugs into the
03:09:44 16 country. They really do. And so we have to deal with that.

03:09:47 17 Part of the reason Family Affair didn't work is
03:09:50 18 because it left behind a community that was still angry and
03:09:52 19 disengaged. What happened the next time brought both law
03:09:58 20 enforcement and the community to a place where they stood
03:10:01 21 together and said here's how we're going to deal with this.
03:10:04 22 We want the same things. We'd rather not have anybody go to
03:10:07 23 jail that doesn't have to.

03:10:08 24 If we've put them on the proper kind of notice and
03:10:10 25 offered them the proper kind of help and they still violate,

03:10:13 1 then we here in the community also think they should go to
03:10:15 2 jail. We believe in the same things, and, therefore, we're
03:10:19 3 going to go from here out together.

03:10:22 4 And the next time -- this is a true story. This was
03:10:26 5 a stop sanction community. The next time somebody used a gun
03:10:31 6 on the street at Terrace and Bedell, which was about a year
03:10:36 7 after the intervention, the residents organized a viewing of
03:10:40 8 the convenience store security camera that happened to have
03:10:43 9 caught one of these robberies, recognized one of the kids, and
03:10:47 10 handed him over to the Hempstead police. That's the big
03:10:50 11 difference.

03:10:51 12 VICE CHAIR CASTILLO: Thank you.

03:10:52 13 VICE CHAIR CARR: Professor Kennedy, something that I
03:10:54 14 think was implicit in you talking about deterrence but was
03:10:57 15 clear in your book, actually, is that many of these drug
03:10:59 16 dealers who are getting arrested federally for the first time
03:11:02 17 don't really have a clue what they're facing until after the
03:11:06 18 handcuffs are put on them so that the deterrence just does not
03:11:09 19 happen simply because we have stiff penalties.

03:11:12 20 Could you address that a little more clearly?

03:11:14 21 MR. KENNEDY: That's right.

03:11:15 22 There's an ATF study of armed career criminal felons.
03:11:26 23 So this was a survey of guys already locked up on 15-year ACC
03:11:33 24 penalties, a substantial portion of whom didn't believe that
03:11:37 25 they were going to serve out their sentences. They had

03:11:39 1 already been sentenced and locked up, and they still didn't
03:11:42 2 understand the law.

03:11:45 3 On the street what you get is people don't understand
03:11:48 4 the federal law in the first place. They've never been in
03:11:52 5 this room. They see their friends picked up all the time for
03:11:57 6 stuff that is in fact -- they're exposed to federal sanctions.
03:12:03 7 They've been picked up. None of them ever go federal. I mean
03:12:07 8 the federal prosecutorial employment in this kind of street
03:12:11 9 crime is still very low relative to everything that's going
03:12:15 10 on.

03:12:15 11 So they have no idea, a lot of them, what the law is,
03:12:21 12 what their exposures are, what triggers it, and especially
03:12:25 13 they don't know, and oftentimes they can't know, what's going
03:12:28 14 to move them from being of interest to the state authorities
03:12:32 15 to being of interest to the federal authorities. And you're
03:12:35 16 exactly right. The moment they find out is when they go to a
03:12:38 17 different holding cell, at which point they collapse -- I mean
03:12:42 18 they literally collapse in tears; but it's too late at that
03:12:45 19 point.

03:12:45 20 And this is why what Pat Fitzgerald is doing is
03:12:51 21 working so well. All he's doing is saying here's your
03:12:57 22 exposure, but the fact is that even in gang circles in
03:13:01 23 Chicago, many, maybe most of those guys, didn't know that.
03:13:04 24 We're taking a next step in some of our cities and saying you
03:13:10 25 are ACC eligible. There's a system that's been put in place

03:13:15 1 so that if you are picked up with a gun, you will be reviewed
03:13:18 2 by the U.S. Attorney. Here's a statement from the U.S.
03:13:21 3 Attorney saying if you're picked up, I will so prosecute you.
03:13:26 4 Don't worry about what's happened to your friends. It's going
03:13:28 5 to happen to you, and we're seeing, not surprisingly at this
03:13:34 6 point, a massive chilling impact out of that.

03:13:36 7 VICE CHAIR CARR: And to follow up on Commissioner
03:13:39 8 Howell's question about why all these probation and parole end
03:13:42 9 up getting their technical violations, it's my understanding
03:13:45 10 that one of the problems with people on probation and parole
03:13:49 11 around the country is their probation and parole officers are
03:13:49 12 spread so thin that really all they're doing is a policing
03:13:53 13 function, and they're not doing much of the counseling
03:13:55 14 function, whereas the people in the programs that you're
03:13:58 15 describing not only get told you are going to get caught, you
03:14:01 16 are going to go to jail if you misbehave, but you've put in
03:14:05 17 structure the other kinds of support groups from the
03:14:08 18 community.

03:14:09 19 MR. KENNEDY: Right. That's correct.

03:14:14 20 VICE CHAIR SESSIONS: Can I just ask about that
03:14:16 21 knowledge in the community? I know that you're talking about
03:14:19 22 drug defendants within poor urban communities, but we've been
03:14:25 23 told of examples, for instance in alien smuggling, when
03:14:29 24 organized groups know the guidelines so well that they know
03:14:32 25 they should be taking five people at a time as opposed to six.

03:14:36 1 MR. KENNEDY: Yeah. No --

03:14:38 2 VICE CHAIR SESSIONS: I mean is that -- is it a
03:14:40 3 universal situation in which people are just totally unknowing
03:14:45 4 in regard to these penalties?

03:14:48 5 MR. KENNEDY: What we see is that they know the
03:14:50 6 things that they most routinely have to worry about, and so
03:14:55 7 this was human trafficking or something that you were just
03:14:59 8 referring to?

03:15:00 9 VICE CHAIR SESSIONS: Alien smuggling.

03:15:02 10 MR. KENNEDY: Yeah. That's not anything I know about
03:15:04 11 personally, but my guess is, and this would be consistent with
03:15:07 12 what we see in other settings, so when I did work in
03:15:11 13 Baltimore, there was a policy in the State's Attorney's Office
03:15:14 14 that they wouldn't take any crack cases that didn't rise to 21
03:15:20 15 rocks. And it was just a filter, you know. It was a demand
03:15:27 16 management problem. And everybody on the street knew that,
03:15:30 17 right? So they would carry 19 pieces. I mean it was very
03:15:33 18 predictable.

03:15:34 19 The link between these conversations is even though
03:15:40 20 there was an active and is an active U.S. Attorney's Office in
03:15:44 21 Baltimore, on the street engaging with federal law enforcement
03:15:48 22 was like getting hit by lightning. It hardly ever happened.
03:15:52 23 And so they didn't understand either what the law was or what
03:15:55 24 would trigger it.

03:15:56 25 I think probably what's going on in your example is

03:15:59 1 that they are routinely dealing with the border authorities
03:16:03 2 and the federal structure. They need to know and they do
03:16:10 3 know.

03:16:10 4 ACTING CHAIR HINOJOSA: Thank you all very much. We
03:16:12 5 appreciate your thoughts and your comments and appreciate your
03:16:17 6 time. Thank you.

03:16:19 7 We'll take a very short three- to five-minute break
03:16:22 8 before we go on with the next panel.

03:16:34 9 (Recess from 3:16 to 3:24 p.m.)

03:25:44 10 PANEL V. VIEW FROM THE APPELLATE BENCH

03:25:44 11 ACTING CHAIR HINOJOSA: We welcome the next panel and
03:25:46 12 the last panel for the day because a lot of times they have
03:25:50 13 the last word in their real jobs.

03:25:53 14 We have a distinguished group of appellate judges
03:25:57 15 next. We have the Honorable Danny J. Boggs, who has been the
03:26:00 16 chief judge of the United States Circuit Court of Appeals of
03:26:04 17 the Sixth Circuit since the year 2003, and he's been serving on
03:26:08 18 that court since 1986.

03:26:10 19 Among his many professional accomplishments have been
03:26:14 20 he was a special assistant to the President in the Executive
03:26:17 21 Office of the President from 1981 to 1983, and he was an
03:26:22 22 assistant to the chairman of the Federal Power Commission from
03:26:26 23 '75 to '77. He was also an assistant to the U.S. solicitor
03:26:31 24 general of the U.S. Department of Justice from '73 to '75 and
03:26:35 25 also has, at various parts of his career, engaged in the

03:26:39 1 private practice of law. He's got his bachelor's degree from
03:26:42 2 Harvard and his law degree from the University of Chicago.

03:26:46 3 The Honorable Frank H. Easterbrook has been the chief
03:26:50 4 judge of the United States Court of Appeals for the Seventh Circuit
03:26:52 5 since the year 2006, and has been on that court since 1985.
03:26:57 6 He also has served as an assistant to the U.S. solicitor
03:27:01 7 general for the Department of Justice from '74 to '77 and as a
03:27:04 8 deputy U.S. solicitor general from '78 through '79. He also
03:27:08 9 has been an assistant professor of law at the University of
03:27:12 10 Chicago from '78 to '81 and a professor of law there from '81
03:27:16 11 to '85. His bachelor's degree is from Swarthmore and his law
03:27:21 12 degree from the University of Chicago.

03:27:23 13 Then we also have the Honorable Jeffrey S. Sutton who
03:27:27 14 has been a circuit judge on the U.S. Circuit Court of Appeals
03:27:31 15 for the Sixth Circuit since the year 2003. He served as a law
03:27:36 16 clerk to Justice Powell and Justice Scalia. He was also
03:27:40 17 engaged in the practice of law in Ohio and was the state
03:27:43 18 solicitor of Ohio from '95 through '98 and has been an adjunct
03:27:47 19 professor of law at Ohio State. He received his bachelor's
03:27:50 20 degree from Williams and his law degree from Ohio State.

03:27:53 21 And we'll start with Judge Boggs.

03:27:57 22 JUDGE BOGGS: We have changed the order.

23 ACTING CHAIR HINOJOSA: You're going to start with
24 Judge Easterbrook?

03:28:00 25 JUDGE BOGGS: We're going to start with our

03:28:01 1 host here.

03:28:03 2 ACTING CHAIR HINOJOSA: You all are the only panel

03:28:05 3 that can tell us what to do --

4 (Laughter.)

03:28:07 5 ACTING CHAIR HINOJOSA: -- but you are the appellate

03:28:09 6 judges, and we will proceed in that fashion.

03:28:09 7 CHIEF JUDGE EASTERBROOK: Thank you, Judge Hinojosa.

03:28:13 8 The sentencing guidelines were designed a generation

03:28:16 9 ago to carry out a legislative policy of determinant sentences

03:28:20 10 with a minimum of judicial discretion. The Supreme Court's

03:28:23 11 decisions in *Booker*, *Kimbrough* and *Spears*, which make the

03:28:25 12 guidelines advisory, call for a change in their structure.

03:28:29 13 Every system of regulations ought to be matched to its

03:28:33 14 purpose, yet the Commission hasn't revised the general

03:28:35 15 structure of the guidelines since *Booker*, and it seems to me

03:28:38 16 that doing this is the most important current task.

03:28:41 17 If the Supreme Court had just eliminated the

03:28:45 18 guidelines from the list of things the district judges are

03:28:48 19 obliged to do at sentencing, as some justices contended that

03:28:53 20 should happen, then a structural revision wouldn't be

03:28:56 21 important. The Commission could maintain the guidelines in

03:28:58 22 any form they wanted as recommendations to the district

03:29:03 23 judges. But what the court has held is that district judges

03:29:06 24 must calculate the guideline range correctly, after which they

03:29:11 25 can impose any reasonable sentence. And the court of appeals

03:29:16 1 then must review the district judges' guideline calculations,
03:29:20 2 as well as the reasonableness of the sentence, and many a case
03:29:24 3 these days is being reversed with the observation that the
03:29:26 4 district court didn't calculate the guidelines correctly. The
03:29:29 5 sentence may well be perfectly fine, but go try again.

03:29:33 6 This means that both the district courts and the
03:29:38 7 court of appeals may be required to carry out an exercise that
03:29:42 8 has a limited, if any, effect on the sentence. It's a
03:29:45 9 make-work prescription; but if work is to be made, there
03:29:48 10 should be less rather than more, and that will conserve
03:29:51 11 judicial time for more pressing tasks and the other litigants
03:29:55 12 in a very long queue.

03:29:57 13 The guidelines ought to be designed so that they
03:30:00 14 provide information to district judges about how comparable
03:30:02 15 cases are handled across the nation. That fulfills their
03:30:05 16 principal function of curtailing unwarranted disparities
03:30:09 17 without engaging in a needless level of detail.

03:30:12 18 When the guidelines were mandatory, detail was vital,
03:30:16 19 and the statute called for ranges to be no more than
03:30:18 20 25 percent from top to bottom. Now that the guidelines are
03:30:22 21 advisory, two principal changes can and should be made:

03:30:28 22 One, the ranges should exceed 25 percent.

03:30:32 23 Second, the overlap in the ranges should be
03:30:36 24 increased.

03:30:37 25 Those two changes together will reduce the need to

03:30:39 1 make precise findings that don't affect the outcome and, thus,
03:30:44 2 save time for both district and appellate judges without
03:30:46 3 sacrificing any of the statutory goals.

03:30:50 4 Current doctrine -- this, by the way, was something
03:30:54 5 that Judge Breyer said in defense of the guidelines right at
03:30:58 6 the outset, that we were going to design things with overlaps
03:31:01 7 and avoid these problems -- but current doctrine has it that
03:31:04 8 unless the district judge formally says on the record
03:31:07 9 something like my sentence is unaffected by how I resolve X,
03:31:12 10 and the sentence is within a range that is generated no matter
03:31:18 11 how X was resolved, unless both of those things are true, then
03:31:23 12 the court of appeals has to determine whether X got resolved
03:31:27 13 correctly.

03:31:28 14 After *Booker*, there's little point to that
03:31:31 15 fastidiousness, and the Commission can end it at a stroke by
03:31:35 16 adopting a presumption that the resolution of any issue is
03:31:38 17 irrelevant when the sentence is within an area where the
03:31:41 18 ranges overlap no matter how that issue is resolved. That,
03:31:45 19 plus somewhat wider ranges, would do a great deal to avoid
03:31:49 20 wastes of lawyers' and judges' time.

03:31:53 21 My court has recommended that judges practice
03:31:55 22 self-help in the interim. We've urged them to say that
03:31:58 23 resolving one or another disputed point just doesn't matter to
03:32:02 24 the final sentence, not only when the ranges overlap, but also
03:32:06 25 when they don't and they've decided to use their discretion

03:32:09 1 under *Booker* and its successors to give a particular sentence.
03:32:12 2 That advice was directed to district judges, but its spirit is
03:32:16 3 equally applicable to guideline design.

03:32:18 4 Let me give you an example. It's prompted by a case
03:32:21 5 now under advisement in my court. I won't mention the name of
03:32:24 6 the case or the precise details, since the opinion hasn't been
03:32:26 7 released, but it illustrates a kind of problem that's common,
03:32:30 8 yet avoidable.

03:32:32 9 Smith, I'll call him, is charged with distributing
03:32:37 10 drugs, and his principal customer is Jones. The evidence at
03:32:40 11 trial shows that Smith has been a commercial distributor for
03:32:43 12 at least a year and has many customers in addition to Jones.
03:32:47 13 The district court needs to determine Smith's relevant conduct
03:32:51 14 in order to decide how many offense levels to add under the
03:32:54 15 drug quantity table in Section 2D1.1.

03:32:57 16 The judge takes testimony from Jones and two other
03:33:00 17 customers, all cooperating as part of plea bargains. The
03:33:04 18 judge has to decide whether they're to be believed and, if
03:33:07 19 they're telling the truth, whether their memories are
03:33:11 20 accurate.

03:33:11 21 Let's suppose that the three customers together
03:33:14 22 narrate sales that come to 1.95 kilograms of cocaine. The
03:33:19 23 drug quantity table distinguishes between 2 kilograms or
03:33:23 24 more -- that's level 26 -- and 500 to 1,999 grams. That's
03:33:31 25 level 24. That's not a statutory breakpoint. The statutory

03:33:35 1 breakpoint is at 5 kilograms, but the prosecutor wants the
03:33:38 2 higher offense level, so he introduces evidence that when
03:33:42 3 Smith was arrested, he was carrying \$3,000. The prosecutor
03:33:47 4 argues that the money must have come from drugs, which should
03:33:51 5 be converted to a cocaine equivalent, which will push Smith
03:33:54 6 over the two-kilo threshold.

03:33:57 7 The need to resolve this argument about the source of
03:34:00 8 funds requires a two-day hearing in the district court, and
03:34:03 9 it's the subject of an appeal and potentially a remand to do
03:34:06 10 it over.

03:34:07 11 The question I have is why should we have a set of
03:34:11 12 guidelines under which this thing can be at issue in the first
03:34:13 13 place? The reason why that hearing was held is because two
03:34:19 14 levels, two offense levels, can mean several extra years in
03:34:23 15 prison. But why draw the distinction? A dealer whose
03:34:27 16 business entails 2,000 grams is no different in social
03:34:31 17 dangerousness from one whose business entailed 1,999 grams.
03:34:37 18 Indeed, as a practical matter, there's little reason to
03:34:40 19 distinguish 2,500 grams from 1,500 grams. Not only is the
03:34:45 20 dangerousness about the same, but the measurement error in
03:34:49 21 these cases is so great that the court's effort to separate
03:34:53 22 them is not reliable.

03:34:54 23 It's not simply are the witnesses honest. It's did
03:34:58 24 they remember accurately? People don't document their illegal
03:35:01 25 transactions with the detail that Merck keeps records of its

03:35:05 1 pharmaceuticals. The guidelines need to recognize that
03:35:09 2 approximations are inevitable. I think a court is lucky if it
03:35:13 3 gets quantity correct within a factor of five.

03:35:17 4 And if approximations are inevitable, lines like the
03:35:21 5 one I'm just describing need to be blurred. That implies
03:35:25 6 overlapping the quantity tables, overlapping the sentencing
03:35:28 7 ranges derived from those tables, or both. The goal should be
03:35:32 8 a reasonable approximation, rather than an illusory
03:35:37 9 exactitude.

03:35:37 10 The example I've given also illustrates another
03:35:40 11 problem, a quest to measure with precision what appears to be
03:35:44 12 measurable at the expense of a larger picture. If we want to
03:35:49 13 know how bad an offender Smith is, we need to know what he
03:35:53 14 sold to all of his customers over the course of his business,
03:35:56 15 not what he sold to the three customers who can be persuaded
03:35:59 16 to testify. Trying to make precise decisions about a subset
03:36:04 17 of the defendant's business means devoting days of judicial
03:36:07 18 time to the wrong question.

03:36:10 19 Guidelines should urge district judges to stop
03:36:13 20 pretending that the social concern with crime stops with the
03:36:17 21 person on the witness stand and to start making estimates of
03:36:20 22 the defendant's whole business. Those estimates will, of
03:36:22 23 course, be imprecise, maybe even worse than a factor of five;
03:36:27 24 but imprecision is less important the wider the ranges are and
03:36:31 25 the more they overlap.

03:36:33 1 My point is, to be short, that the guidelines should
03:36:37 2 urge district judges, to stop urging district judges to
03:36:41 3 measure what they think they can measure with live witnesses
03:36:44 4 and to make approximations of what really matters to the
03:36:47 5 dangerousness of the offense behavior.

03:36:50 6 Now, let me move from drugs and other crimes that
03:36:54 7 come within the relevant conduct rules to recidivist
03:36:58 8 sentencing. Congress required the Commission to provide that
03:37:01 9 repeat offenders who have three convictions for violent crimes
03:37:04 10 or serious drug offenses must be sentenced at or near the
03:37:08 11 statutory maximum. That's 28 U.S.C. 994(h). The Commission's
03:37:13 12 career offender guideline, 4B1.1, which was devised to fulfill
03:37:18 13 that mandate, goes beyond the statutory list. That has
03:37:22 14 certain consequences that my court's at *Knox* opinion
03:37:28 15 discusses. I, for one, am not troubled by the Commission's
03:37:31 16 decision to establish its own list of prior offenses that
03:37:33 17 justify recidivist treatment. My concern, rather, is that the
03:37:37 18 Commission didn't do enough to establish its own list.

03:37:41 19 Instead of producing its own definition of violent
03:37:44 20 felony or serious drug offense, the Commission copied language
03:37:48 21 from the Armed Career Criminal Act, 18 U.S.C. 924(e). That
03:37:53 22 act of copying has led my circuit and most others to hold that
03:37:57 23 the guidelines must be understood in the same way as the
03:38:01 24 Supreme Court has understood 924(e) and a similar definition
03:38:05 25 in 18 U.S.C. § 16, and that definition has needlessly

03:38:10 1 complicated sentencing.

03:38:12 2 But there are two sources of complication. First,
03:38:15 3 the Supreme Court has adopted what it calls a modified
03:38:18 4 categorical approach under which a court looks at the
03:38:21 5 statutory definition of a prior conviction in order to
03:38:24 6 classify it as violent or a serious drug offense. When one
03:38:30 7 state statute covers multiple offenses, which is fairly
03:38:35 8 common, the court may examine the charging papers and plea
03:38:39 9 colloquy but nothing else. Police reports are out.

03:38:42 10 Second, the guideline, like the statutes, has a
03:38:45 11 residual category under which certain crimes that are
03:38:48 12 dangerous in fact count as violent felonies even if the
03:38:51 13 elements of that offense don't include an aggressive act. The
03:38:55 14 Supreme Court's decision last year in *Begay* has made
03:38:58 15 application of that residual category substantially more
03:39:02 16 difficult. I won't get into the tedious details, though my
03:39:06 17 circuit's opinion in the last couple of months in *Woods* and
03:39:10 18 *Evans* explore them at great length.

03:39:12 19 But I can't think of any reason why all the
03:39:15 20 complexities of the statutes, which set mandatory minimum
03:39:19 21 sentences and dramatically raise maximum sentences, should
03:39:23 22 apply to calculations under the guidelines which affect
03:39:27 23 neither minimum nor maximum sentences.

03:39:31 24 My circuit said in *Woods* that a district judge, after
03:39:34 25 applying 4B1.1, is free to use the discretion he enjoys under

03:39:39 1 *Booker* and its successors to raise the sentence to reflect the
03:39:43 2 defendant's real conduct, even if it turns out that one of the
03:39:47 3 prior offenses was not technically classified as a violent
03:39:50 4 felony.

03:39:52 5 This means that the judge must first ignore the
03:39:55 6 actual conduct underlying the prior convictions, classify the
03:40:00 7 offense under an absolutely rococo system, and then come back,
03:40:07 8 look at what's actually going on, and then make his real
03:40:10 9 decision. It's a layer cake of decisions.

03:40:13 10 I say take Ockham's razor and slice off the
03:40:17 11 complexity. If the judge is eventually at the discretionary
03:40:20 12 stage authorized to look at the actual facts of the prior
03:40:24 13 offense behavior, then the guidelines should allow that at the
03:40:27 14 outset, rather than requiring this cascade of decisions. In
03:40:30 15 other words, the guidelines should say that the modified
03:40:33 16 categorical approach just doesn't apply to 4B1.1.

03:40:38 17 Second, the guidelines should get rid of the residual
03:40:41 18 category of violent or dangerous offenses with all the
03:40:45 19 difficulties that *Begay* has introduced. It can easily be
03:40:50 20 replaced with a list of crimes that the Commission thinks as
03:40:53 21 so dangerous that they justify a special recidivist
03:40:56 22 enhancement, or it can be replaced with discretion, permitting
03:41:00 23 the district judge to use the pre-*Begay* approach to
03:41:04 24 determining a prior crime's dangerousness.

03:41:07 25 Now, I happen to prefer the list. A list is always

03:41:10 1 simpler, and it curtails dispute. And, of course, lists have
03:41:13 2 loopholes and oversights, but so be it. After *Booker*, the
03:41:17 3 judge remains free to impose a reasonable sentence even if the
03:41:20 4 guidelines have lacunae.

03:41:23 5 Instead of trying to perfect -- this is my basic
03:41:26 6 message: Instead of trying to perfect the guidelines to cover
03:41:30 7 every contingency, the Commission should simplify the
03:41:34 8 guidelines to get the main themes right and rely on sound
03:41:37 9 discretion in the district courts to address unusual details.
03:41:41 10 I could go on, but I think I've given enough illustrations to
03:41:44 11 make my point.

03:41:46 12 After *Booker*, simplification is much to be desired.
03:41:49 13 It yields gains for litigants, for judges, and for society at
03:41:53 14 large.

03:41:54 15 Thank you.

03:41:55 16 ACTING CHAIR HINOJOSA: Thank you, Judge Easterbrook.
03:41:58 17 What's the next?

03:42:01 18 Judge Sutton.

03:42:02 19 JUDGE SUTTON: Thank you, Judge Hinojosa, and thank
03:42:06 20 you for hearing from the perspective of a non-chief judge. I
03:42:10 21 appreciate that. Let me make two comments about Chief Judge
03:42:13 22 Easterbrook's remarks and then make a remark of my own.

03:42:16 23 I'd like to echo the point about crimes of violence.
03:42:20 24 This is a disaster. It's not your problem, at least -- well,
03:42:24 25 there may be a solution, and I'm not sure I can blame the

03:42:27 1 court, the Supreme Court. It's very difficult figuring out
03:42:30 2 how to do this.

03:42:31 3 The categorical approach makes some sense, right?
03:42:34 4 They wanted to avoid district courts having to do mini-trials
03:42:38 5 about every prior crime. That makes some sense.

03:42:40 6 On the other hand, what you get into is this problem
03:42:43 7 of deciding as a matter of federal law what these different
03:42:47 8 categories of state laws mean. It's ridiculously complicated.
03:42:52 9 To give you one example, Michigan has a fleeing and eluding
03:42:57 10 offense, and that one statute has generated four appeals in my
03:43:01 11 circuit, the most recent leading to an effort by two of my
03:43:05 12 colleagues to overrule the second of those cases. So we not
03:43:09 13 only get four different cases trying to figure out what parts
03:43:13 14 of fleeing and eluding under Michigan law are crimes of
03:43:16 15 violence, we're now changing our minds after seven years
03:43:19 16 because of *Begay* and *Chambers*.

03:43:22 17 Anything the Commission can do to bring a little
03:43:25 18 sanity to this would be very helpful. The stakes are very
03:43:28 19 high. I mean that's why people are appealing these things.
03:43:30 20 The stakes are very high as to whether you fall under ACCA or
03:43:35 21 under the guidelines. And my view, and I'm increasingly
03:43:38 22 coming to this view, is that there are real notice, fairness,
03:43:41 23 rule of lenity problems right now. I could really see a court
03:43:46 24 saying enough is enough. This has gotten so confusing, it's
03:43:49 25 getting so arbitrary as to whether we're calling, labeling

03:43:52 1 something after a fact a crime of violence. As far as we're
03:43:55 2 concerned, if there's any ambiguity at all, it is not a crime
03:43:59 3 of violence. I mean at this point, it's beginning to seem to
03:44:01 4 me that's really the way to look at it.

03:44:03 5 But the broader point is there's got to be something,
03:44:07 6 this Commission, Congress, someone's got to figure something
03:44:10 7 out. Until I read Chief Judge Easterbrook's comments a few
03:44:14 8 minutes ago, it hadn't even occurred to me that you could lead
03:44:16 9 by example here.

03:44:18 10 You know, I will say I have a slightly negative
03:44:20 11 reaction to that initially. I mean it would seem to be a lot
03:44:23 12 better to solve the whole problem, see if you can convince
03:44:26 13 Congress to either get rid of the categorical approach. I
03:44:30 14 agree with Chief Judge Easterbrook. I'd much prefer do it
03:44:33 15 like RICO, just name all the predicate offenses, do the best
03:44:37 16 you can, don't have a residual category. If you haven't named
03:44:40 17 them, there's no such thing. You can amend the rule later on.

03:44:44 18 I really think it would be a lot better if you could
03:44:48 19 find a way to do this both through Congress and the
03:44:49 20 Commission; but if you can't do that, I think the Commission
03:44:51 21 should lead by example. I think it's a great idea.

03:44:54 22 I'm not sure I've totally processed Chief Judge
03:44:57 23 Easterbrook's first point because I'm not sure I frankly
03:45:00 24 understand the overlapping ranges point, but I guess I'd
03:45:03 25 respond with a question, which was something I was wondering

03:45:06 1 about in thinking about my comments today. And the Second Circuit
03:45:12 2 did this recently in a case, and my first reaction was that
03:45:15 3 this was improper, and now I'm wondering about that.

03:45:18 4 What the Second Circuit did recently in a case with Judge
03:45:21 5 Calabresi and Judge Parker -- I think Judge, now Justice,
03:45:23 6 Sotomayor had been on the panel -- but the two of them agreed,
03:45:26 7 so they went ahead and released it, and I think it was a money
03:45:30 8 laundering case. Their basic idea was if you find yourself as
03:45:34 9 a district court judge facing a very difficult factual
03:45:37 10 assessment, quantity of drugs, even legal assessment, and in
03:45:42 11 you, the district court judge's mind, it's not going to make a
03:45:45 12 difference to the sentence. In other words, under calculation
03:45:48 13 A, you get a bottom of the range being 120 months; calculation
03:45:51 14 B, the bottom of the range is 170 months. You, the district
03:45:54 15 court judge, you've looked at all these factors, you've
03:45:56 16 thought about those possible ranges and to you it's just not
03:45:59 17 going to be make a difference. You think it should be 100
03:46:04 18 either way or you think it ought to be 130 either way.

19 I don't know whether that's a role the Commission
03:46:06 20 has. It seems to me like a partial answer to what Chief Judge
03:46:09 21 Easterbrook is saying, and maybe it's something the courts of
03:46:12 22 appeal should be thinking about.

03:46:13 23 My first instinct to it, my first reaction to it when
03:46:15 24 I read the Second Circuit opinion was to think how wrong it was,
03:46:18 25 that that's a starting point. *Gall* says that's a starting

03:46:21 1 point, and how can you accurately consider all these factors,
03:46:24 2 all 3553 factors, if you're not starting with a guideline
03:46:29 3 recommendation?

03:46:30 4 But I'm with Chief Judge Easterbrook. I mean we're
03:46:32 5 spending an awful lot of time, having a two-day hearing about
03:46:35 6 quantity, where the judge is going to decide to look and act,
03:46:41 7 what's really going on here, makes some sense to me. So I'm
03:46:44 8 wondering if that's not a partial answer to the problem.

03:46:46 9 Now to my comments, which certainly have a
03:46:50 10 provocative title, and I'm looking for guidance from you
03:46:51 11 all -- by the way, nothing I say here today will ever affect a
03:46:54 12 ruling. These are just thoughts.

03:46:56 13 Is appellate review of criminal sentences worth it?
03:47:02 14 I'm really starting to wonder. There's one sense in which
03:47:06 15 there's clearly still a yes answer. That's in what we've come
03:47:10 16 to call procedural reasonableness, and the first and most
03:47:14 17 important part of that is figuring out whether the sentence
03:47:17 18 has been calculated correctly and figuring out most
03:47:20 19 importantly from the court of appeals perspective whether the
03:47:23 20 guidelines have been interpreted correctly. So still there's
03:47:25 21 obviously a very important role there to be played. That was
03:47:29 22 true pre-*Booker*. I think it's still true today.

03:47:32 23 Much of the rest of procedural reasonableness review
03:47:35 24 has become either irrelevant or academic in my view. I mean
03:47:38 25 the notion that there's a district court judge out there that

03:47:41 1 doesn't know he or she has discretion, that's no longer
03:47:44 2 something to talk about. This whole mentioning each of the
03:47:48 3 factors has gotten a little silly, but anyway they've learned
03:47:51 4 how to do it, so we don't worry about that. We probably tend
03:47:54 5 to fight the most these days about whether the district court
03:47:57 6 judge mentioned every single one of the -- in other words,
03:48:02 7 responded to every single one of the arguments usually for a
03:48:05 8 downward variance made by the defendant.

03:48:08 9 I think the court of appeals are providing a fairly
03:48:12 10 important check just to make sure as a matter of process this
03:48:15 11 is a good idea. It seems to ignore what's really going on.
03:48:19 12 I've sat by designation once and sentenced four people, and I
03:48:22 13 can tell you I did read the 3553(a) factors, I did know what
03:48:27 14 they were, I did mention them. It wasn't what I was doing.
03:48:31 15 You know, what I was doing was I was looking at that range you
03:48:34 16 all suggested, and I was asking myself is this a real
03:48:37 17 candidate for rehabilitation or not?

03:48:40 18 But I was doing things that were sizing the person
03:48:43 19 up. I didn't have a lot of experience, but most district
03:48:45 20 court judges that do, that's, of course, what's really going
03:48:48 21 on, and trying to reduce it to this formula and magic words I
03:48:52 22 don't have a lot of tolerance for. But I will say on
03:48:57 23 procedural reasonableness, there is this important function
03:49:00 24 we're still providing, which is whether the guidelines were
03:49:03 25 interpreted correctly and, in most cases, whether the

03:49:05 1 calculation was accurate.

03:49:06 2 The second point, substantive reasonableness review,
03:49:09 3 is very complicated, and I'm quite concerned. As you all
03:49:14 4 know, the whole debate here is between individualized
03:49:16 5 sentencing on the one hand and avoiding needless disparities,
03:49:19 6 having some consistency on the other. It's a very difficult
03:49:23 7 needle to thread.

03:49:24 8 *Booker* arguably does some good things as a matter of
03:49:27 9 policy in terms of giving district court judges a little more
03:49:30 10 discretion. I must say I'm being close to a loss, however, in
03:49:35 11 what I as a court of appeals judge should be doing when it
03:49:38 12 comes to reviewing sentences for substantive reasonableness,
03:49:41 13 which is another way of saying is the sentence too low or is
03:49:44 14 it too high?

03:49:44 15 There are three types of sentences as far as I'm
03:49:47 16 concerned: There's the within-guideline sentence, there's the
03:49:49 17 slight variance, and there's the significant variance. The
03:49:52 18 within-guideline sentence, I just don't understand how I sit
03:49:55 19 in a place where I can second-guess the judgment of two bodies
03:49:59 20 who know a little -- a lot more about this than I do.

03:50:02 21 If the Commission has agreed that this is the right
03:50:04 22 range and the district court judge sentences within that
03:50:07 23 range, you've got two people who have spent a lot of time with
03:50:10 24 this, one in a macro, one very micro, looking at this
03:50:14 25 individual. They're saying this range is appropriate. I'm

03:50:16 1 hard pressed to see a role for substantive reasonableness
03:50:19 2 review in that setting.

03:50:20 3 So then you ask yourself about the slight variances,
03:50:24 4 slightly up, slightly down. There there's not too much to
03:50:27 5 worry about when it comes to disparities in consistency
03:50:30 6 because you're not that far off the ranges. So I'm kind of
03:50:32 7 back to where I was on the first point. It's essentially like
03:50:36 8 the within-guideline sentence. It's off by maybe a year, four
03:50:41 9 months, it depends on what the range happened to be.

03:50:44 10 I'm just very hard pressed to see how a court of
03:50:48 11 appeals can say no, no, no, you had to stick within the range,
03:50:50 12 or you somehow had to go further down. That's difficult
03:50:53 13 because the judgment of the Commission and the district court
03:50:55 14 is so close at that point, and our biggest concern, the court
03:50:59 15 of appeals' biggest concern, outside making sure the
03:51:00 16 guidelines are interpreted correctly, is one of disparities,
03:51:03 17 and that's not implicated by that problem.

03:51:06 18 So that leaves you with what I think is the biggest
03:51:08 19 problem for disparities, 3553(a)(6), one of the key missions
03:51:14 20 of the guidelines, and so now you have a -- well, a child porn
03:51:19 21 case is a pretty good example -- 120-month recommendation,
03:51:24 22 70-month recommendation bottom of the guidelines, and you get
03:51:26 23 a one-day sentence. You know, many judges are going to have,
03:51:31 24 court of appeals judges are going to have visceral reactions,
03:51:35 25 wow, that's really disrespecting the Commission's work, that's

03:51:39 1 really disrespecting the guidelines. I'll say that's usually
03:51:42 2 my first reaction when I review a sentence like that.

03:51:44 3 Then I say, okay, now let's talk about writing the
03:51:47 4 opinion. How am I going to do this? I know as a matter of
03:51:51 5 logic that if the guidelines are advisory, there is such a
03:51:54 6 thing as one-day sentences that are permissible that are
03:51:57 7 reasonable. That has to be true.

03:52:00 8 So there's this range between one day and 70 months,
03:52:05 9 100 months, whatever it is, and I'm now supposed to write an
03:52:08 10 opinion that explains why this is not one of the one-day
03:52:12 11 cases, and how do I do that? How do I -- what lines do I
03:52:16 12 draw? And even if I'm clever enough to write it in a way
03:52:19 13 that's satisfactory to me that makes me feel like it's
03:52:22 14 meaningful, I'm drawing meaningful distinctions, I'm hard
03:52:26 15 pressed to see why that precedent is still nothing more than a
03:52:30 16 take a good for one train and one train only, when the next
03:52:34 17 court of appeals panel faces another one-day sentence and even
03:52:38 18 in a child porn case or the next district court judge sees
03:52:42 19 that. We know every individual's unique. The facts are going
03:52:45 20 to be different. I suppose if it's the exact same defendant,
03:52:48 21 but then, of course, it would be completely inexplicable that
03:52:52 22 we'd do another one-day sentence. But the point is it's going
03:52:55 23 to be very easy to distinguish whatever line I try to draw.

03:52:59 24 So I'm quite concerned that appellate judges really
03:53:04 25 don't have the tools to perform substantive reasonableness

03:53:08 1 review in the one area where it seems to matter, significant
03:53:13 2 variances upward or downward. I don't know whether it's
03:53:17 3 something the Commission can help us with, whether it's
03:53:21 4 gathering information. I suppose the more one knows that
03:53:25 5 there have been lots of -- the statistics show that there are
03:53:29 6 lots of substantial downward variances, let's say, in child
03:53:32 7 porn crimes, I suppose that would give appellate judges more
03:53:35 8 comfort in continuing to affirm them or primarily affirming
03:53:39 9 them.

03:53:39 10 But it's something I've struggled with quite a bit in
03:53:44 11 quite a few opinions, and I haven't come up with much of an
03:53:47 12 answer. We're essentially engaged in abuse-of-discretion
03:53:50 13 review. We can't treat it as a math problem, *Gall* reminds us,
03:53:54 14 and even if we do engage in semi-proportionality review, it's
03:54:00 15 very difficult to draw distinctions between and among
03:54:04 16 defendants, particularly when we're not the ones who
03:54:06 17 eye-balled the defendant. We're not the ones who were at the
03:54:09 18 hearing. We're not the ones who heard the allocution. We're
03:54:12 19 not the ones that heard any other evidence.

03:54:14 20 So I wish I had -- I hate to come with just a problem
03:54:18 21 without a recommendation, but maybe there's something the
03:54:21 22 Commission can provide some tools for that. But I am worried
03:54:23 23 about it for the long term, that there's going to be a real
03:54:28 24 tendency here to return to these disparities problems.

03:54:31 25 The district court judges can't do this because they

03:54:35 1 don't see a whole circuit, much less a whole country. We're
03:54:38 2 in a position to do it because we see a whole circuit. We can
03:54:41 3 try to preserve consistency within the circuit, but I'm at
03:54:45 4 something of a loss in drawing meaningful lines between and
03:54:48 5 among defendants.

03:54:49 6 Thank you.

03:54:50 7 ACTING CHAIR HINOJOSA: Thank you, Judge Sutton, and
03:54:52 8 I take it you're next, Chief Judge Boggs?

03:54:56 9 JUDGE BOGGS: Well, I slightly arranged this,
03:54:57 10 but partly it's like a composition. My colleagues have
03:55:02 11 provided the lyrics with some very good specifics. I'm just
03:55:06 12 going to provide some overall fugue or musical theme because
03:55:12 13 when I was invited -- since, I suppose, as appellate judge you
03:55:17 14 just don't do this every day, you're seeing the guidelines at
03:55:22 15 a level of review -- what I thought I would first just give
03:55:27 16 you a couple of observations that are, as the usual criticism
03:55:34 17 of circuit judges, it's while we're outside the battle and
03:55:37 18 then just come down and shoot the wounded.

03:55:40 19 The first is that an enormous amount of the struggle
03:55:46 20 over the adequacy and the direction of the guidelines and
03:55:51 21 guidelines versus discretion to me is driven by the level at
03:55:56 22 which the guidelines were set. There are lots of reasons they
03:56:01 23 were set at that level, but if you took the guidelines and
03:56:04 24 divided all of the numbers by three, I am quite confident that
03:56:09 25 the supporters of the guidelines and the critics of the

03:56:11 1 guidelines would change uniforms almost immediately. The
03:56:16 2 people who were criticizing the guidelines root and branch
03:56:20 3 would think the guidelines were great, and the people who were
03:56:23 4 trying to defend the guidelines against downward departures
03:56:26 5 would want all sorts of upward departures. So that's simply
03:56:32 6 an observation that I have about where the allegedly
03:56:36 7 intellectual struggle over guidelines is.

03:56:38 8 The second thing I would say is that there's a very
03:56:44 9 interesting dynamic about being a federal appellate judge in
03:56:48 10 sentencing, and I say this as one who came on the federal
03:56:51 11 bench without federal criminal experience except a little bit
03:56:56 12 through the Solicitor General's Office just before the
03:57:00 13 guidelines came in.

03:57:02 14 And so I was sitting there, fat and happy with the
03:57:05 15 notion that we couldn't review anything. And as the
03:57:09 16 guidelines came in, frankly, there was a lot of talk, table
03:57:14 17 talk from the older hands that, yes, these guidelines are
03:57:17 18 going to come in and, you know, we really don't like them
03:57:21 19 much, but, you know, whatever the district judges do is going
03:57:23 20 to be all right.

03:57:25 21 And then it was interesting to observe as the
03:57:28 22 opinions began to come down, there's something about the
03:57:32 23 dynamic of appellate judging that kept that from happening;
03:57:38 24 that when there is a rule that we don't review, we can hold
03:57:43 25 that line, but when there is a reviewing process to be done,

03:57:50 1 appellate judges will tend to say, well, sometimes it's yes
03:57:53 2 and sometimes it's no, which means you are going to be digging
03:57:58 3 into the meat of it.

03:58:00 4 And, of course, that is what happened, that even the
03:58:03 5 judges, the old hands who confidently said, you know, we're
03:58:07 6 going to let the district judges do whatever they want, found
03:58:10 7 that they had to dig in and make decisions which made that
03:58:16 8 review quite stringent.

03:58:18 9 Well, in a sense, after *Booker*, we're at something of
03:58:23 10 the same stage. We're starting over again with something of a
03:58:27 11 mandate for leniency, and I think Judge Sutton has said some
03:58:33 12 very wise things on that, and yet I think you are seeing, it
03:58:37 13 may be a smaller number, but judges are trying to
03:58:41 14 conscientiously apply this reasonableness standard that the
03:58:45 15 Supreme Court has given us. And when you conscientiously
03:58:54 16 apply a standard, sometimes you're going to say yes, sometimes
03:58:54 17 you're going to say no.

03:58:54 18 So, again, we, almost by hydraulic pressure, end up
03:59:00 19 meddling perhaps more than we think we're going to. And from
03:59:08 20 that, I segue to the task that we perform day-to-day, and I
03:59:18 21 take Judge Sutton's example as a case that I have before me
03:59:18 22 right now. We have a child pornography defendant with a
03:59:21 23 significant sentence, a few years, who was given a one-day
03:59:25 24 sentence, and we have two precedential cases, not binding, but
03:59:35 25 I think Judge Sutton is right, it wouldn't make much

03:59:50 1 difference if it were "binding." And in one of them, a panel
03:59:50 2 upheld the one-day sentence and in the other one, the panel
03:59:50 3 didn't.

03:59:50 4 So our panel is dutifully doing our appellate job and
03:59:50 5 thrashing through and trying to see what the factors on the
04:00:02 6 one hand, the factors on the other were. And as I say at the
04:00:02 7 appellate level, the simple standard of reasonableness I don't
04:00:23 8 think does the job. It doesn't give us guidance. We'll do
04:00:23 9 our best with it, but I think that to me, the crux of its lack
04:00:23 10 of guidance is that it doesn't address the "unwarranted
04:00:23 11 disparities" item, that that phrase was in many ways the
04:00:27 12 driving force for starting the guidelines. And everyone still
04:00:32 13 says they're against unwarranted disparities, but that must
04:00:36 14 mean that they must think warranted disparities are all right.
04:00:41 15 And in a sense, our task of trying to sort the unwarranted
04:00:48 16 disparities from the warranted disparities is one that to this
04:00:53 17 stage, the Supreme Court nor the guidelines nor the Congress
04:00:58 18 have given us an enormous degree of guidance.

04:01:01 19 So, as I say, I don't have recommendations for you.
04:01:07 20 I guess I do think that if you try to go back to Congress for
04:01:12 21 significant changes every time you start over, you lose a vast
04:01:17 22 amount. So I'm not recommending that, but I'm just throwing
04:01:22 23 out these as considerations to think about.

04:01:25 24 The final thing I would say, and perhaps this
04:01:28 25 reflects the fact that at one point in my misspent youth I had

04:01:33 1 some mathematical background, the phrase in 3553 about a
04:01:38 2 sentence sufficient but not greater than necessary sentence.
04:01:43 3 This is sometimes referred to, I don't know who first coined
04:01:46 4 it, as the rule of parsimony, but if you apply mathematical or
04:01:51 5 logical analysis, that phrase implies that there is only one
04:01:56 6 correct sentence --

04:02:00 7 CHIEF JUDGE EASTERBROOK: Uh-huh.

04:02:02 8 JUDGE BOGGS: -- because if there is a sentence
04:02:03 9 and the next one is higher, either the first one isn't
04:02:06 10 sufficient, or the second one is greater than necessary. I
04:02:11 11 don't know if some commentary that the guidelines or the
04:02:15 12 statute doesn't mean what it says because it seems to me that
04:02:18 13 that statutory phrase is in direct contradiction to the notion
04:02:26 14 of a wide range of permissible sentences, and this has been
04:02:30 15 argued before our court. We have never bought it, but
04:02:35 16 nevertheless it has a great deal of logical force. So I put
04:02:40 17 that factor out as well.

04:02:42 18 Thank you for the opportunity to appear.

04:02:44 19 ACTING CHAIR HINOJOSA: Thank you, Judge Boggs.

04:02:47 20 QUESTION AND ANSWER SESSION

04:02:47 21 VICE CHAIR SESSIONS: Judge Sutton, it's great to see
04:02:50 22 you again, and I appreciate the fact that you don't have any
04:02:53 23 answers, but I'm going to ask you a question for which I hope
04:02:55 24 you have the answer.

04:02:57 25 JUDGE SUTTON: I think you taught me the guidelines.

04:02:59 1 Didn't you teach me the guidelines?

04:03:01 2 VICE CHAIR SESSIONS: I did, absolutely, yes.

04:03:03 3 You talk about the Second Circuit case.

04:03:06 4 JUDGE SUTTON: Yes.

04:03:07 5 VICE CHAIR SESSIONS: And the Second Circuit case
04:03:09 6 generally from the perspective of district court judges in the
04:03:13 7 Second Circuit suggests that, well, if there's any kind of
04:03:15 8 confusion regard to applying the guidelines, well, you just
04:03:18 9 forget it and you just go to 3553(a) factors. You short
04:03:25 10 circuit the guidelines.

04:03:26 11 And, of course, what that means from the perspective
04:03:29 12 of the Sentencing Commission, frankly, is that that's a
04:03:32 13 slippery slope.

04:03:34 14 So when does it happen then that every judge just
04:03:37 15 says, well, even though *Booker* said you're supposed to go
04:03:41 16 through the guidelines and make a literal application,
04:03:45 17 whenever we do that, there's going to be procedural review by
04:03:48 18 the court of appeals, why don't we just forget that. And as a
04:03:53 19 result, we then go to 3553(a) factors, and then we're home
04:03:56 20 free.

04:03:58 21 And I guess the ultimate question is, and Judge
04:04:01 22 Easterbrook, I think, raised the question about what we should
04:04:04 23 do from the guidelines perspective, from our Commission's
04:04:08 24 perspective to change the guidelines in such a way as to make
04:04:11 25 them sufficiently credible that everybody would go to the

04:04:15 1 guidelines and everybody would go through the process, and we
04:04:19 2 wouldn't have that short circuiting of, you know, the
04:04:24 3 procedural steps that the Supreme Court requires in *Booker*.

04:04:28 4 He suggested, I think, I read what I think you're
04:04:32 5 saying is that we simplify, broaden and simplify the
04:04:36 6 guidelines in that kind of way. And I'm interested to know if
04:04:38 7 you think that that's something we should do.

04:04:41 8 JUDGE SUTTON: I couldn't agree more with it.

04:04:44 9 The other thing it does, just to go back to the
04:04:46 10 problem with that approach, is it disrespects the common law
04:04:50 11 approach to how we clarify things. I mean what you should
04:04:54 12 want to do, when it's not clear how the guidelines work in a
04:04:57 13 given case, is have someone figure it out, if need be have it
04:05:02 14 appealed, have the answer provided, and then the next district
04:05:05 15 court judge or district court judges have some guidance.

04:05:08 16 The reason I have some sympathy with Chief Judge
04:05:11 17 Easterbrook's point is there are so many places for
04:05:14 18 refinement, it just can go on and on and on, and that's where
04:05:17 19 simplicity seems to be the answer.

04:05:19 20 I love the idea of broader ranges. You know, the
04:05:22 21 problem I think with most government initiatives is refinement
04:05:27 22 rarely breeds simplicity. I mean the old joke at the U.S.
04:05:32 23 Supreme Court was they'd take a case to resolve a circuit
04:05:34 24 split, and they'd create three splits. And I think there's a
04:05:38 25 real risk when you try to refine some of these things.

04:05:41 1 But I think if you're going the other direction of
04:05:44 2 asking the district court judges to do less so that there's
04:05:47 3 not a complicated task for them to do, you're saying instead
04:05:50 4 of three tasks, perform one. Do this one task, get this
04:05:54 5 general reaction to what happened, I think -- if I hear Chief
04:05:58 6 Judge Easterbrook correctly, I think that's the direction he's
04:06:01 7 going, and that seems to me to make a whole lot more sense.
04:06:04 8 And it makes particular sense after *Booker*, and the whole idea
04:06:07 9 here was to let the district court judges be judges. Size up
04:06:10 10 what's going on, size up the individual, size up the crime,
04:06:13 11 the consequences of the crime. But you're right, you should
04:06:16 12 want district court judges to want to perform the guidelines
04:06:19 13 calculation.

04:06:19 14 I will tell you even when you have a very difficult
04:06:23 15 guidelines calculation or problem, quantity issue, I think
04:06:26 16 most district court judges still want to do it because I think
04:06:29 17 they like knowing what the Commission thinks. I think there's
04:06:34 18 still a very strong instinct to start there.

04:06:37 19 ACTING CHAIR HINOJOSA: I have a follow-up question
04:06:40 20 to that.

04:06:41 21 To me, the Second Circuit opinion that you refer to,
04:06:45 22 what's the difference between saying that about one of the
04:06:48 23 seven factors and if a district court judge says, well, I find
04:06:53 24 these 3553(a)(2) factors too complex in this particular case,
04:06:57 25 so I'm just not going to figure them out and I'll give a rough

04:07:01 1 estimate, but I'm just really not going to go ahead and go
04:07:04 2 through the whole thing.

04:07:07 3 Would the outcome have to be the same? It's just one
04:07:09 4 of the seven factors, like consideration of the guidelines, or
04:07:13 5 is there a different standard because they're the guidelines,
04:07:17 6 as opposed to one of the other seven factors and somebody
04:07:20 7 saying, well, I find that too complex to apply to this
04:07:23 8 particular case. I'm just not going to do it. I'll just
04:07:27 9 leave that one out.

04:07:28 10 JUDGE SUTTON: I think it's a problem. I think if I
04:07:31 11 were a district court judge doing that, I'd want to be sure
04:07:34 12 that the court of appeals was going to have the same reaction
04:07:37 13 to the complexity of the problem that the district court judge
04:07:40 14 did. I think the court of appeals panel that saw the problem
04:07:43 15 said, are you kidding me? That doesn't give me much
04:07:47 16 discretion.

04:07:47 17 ACTING CHAIR HINOJOSA: I guess that's my point in
04:07:49 18 the form of a question, frankly. Shouldn't the reaction be
04:07:51 19 the same to when you say I find the guidelines too complex?
04:07:54 20 It is one of the seven factors, and if you look at the
04:07:57 21 statutory scheme, it was an important factor, just like all
04:08:01 22 the other six would be as far as being important.

04:08:05 23 JUDGE SUTTON: I think you're at the bottom of the
04:08:07 24 slope. I would go a little higher up on the slope, and I
04:08:10 25 would say the sand on the slope is, you know, if there are six

04:08:13 1 things that one needs to do to figure out what the guideline
04:08:16 2 range is and the district court judge has done four or five of
04:08:20 3 them, there's one left and option A creates one range, option
04:08:25 4 B creates another range, and it's either very complicated
04:08:28 5 figuring out how to do the guidelines or it's close to
04:08:31 6 unknowable as a matter of fact as to what the right answer
04:08:34 7 should be, I'm simply making the point, as I think the Second
04:08:39 8 Circuit is, that I'm not sure it's a disastrous thing for a
04:08:42 9 district court judge to say at that point, it doesn't make a
04:08:45 10 difference to me if that's true.

04:08:46 11 Now, if it does make a difference to the district
04:08:49 12 court judge what the range is, the district court judge has to
04:08:51 13 make a call. But that's up at the top of the slope. You took
04:08:56 14 me all the way to the bottom, and we're still sledding, where
04:09:00 15 they don't do anything. I don't think too many courts of
04:09:02 16 appeals judges will be amenable to that, but I haven't seen
04:09:07 17 that case.

04:09:09 18 I want to hear what Chief Judge Easterbrook says,
04:09:11 19 though, about this.

04:09:13 20 CHIEF JUDGE EASTERBROOK: About which aspect?

04:09:17 21 To the extent you're asking can a district court just
04:09:25 22 say, well, Congress told us to consider seven things. I
04:09:29 23 disagree with Congress. I think we should consider six
04:09:33 24 things, it's just a one-sentence reversal. It's not a
04:09:37 25 complicated problem at all.

04:09:38 1 To the extent the question is Congress told us to
04:09:42 2 consider seven things. I'm doing seven things, but one of
04:09:46 3 them, one of those seven things, is terminally indeterminate.
04:09:51 4 All right? I've given thought to number six or number seven.
04:09:56 5 It just doesn't weigh one way or the other, so it doesn't have
04:10:00 6 any consequence in this case.

04:10:02 7 That's perfectly normal. And so depending on how one
04:10:06 8 understands the question you framed, it's either a
04:10:10 9 one-sentence reversible error or the kind of thing district
04:10:13 10 judges do all the time; and it's, therefore, hard to have a
04:10:16 11 general reaction about whether it's good or bad when one needs
04:10:19 12 to be a little more concrete, I think.

04:10:22 13 ACTING CHAIR HINOJOSA: Well, I guess my point is
04:10:23 14 it's not a serious question, but my point is even though it
04:10:27 15 may be hard to determine the guideline, you'll be able to do
04:10:30 16 it. We certainly did it under the mandatory system, so it
04:10:33 17 would be no different under the advisory system.

04:10:36 18 Shortcutting it and saying, well, you don't have to
04:10:38 19 spend your time doing it is another issue, but as opposed to
04:10:43 20 saying it's a difficult question, well, in some certain cases
04:10:48 21 it may be a difficult question, but it can be done.

04:10:51 22 JUDGE BOGGS: Although isn't part of it how,
04:10:53 23 let's say, confident or honest you are in what you are doing?
04:10:57 24 It seems to me that the logical import, and I'm not familiar
04:11:01 25 with the Second Circuit opinion by name, but the logical import,

04:11:06 1 if I'm getting it right, would be the following:

04:11:08 2 Under the guidelines, I am required to say A or B.

04:11:13 3 If I said A, the advice would be 100 months. I look at that

04:11:18 4 advice, and I think I'm going to give him 80. If I said B, it

04:11:23 5 would be 60 months, and I've looked at that advice, and I'm

04:11:27 6 still going to give him 80.

04:11:29 7 If you go through that as logical matter, then what's

04:11:33 8 wrong with it? If you have affirmatively said I've looked at

04:11:37 9 that advice, and like, you know, I have two children, and they

04:11:40 10 each give me advice and after I've heard them both, I've said

04:11:44 11 whichever one of you I believed, I would still do what I want.

04:11:48 12 It's if you short circuit that process and kind of wave your

04:11:53 13 hands and say I'm not even going to tell you what I'm thinking

04:11:56 14 that it's a problem. But if you did it as explicitly as I

04:11:59 15 just said, I don't see where the problem is under *Booker*.

04:12:02 16 CHIEF JUDGE EASTERBROOK: Of course, that's what I

04:12:03 17 was talking about to begin with, and that's why I referred to

04:12:07 18 Justice Breyer. When Judge Breyer, as he then was, wrote his

04:12:12 19 article describing the genesis of the first version of the

04:12:17 20 guidelines, the 1987 version, he said one of the major

04:12:22 21 objections to the 1987 version, the original draft, had been

04:12:27 22 that it required unnecessary detail, to which Judge Breyer

04:12:32 23 said it doesn't require unnecessary detail because the

04:12:35 24 Commission has been very careful about providing reasonably

04:12:39 25 wide and overlapping ranges so that judges can do exactly what

04:12:44 1 Judge Boggs just suggested. To say if I do, if I resolve X
04:12:50 2 one way, the Sentencing Commission is recommending this range.
04:12:53 3 If I resolve X the other way, it's recommending the other
04:12:56 4 range. There's an area of overlap in these two ranges. I'm
04:13:00 5 going to give a sentence in the overlap, and it, therefore,
04:13:03 6 doesn't matter which way I resolve it.

04:13:05 7 That was, according to Judge Breyer, an integral part
04:13:08 8 of the structure of the original guidelines, and I still think
04:13:12 9 Judge Breyer was right. My recommendation is that, given
04:13:18 10 *Booker*, the width of the sentencing ranges and those
04:13:22 11 circumstances in which there is an overlap should be
04:13:25 12 increased. Judge Breyer was right, and *Booker* makes him more
04:13:28 13 so. That was the gist of the first half of my presentation.

04:13:34 14 VICE CHAIR CASTILLO: I appreciate the honesty that
04:13:36 15 all of you have given us in testifying, but I want to pick up,
04:13:42 16 Judge Easterbrook, where you left off, which is Judge Breyer
04:13:45 17 who, after all, got us into all of this, the Advisory
04:13:50 18 Sentencing Guidelines, and then what I look at what we're all
04:13:53 19 trying to do in honest fashion is apply Supreme Court
04:13:57 20 precedent.

04:13:57 21 And Judge Breyer says in *Rita* that there's a
04:14:01 22 three-step process to sentencing of first calculating the
04:14:05 23 guidelines, which, of course, we already have figured out that
04:14:08 24 Judge Calabresi in the Second Circuit believes you can just duck
04:14:12 25 that.

04:14:14 1 CHIEF JUDGE EASTERBROOK: Yeah, well --

04:14:16 2 VICE CHAIR CASTILLO: He second of all says in *Rita*
04:14:18 3 that you should figure out if there are any valid departures
04:14:21 4 under the guidelines, and we know, Judge Easterbrook, that the
04:14:25 5 Seventh Circuit has said that departures are obsolete. So I think
04:14:30 6 there is sort of a disservice of *Rita* right there. And the
04:14:34 7 other circuits, they're all enforcing departures. In fact,
04:14:38 8 the Third Circuit has aggressively remanded cases back to the
04:14:42 9 district court for failure to rule on departures.

04:14:46 10 So I'm looking at it as a Sentencing Commissioner,
04:14:52 11 and I'm wondering what do we do about this disparity that's
04:14:55 12 arising from different circuits taking different positions?

04:15:00 13 And the last one I'll bring up, and then I'll give
04:15:02 14 you the last word, Frank, is just what manual to apply. You
04:15:06 15 say we should be revising the manual. The Seventh Circuit says
04:15:11 16 there's no *ex post facto* problem with applying a newer version
04:15:17 17 of the guidelines even though the crime might have been
04:15:19 18 committed before that version was even written. The First
04:15:23 19 Circuit says otherwise.

04:15:24 20 So what do we do with those circuits' [inaudible]?

04:15:27 21 CHIEF JUDGE EASTERBROOK: I don't think you do
04:15:28 22 anything with them. It's not your task as a Commission to
04:15:31 23 worry about what the courts are going to do with them. I
04:15:35 24 think it's your task as a Commission to come up with the best
04:15:38 25 set of guidelines you can in light of *Booker*.

04:15:41 1 *Rita* and *Gall* and the rest of them say that the
04:15:45 2 judge, district judge, has to start by applying the
04:15:48 3 guidelines, but they don't say that the guidelines have to be
04:15:50 4 as complex as they now are; that is, you can make the task
04:15:56 5 easier by simplifying the guidelines in the way I suggested,
04:16:01 6 by having a list instead of the residual category for the
04:16:05 7 career offender enhancement.

04:16:08 8 There are all sorts of simplifications. They aren't
04:16:11 9 inconsistent with *Rita* and *Gall*. They take advantage of the
04:16:15 10 fact that the justices say start with the guidelines.

04:16:17 11 Now, on the departures question, I don't know what
04:16:21 12 the Third Circuit is saying. Have they read the fact that the
04:16:23 13 Supreme Court itself said last spring that there's no such
04:16:27 14 thing as departures? It isn't just the Seventh Circuit that said
04:16:31 15 that. The Supreme Court had the question what to do with the
04:16:33 16 part of Rule 32(d) which says that district judges have to
04:16:38 17 notify defendants about potential departures in advance of the
04:16:42 18 sentencing hearing. The Supreme Court said no notice is now
04:16:45 19 required because there are no more departures, period.
04:16:50 20 They're gone.

04:16:52 21 If the Third Circuit hasn't read that opinion of the
04:16:54 22 Supreme Court, I suggest giving them a copy.

04:16:57 23 VICE CHAIR CASTILLO: Well, the only problem there,
04:16:58 24 and we could debate this, is it seems to me the Supreme Court
04:17:02 25 itself has misused language in terms of categorizing what is a

04:17:08 1 departure versus what is a variance, and just with that --

04:17:13 2 CHIEF JUDGE EASTERBROOK: Yeah.

04:17:14 3 VICE CHAIR CASTILLO: -- misuse of terminology, it is
04:17:17 4 confusing people, but when you say --

04:17:18 5 CHIEF JUDGE EASTERBROOK: They used to, but I think
04:17:20 6 they cleared it up last spring in that Rule 32(d) case.

04:17:23 7 VICE CHAIR CASTILLO: You think they did.

04:17:26 8 CHIEF JUDGE EASTERBROOK: Yes.

9 JUDGE BOGGS: I think they were clear.

04:17:27 10 CHIEF JUDGE EASTERBROOK: I think it's clear. We'll

04:17:28 11 see.

12 VICE CHAIR CASTILLO: Okay.

04:17:28 13 CHIEF JUDGE EASTERBROOK: We'll see. But on your

04:17:29 14 final --

04:17:31 15 JUDGE SUTTON: Speaking for the Sixth Circuit, I didn't
04:17:33 16 read it quite that way.

04:17:36 17 JUDGE BOGGS: We have a two-to-one majority.

04:17:38 18 VICE CHAIR CASTILLO: I'd like to know what the Sixth
04:17:40 19 Circuit judges think about departures. Should judges rule on
04:17:44 20 departures, or should we just throw them to the wayside?

04:17:47 21 JUDGE BOGGS: Well, I would say, and, you know,
04:17:50 22 this is an advisory opinion in a sense that it hasn't come
04:17:52 23 before me in a formal case, but certainly in my thinking and
04:17:57 24 in my chambers, I -- first thing I guess I almost do when the
04:18:02 25 clerks come in is teach them the difference, I thought,

04:18:04 1 between departures and variances.

04:18:07 2 Frank may have said that that's now unnecessary, but

04:18:11 3 that I always thought departures were part of the guideline

04:18:16 4 system that had to be looked at on their own merits because

04:18:21 5 they had to be justified under the guidelines. And

04:18:25 6 then there's an overlap because you might easily say

04:18:32 7 Mr. Attorney on either side, you're asking for a departure.

04:18:35 8 You know, can't I do the same thing with a variance, and the

04:18:39 9 lawyer then might give you a different answer, but as a

04:18:42 10 general matter, I have maintained that distinction. As I say,

04:18:46 11 I haven't had it come up in a case.

04:18:48 12 Let me throw one thing in about the overlapping

04:18:50 13 ranges because there's a Sixth Circuit case called Barnett from

04:18:55 14 eight or ten years ago, where the issue was, and I just

04:18:59 15 thought of it this minute so I can't give you every fact, but

04:19:03 16 was where there was a range that the judge had given a

04:19:08 17 sentence in the middle of the range or not at the end of the

04:19:12 18 range and there was some change, was it all right?

04:19:19 19 And over my dissent, the court there held that even

04:19:24 20 if the judge wasn't bound by the range, if the range should

04:19:28 21 have been lower or higher, we had to remand; that is, I argued

04:19:34 22 if the judge wasn't up against either end of it, presumably

04:19:38 23 the judge gave a sentence because that was the sentence he

04:19:41 24 wanted. And a majority of my colleagues said, no, no. You're

04:19:47 25 dynamically affected by where that range is.

04:19:51 1 So while I actually agree with Frank about widening
04:19:54 2 the ranges, increasing the overlaps, I would at least look at
04:19:59 3 whether our circuit or other circuits were going to say that
04:20:02 4 still doesn't solve the problem.

04:20:05 5 ACTING CHAIR HINOJOSA: A point --

04:20:07 6 CHIEF JUDGE EASTERBROOK: Could I come back to Judge
04:20:09 7 Castillo's final question about *ex post facto*?

04:20:11 8 It's another thing I don't think you can do anything
04:20:14 9 about. The statute calls on district judges to use the manual
04:20:20 10 that's in force on the date of sentencing, and there's
04:20:23 11 obviously a disagreement among the court of appeals on whether
04:20:27 12 that statute is constitutional or not, but I don't see that it
04:20:30 13 leaves a task for the Commission. The Commission already has
04:20:32 14 done what I think is the only sensible thing it can do, which
04:20:37 15 is to apply the whole manual rule.

04:20:39 16 Right after this conflict develops, the Commission
04:20:41 17 adopts the whole manual rule and says either apply the whole
04:20:46 18 manual as of the day of sentencing or, if circuit law requires
04:20:49 19 it, the whole manual as of some other date. But I don't think
04:20:52 20 there's anything else you can do other than say -- other than
04:20:57 21 keep the whole manual rule in force.

04:21:00 22 ACTING CHAIR HINOJOSA: I would like to make a point
04:21:01 23 about the enumerated offenses in relationship to crime of
04:21:05 24 violence.

04:21:05 25 We have enumerated offenses in the illegal re-entry

04:21:09 1 guideline, and I have to tell you if you look at Fifth and Ninth
04:21:14 2 Circuit case law, it is no easier with regards to enumerated
04:21:17 3 offenses as opposed to other definitions of crimes of
04:21:20 4 violence, whether we adopt a statute or not because the
04:21:22 5 litigation that goes on, first of all, at the district court
04:21:26 6 level and then at the appellate level as to whether it fits
04:21:29 7 that particular description as far as an enumerated offense is
04:21:33 8 just as complicated as it is with regards to the others, and a
04:21:38 9 lot of it has to do with the fact that we have 51
04:21:40 10 jurisdictions that have sentenced people, whether it's the 50
04:21:43 11 states or the federal government, with regards to what those
04:21:47 12 individual statutes say about, for example, sexual abuse of a
04:21:51 13 minor or rape or any of the other enumerated offenses. So
04:21:55 14 that also can be just as complicated, and a lot of it is
04:22:00 15 created by the way the statutes are written.

04:22:02 16 CHIEF JUDGE EASTERBROOK: Uh-huh. Well, my -- I
04:22:04 17 didn't pretend that a list would be a surefire solution, and
04:22:08 18 it's actually even worse than that. It's something like 55
04:22:13 19 jurisdictions.

04:22:14 20 Our current President said he campaigned in all 55
04:22:17 21 states, and he was correct because there's the District of
04:22:19 22 Columbia and Puerto Rico and Guam and the Virgin Islands.
04:22:27 23 We've got all of those as producers of predicate offenses.

04:22:30 24 You can't solve all the problems, but my suggestion
04:22:36 25 was that a list is better than the residual category,

04:22:42 1 especially after *Begay*, with the proviso that there are going
04:22:46 2 to be a lot of things where the list is not dispositive, but
04:22:49 3 all of our district judges are intelligent, and they can make
04:22:53 4 suitable approximations. And, of course, *Booker* and *Kimbrough*
04:22:58 5 allow that.

04:23:00 6 It's only when one has the sense that if you've put
04:23:04 7 in a list or if there is a residual category, there is one
04:23:07 8 uniquely right answer which we have to find. I began by
04:23:13 9 saying we've got problems that amount to trying to stuff round
04:23:16 10 pegs in square holes. The district courts are, I think, well
04:23:22 11 aware of the fact that our states are sufficiently disparate
04:23:24 12 that the holes the Commission makes won't always have pegs
04:23:29 13 that fit, but the guidelines should be written with sufficient
04:23:32 14 latitude to allow the judge to recognize that and behave
04:23:36 15 appropriately, rather than either classify uniquely this
04:23:41 16 conviction or find uniquely whether it's 2,001 grams versus
04:23:47 17 1,999 grams and so on.

04:23:50 18 The more flexibility there is and the more we
04:23:53 19 recognize that for many categories of disputes, there is no
04:23:57 20 one right answer, I think the easier and the more rational it
04:24:03 21 will be to carry out this program.

04:24:06 22 JUDGE SUTTON: Judge Hinojosa, could I also respond
04:24:09 23 to that? I agree with you, it's not going to solve all the
04:24:09 24 problems, but ACCA actually illustrates the two layers of
04:24:13 25 complexity. So that's a statute that does give lists, then

04:24:17 1 has the residual clause.

04:24:19 2 So the first problem interpreting that was, oh, okay,
04:24:22 3 they say burglary, but now we have these different types.

04:24:25 4 Florida has this. Massachusetts, burglary of a boat. So then
04:24:29 5 they had to come up with this generic versus non-generic
04:24:33 6 category. So I think there's no avoiding that.

04:24:34 7 I assume that's what the Fifth and Ninth Circuit cases are
04:24:37 8 all fighting about on the immigration front. I don't know how
04:24:41 9 we avoid that. But the problem that has come up with the
04:24:44 10 residual clause is just a whole other layer of complexity on
04:24:49 11 top of that, figuring out what categories they are, dividing
04:24:52 12 them up, all these state law offenses as a matter of federal
04:24:56 13 law. That's just doubling the work. So that's why I think
04:24:57 14 they're both bad, but it seems to me like the list is a little
04:25:01 15 bit less worse.

04:25:04 16 COMMISSIONER WROBLEWSKI: First of all, thank you all
04:25:05 17 for being here. It's been a fascinating discussion, and it's
04:25:11 18 been especially important because you've touched on a number
04:25:14 19 of issues that the Commission has put on its agenda for the
04:25:17 20 coming year, this question of departures versus variances, the
04:25:20 21 question of crime of violence and so forth.

04:25:23 22 My one question is if we go ahead and really look at
04:25:27 23 the crime of violence, should we look at it first from the
04:25:31 24 guidelines lens and try to do something there first? Should
04:25:34 25 we try to attack ACCA and make them parallel the guidelines in

04:25:39 1 ACCA and make a proposal to Congress to make a change? Should
04:25:43 2 we do that at once? Should we do it separately? Should we
04:25:44 3 experiment with the guidelines and see how it works?

04:25:46 4 Do you have any opinion about that?

04:25:49 5 CHIEF JUDGE EASTERBROOK: My suggestion was expressly
04:25:50 6 that you do the best you can with the guidelines. Trying to
04:25:56 7 make proposals to Congress leaves me usually in mind of Edmund
04:26:01 8 Burke's famous phrase, "Don't talk to me about reform. Things
04:26:05 9 are bad enough as they are."

04:26:06 10 It's easy to see how this could get worse. It's
04:26:12 11 easier to see how a legislative proposal might be better if
04:26:16 12 the Commission already had in place a workable set of rules
04:26:19 13 for its own house. So my suggestion is do the best you can
04:26:23 14 with recidivist sentencing, with a career offender guideline,
04:26:28 15 and then if Congress can be persuaded to emulate it, so much
04:26:31 16 the better.

04:26:32 17 COMMISSIONER WROBLEWSKI: Thank you.

04:26:35 18 COMMISSIONER FRIEDRICH: Judge Sutton, you posed the
04:26:37 19 problem of the difficulty in trying to draw meaningful lines
04:26:40 20 in determining whether a sentence is substantively reasonable.
04:26:43 21 You posed a problem and not a solution.

04:26:45 22 One of your colleagues has proposed that the
04:26:48 23 Commission could actually use its delegated authority and
04:26:50 24 define in the manual itself what substantive reasonableness
04:26:55 25 means. I question whether --

04:26:58 1 ACTING CHAIR HINOJOSA: Not from your circuit.

04:27:00 2 COMMISSIONER FRIEDRICH: -- whether that would
04:27:01 3 withstand judicial scrutiny, and I'm interested in your
04:27:04 4 perspectives on that; but, secondly, putting that aside,
04:27:06 5 certainly the Commission could recommend to Congress that
04:27:10 6 Congress take some of the steps Judge Easterbrook has
04:27:14 7 recommended and simplify the guidelines greatly, perhaps
04:27:17 8 require the government to prove certain key sentencing
04:27:20 9 enhancements, and create a binding constitutional system that
04:27:25 10 then would have a more stringent level of appellate review.

04:27:28 11 JUDGE SUTTON: Yeah, I haven't -- I guess I don't --
04:27:33 12 I'm not sure I have an allergic -- I mean reasonableness
04:27:36 13 appears in the statute, right? So I guess I don't have an
04:27:39 14 allergic reaction to the notion that you don't have -- why
04:27:44 15 wouldn't you have some authority to put some teeth on that?

04:27:46 16 I would also say good luck. I think you'll be
04:27:54 17 between saying things that are too general and aren't really
04:27:57 18 adding anything to it or so specific you can't possibly mean
04:28:00 19 what you're saying in some situations. So it seems like a
04:28:03 20 very tough task, but I don't have a visceral reaction against
04:28:06 21 the notion that you could try.

04:28:10 22 When I think of the tools you can provide, it does
04:28:12 23 seem to me, I've always thought there's a bit of a status quo
04:28:19 24 bias with the Commission, partly because I've never quite
04:28:20 25 investigated how it seems to have this descriptive part to it,

04:28:22 1 where we just gather what everyone does and we say those are
04:28:26 2 the ranges because that's what everyone's doing, and then I'm
04:28:29 3 told, well, it also has this normative part of it, we're also
04:28:32 4 saying what the sentences should be. I've never quite figured
04:28:35 5 out how that works, but I have to believe however you do that,
04:28:39 6 it has to be very helpful to get information sooner rather
04:28:43 7 than later about variances, up or down.

04:28:46 8 And it seems to me the more you're getting that out
04:28:49 9 to the judges, everyone in general, but I could imagine courts
04:28:54 10 of appeals using that as a tool either to justify significant
04:28:59 11 variances. You know, they're calling, the government says
04:29:01 12 this is a significant variance. Well, no, it isn't. Thirty
04:29:07 13 percent of child porn sentences are downward variances, and
04:29:11 14 15 percent are by a very significant margin. And then you
04:29:15 15 have another case that comes along, and it turns out no one's
04:29:18 16 done it. This is the first case in the country, and yet it's
04:29:21 17 a case where there are many of them and no one's doing it.

04:29:25 18 So whether that would persuade me, I can't honestly
04:29:28 19 say. I think it might persuade some, though, and it would
04:29:31 20 certainly give you something objective to look at. It still
04:29:35 21 has some question-bating qualities to me. I mean just because
04:29:40 22 people are or are not doing something, I don't know why that
04:29:43 23 proves it's reasonable. So I think it's a really important
04:29:48 24 project because there is a risk we're going to go back to
04:29:51 25 where we were.

04:29:52 1 I do think individualized sentencing is great,
04:29:54 2 though. I must say putting to one side how the court got
04:29:58 3 there and whether that was right, the solution as a matter of
04:30:04 4 policy seems to be a positive one in many respects, as far as
04:30:07 5 I'm concerned. But I don't know how we preserve uniformity.

04:30:13 6 Of course, the other answer to that is whoever
04:30:15 7 thought you were going to have uniformity when you decided to
04:30:18 8 federalize all this stuff. I mean the minute Congress makes
04:30:21 9 the choice to federalize an area of crime, don't come talking
04:30:24 10 to me about uniformity. You want uniformity, leave it to the
04:30:28 11 State of Ohio with 14 million people, one state supreme court,
04:30:31 12 and you're going to get a fairly uniform system. But if you
04:30:34 13 want uniformity for 300 million people, I'll stick with 51
04:30:37 14 jurisdictions, it's maybe chasing the wind.

04:30:45 15 ACTING CHAIR HINOJOSA: Judge Sutton, I think
04:30:47 16 reasonableness is not in the statute. It may have appeared in
04:30:50 17 *Booker* first.

04:30:51 18 JUDGE SUTTON: But I thought they pulled it out of
04:30:53 19 one -- it certainly wasn't something that said you review
04:30:55 20 sentences for reasonableness, but I thought there was
04:30:57 21 something -- oh, in the probation area.

04:31:00 22 ACTING CHAIR HINOJOSA: Actually, they struck down
04:31:01 23 the appellate review section of the statute. That was the
04:31:04 24 only other one that they struck down besides the mandatory
04:31:07 25 nature. I mean they may have taken out a part of it, but I

04:31:13 1 don't know that that wasn't something that --

04:31:15 2 CHIEF JUDGE EASTERBROOK: Can I speak to this

04:31:18 3 briefly?

04:31:18 4 It would be very nice to have some definition of
04:31:20 5 reasonableness, but I tend to agree with Jeff Sutton that it's
04:31:26 6 elusive. I doubt very much that anything the Commission could
04:31:30 7 do would be binding because, of course, *Kimbrough* says that
04:31:33 8 anything that's in the guidelines judges can disagree with.

04:31:38 9 I agree, though, with Danny Boggs that the single
04:31:45 10 most important thing in the Sentencing Reform Act of 1984 was
04:31:49 11 3553(a)(6), the prohibition on unreasonable or unjustified
04:31:55 12 disparities in sentencing; that the Act, the only thing that
04:31:59 13 could get Senator Kennedy and Senator Thurmond to agree on
04:32:02 14 that Act was the desire to curtail the discretion of both
04:32:08 15 *Bleeding Heart J*, who was giving probationary sentences for
04:32:14 16 bank robbers, and, on the other hand, the judge who always
04:32:17 17 gave the maximum for all the crimes he didn't like. And both
04:32:20 18 sets of judges were to be forced into the middle.

04:32:24 19 And 3553(a)(6) designed to do that and give the
04:32:29 20 Sentencing Commission authority to do it, and it's difficult
04:32:32 21 to see if the role of the Commission is reduced, as *Booker*
04:32:35 22 does, that there's anybody in the federal system who can do
04:32:39 23 that except the court of appeals because we're the only ones
04:32:43 24 who see both the sentence imposed by *Bleeding Heart J* and
04:32:46 25 *Maximum John J*, all right?

04:32:50 1 So it would be nice to have some algorithm to carry
04:32:55 2 that out; but, of course, the best algorithm that's ever been
04:32:58 3 designed to carry that out was the original set of sentencing
04:33:01 4 guidelines, and that's what *Booker* said wasn't conclusive. So
04:33:08 5 I wish the project could be accomplished, but I wonder whether
04:33:11 6 after *Booker* it's feasible.

04:33:15 7 JUDGE BOGGS: I just want to chime in in
04:33:18 8 support of that, having defended bank robbers before a federal
04:33:22 9 district judge in the old days who, once the guilty verdict
04:33:24 10 came in, the sentence was always 25 years. So the
04:33:28 11 pre-guidelines "discretion" was not the best way, and we do
04:33:32 12 need to keep that in mind.

04:33:37 13 JUDGE SUTTON: I will say one other thing, not to be
04:33:39 14 too discouraging about this problem of substantive
04:33:42 15 reasonableness. I wasn't around pre-guidelines -- I wasn't
04:33:45 16 out of college -- but I don't see too many sentences, even
04:33:49 17 ones where I say to myself, wow, my first reaction is wow.
04:33:54 18 When I read the whole thing, there are not too many of them
04:33:57 19 where I say, okay, you know, I [can't] understand why they're
04:33:59 20 doing that.

04:34:02 21 So I guess my point is most judges in our circuit, I
04:34:07 22 feel like they're paying a lot of attention to the guideline
04:34:10 23 recommendations and when they're not following them, they're
04:34:13 24 thinking pretty hard about it, and there's usually a pretty
04:34:15 25 exceptional set of circumstances.

04:34:17 1 CHIEF JUDGE EASTERBROOK: Well, maybe.

04:34:20 2 (Laughter.)

04:34:21 3 CHIEF JUDGE EASTERBROOK: You always hope.

04:34:22 4 JUDGE SUTTON: I always try to end on a happy note.

04:34:26 5 JUDGE BOGGS: That's the Sixth Circuit, Frank.

04:34:29 6 CHIEF JUDGE EASTERBROOK: When I pick up the first
04:34:31 7 set of briefs for a day and it's an armed bank robbery and the
04:34:35 8 sentence is ten months, and the second set of briefs for the
04:34:37 9 day and it's downloading child porn from the Internet and the
04:34:40 10 sentence is 480 months, one wonders whether we aren't facing
04:34:43 11 some unreasonable and unjustified disparities.

04:34:48 12 ACTING CHAIR HINOJOSA: On that note, I think we'll
04:34:51 13 end for the day. Thank you all very much.

04:34:56 14 (Proceedings adjourned at 4:34 p.m.)

08:15:56 15 * * * * *

08:15:56 16 Thursday, September 10, 2009, 9:05 a.m.

09:05:47 17 ACTING CHAIR HINOJOSA: Good morning. This is the
09:05:49 18 second day of our fourth public hearing that we're having
09:05:53 19 across the country with regards to the 25th anniversary of the
09:05:58 20 passage of the bipartisan Sentencing Reform Act. It has been
09:06:05 21 a great experience for the Commission to have gone around
09:06:10 22 different parts of the country and heard different viewpoints
09:06:12 23 of judges, both the district and appellate level, from
09:06:16 24 practitioners, both on the prosecution side as well as the
09:06:21 25 defense side, and then from individuals who are interested in

09:06:23 1 federal criminal justice policy, including obviously
09:06:26 2 sentencing. And so, therefore, I do again thank everyone who
09:06:30 3 has participated in these hearings as a presenter and we know
09:06:35 4 that everyone that is here has other things that they do with
09:06:40 5 the rest of their jobs and that this is a sacrifice with
09:06:43 6 regards to time and certainly I hope that you understand how
09:06:48 7 much the Commission appreciates your giving of your time and
09:06:52 8 your thoughts and also want to emphasize how helpful
09:06:54 9 everything that we have heard and will continue to hear as we
09:06:57 10 continue the rest of the hearings in other parts of the
09:07:01 11 country has helped the Commission.

09:07:03 12 This morning the first panel we have is a view from
09:07:06 13 the Executive Branch, and we have two individuals. We have
09:07:10 14 Mr. Patrick J. Fitzgerald who was appointed as U.S. Attorney
09:07:14 15 for the Northern District of Illinois in 2001. He previously
09:07:18 16 served as an assistant U.S. attorney in Manhattan from '88 to
09:07:23 17 2001, where he directed the Organized Crime and Terrorism
09:07:27 18 Unit. Mr. Fitzgerald received his bachelor's degree from
09:07:30 19 Amherst and graduated from Harvard Law School.

09:07:33 20 We also have Mr. Edward M. Yarbrough who was
09:07:39 21 appointed as the U.S. Attorney for the Middle District of
09:07:42 22 Tennessee in October of 2007. Prior to assuming that post, he
09:07:44 23 was a partner in a Nashville law firm, and before entering
09:07:48 24 private practice, Mr. Yarbrough served as a state prosecutor
09:07:52 25 in Nashville. Mr. Yarbrough received his bachelor's degree

09:07:53 1 from [Rhodes] College and his law degree from Vanderbilt.

09:07:56 2 And we will start with Mr. Fitzgerald.

09:07:59 3 PANEL VI. VIEW FROM THE EXECUTIVE BRANCH

09:07:59 4 MR. FITZGERALD: Thank you, Judge, and thank you to
09:08:01 5 the Commission. You thanked us for our sacrifice of being
09:08:04 6 here, but we want to thank you for the opportunity to speak to
09:08:06 7 you. The work you have to do is extremely important, and the
09:08:09 8 more points of view that we can bring to bear on these issues
09:08:13 9 is important.

09:08:13 10 I'd like to read my statement, but I'll make some
09:08:16 11 ad-lib comments from that. Truly we're grateful for the
09:08:19 12 opportunity to speak before you on the important topic of
09:08:21 13 federal sentencing policy and the guidelines in particular.
09:08:24 14 As you know, while this Commission continues its critical work
09:08:28 15 studying and seeking to improve the sentencing guidelines, the
09:08:31 16 Department of Justice is undertaking its own fairly
09:08:34 17 comprehensive review of sentencing policy internally, and I
09:08:37 18 know that this Commission has been a valuable resource for
09:08:42 19 information in that process. And those of us working in those
09:08:45 20 working groups are very, very grateful.

09:08:47 21 As a result of the ongoing Department of Justice
09:08:49 22 efforts, I just want to note up front that I'm not in a
09:08:52 23 position to advocate for particular changes to the federal
09:08:57 24 sentencing guidelines, as I participate in that working group
09:08:59 25 studying the matter because we'll be preparing a report for

09:09:03 1 the deputy attorney general and, through him, the Attorney
09:09:05 2 General, but I will say that in speaking to you, I also don't
09:09:10 3 want to give the false impression that any thoughts I share
09:09:13 4 with you or suggestions may reflect anything approaching a
09:09:16 5 consensus among my colleagues among the working group or
09:09:20 6 predict how the Department of Justice will come out.

09:09:23 7 Thus my remarks should not be viewed as anything
09:09:26 8 approaching an official view of the Department, but what I can
09:09:27 9 provide is a view from the field of how sentencing has changed
09:09:30 10 on the ground in the Northern District of Illinois in the wake
09:09:33 11 of the Supreme Court ruling in *Booker* and its progeny. And I
09:09:36 12 wanted to talk about a few topics that I think merit special
09:09:38 13 attention which I will discuss in a moment and from what I
09:09:42 14 heard about from the hearings yesterday, I think other people
09:09:45 15 have commented on those topics.

09:09:47 16 The first thing I would like to discuss is how
09:09:50 17 sentencing has changed in the district court in Chicago in the
09:09:51 18 post-*Booker* world. *Booker* has required the prosecutors to
09:09:54 19 refocus their sentencing advocacy on the factors described in
09:09:58 20 title 18, United States Code, § 3553(a), which requires
09:10:01 21 us to include a justification in the context of particular
09:10:04 22 cases of the reasoning behind many of the specific offense
09:10:08 23 characteristics, as well as favored and disfavored departures
09:10:13 24 covered by the guidelines. That substantial change has
09:10:15 25 resulted in both advantages and disadvantages.

09:10:17 1 On the positive side, the government is required to
09:10:20 2 make a fuller record of why a particular recommendation of
09:10:24 3 incarceration is warranted beyond proving the separate facts
09:10:26 4 that support the proffered guidelines range calculation. In
09:10:30 5 fact, Judge Castillo, I know, has lectured in the Chicago area
09:10:33 6 once *Booker* came out about how important it is for advocates
09:10:36 7 on both sides to address the 3553(a) factors more fully. I
09:10:42 8 think that's very true.

09:10:43 9 Prior to the guidelines, people went into court and
09:10:45 10 they argued why sentences made particular sense. I think we
09:10:48 11 lapsed a little bit before *Booker* and people dwelled
09:10:52 12 particularly on the particular calculations and didn't step
09:10:55 13 back and give the broader view. I think that some of that has
09:11:00 14 changed post-*Booker*, and that's been a good thing.

09:11:02 15 And there are no doubt cases where the appearance of
09:11:03 16 substantive fairness is easier to achieve because the
09:11:06 17 sentencing judge is not constrained by the sentencing
09:11:09 18 guidelines. And it's true that as a matter of perception,
09:11:12 19 both defendants and victims may well view and are likely to
09:11:14 20 perceive that the sentencing process is fair, gives greater
09:11:16 21 emphasis on the facts specific to an individual defendant and
09:11:20 22 a specific offense.

09:11:21 23 Having said that, there's a flip side to the *Booker*
09:11:23 24 decision. And the benefits of advisory rather than mandatory
09:11:26 25 guidelines do come at the serious expense of other fundamental

09:11:30 1 sentencing principles, specifically similar treatment for
09:11:34 2 similarly situated defendants and certainty of punishment. I
09:11:37 3 venture to say that *Booker* has reintroduced into federal
09:11:40 4 sentencing both substantial district-to-district variations
09:11:42 5 and substantial judge-to-judge variations. In many ways,
09:11:45 6 we're experiencing sentencing variations on a district level
09:11:48 7 similar to what occurred post-*Booker* on a nationwide basis.

09:11:52 8 And in my written statement, I go through some of the
09:11:54 9 statistics which I think have been covered, but in the
09:11:57 10 Northern District between the issuance of *Gall* and the end of
09:12:00 11 fiscal year 2008, around 42 percent of the contested
09:12:04 12 sentencings resulted in below-range sentences. In comparison
09:12:08 13 nationwide, only 19 percent of contested sentences were below
09:12:11 14 range. And I noted in my statement, and I mean it sincerely,
09:12:15 15 I'm not, of course, labeling below-range sentences as
09:12:18 16 unreasonable but instead pointing out that significant
09:12:21 17 disparity does exist between districts, and one of the
09:12:24 18 comments I'd like to make clear is that when we talk about the
09:12:26 19 balancing of scale between uniformity and allowing for the
09:12:30 20 discretion to deal with individual cases, they're both
09:12:34 21 important values that we have to balance. And I think my role
09:12:36 22 here as a witness is to describe what's happening on the
09:12:39 23 ground and to leave to others to make the judgments about how
09:12:43 24 to balance those two competing values.

09:12:45 25 There are anecdotal reports of substantial variation

09:12:49 1 in sentences from judge to judge. That is not at all
09:12:52 2 surprising, as discretion is a two-edged sword. The more
09:12:55 3 freedom any given judge is provided to impose a sentence, the
09:12:59 4 more likely he or she will use a different perspective to
09:13:02 5 impose, different judges may use different perspectives to
09:13:06 6 impose dissimilar sentences in similar situations. And the
09:13:09 7 concern is that any perception that punishment heavily depends
09:13:12 8 on where one is prosecuted or which judge is assigned to the
09:13:15 9 case undermines the fairness and perceived fairness of the
09:13:18 10 system.

09:13:19 11 *Booker* has certainly undercut the certainty of
09:13:22 12 punishment. By that, I mean not only the length of
09:13:25 13 imprisonment but also whether any amount of imprisonment is
09:13:28 14 part of the sentence. One of the Commission's initial
09:13:31 15 findings under the Sentencing Reform Act is that courts
09:13:34 16 sentenced to probation an inappropriately high percentage of
09:13:36 17 offenders guilty of certain economic crimes, such as theft,
09:13:39 18 tax evasion, antitrust offenses, insider trading, fraud and
09:13:43 19 embezzlement, and there is reason to believe that *Booker* has
09:13:46 20 started a trend returning to that type of leniency in some
09:13:50 21 economic crime cases.

09:13:51 22 In fiscal year 2003, the Commission's statistics show
09:13:55 23 that 26.7 percent of offenders in the fraud category received
09:13:58 24 entirely non-prison sentences, whereas in fiscal year 2008,
09:14:02 25 that percentage increased to 32.4 percent. In other words,

09:14:06 1 non-prison sentences in the fraud category have increased by
09:14:10 2 20 percent in the last full year before *Blakely/Booker* versus
09:14:15 3 the last fiscal year. Again, leniency may have been
09:14:17 4 well-deserved in particular cases, but the enforcement of a
09:14:18 5 uniform sentencing policy is more difficult in the post-*Booker*
09:14:22 6 era.

09:14:23 7 Two points about the effect of *Booker* on our practice
09:14:26 8 in my office in this district. First, as discussed before,
09:14:30 9 our prosecutors must pay close attention to the 3553(a)
09:14:33 10 factors in each individual case rather than reflexively object
09:14:37 11 to a non-guideline sentence. To be sure, the advisory
09:14:40 12 guidelines continue to be extremely important. They remain
09:14:43 13 for us the one uniform reference point in the sentencing
09:14:46 14 regime that is subject to geographic and judicial variation.
09:14:49 15 For that reason, we generally seek a within-range sentence
09:14:52 16 rather than introduce yet another point of disparity, namely,
09:14:55 17 the subjective sentencing philosophies of individual AUSAs.

09:15:00 18 In particular cases, however, we have authorized
09:15:02 19 prosecutors to advocate for a deviation from the advisory
09:15:05 20 range, both upward and downward. We have a centralized
09:15:08 21 approval process in place for such requests so that, as an
09:15:11 22 office, we maintain some uniformity in how we treat defendants
09:15:14 23 across cases, while at the same time making allowances where
09:15:17 24 case-specific circumstances warrant sentences outside the
09:15:20 25 advisory guidelines range.

09:15:21 1 Second, our practice of entering into cooperation
09:15:25 2 agreements has changed to some extent. It has been our office
09:15:27 3 practice to have supervisory review of cooperation agreements
09:15:30 4 to ensure that similar defendants receive similar deals within
09:15:33 5 the district. In my office, cooperation agreements and 5K
09:15:38 6 letters are all approved by the criminal chief, so that in
09:15:40 7 most cases, you have an assistant, reviewed by a deputy chief
09:15:44 8 of a section, a chief of a section, and then the criminal
09:15:46 9 chief. The section review is designed to make sure that we're
09:15:49 10 being consistent in, say, drug cases with having treated
09:15:53 11 cooperation. In a fraud case, that other section reviews it
09:15:55 12 for consistency. And the criminal chief reviews all
09:15:59 13 cooperation agreements, all 5K agreements, so that he can make
09:16:02 14 sure that as an office we try to be consistent in how we treat
09:16:05 15 people across different cases.

09:16:06 16 We are seeing now that after *Booker*, more defense
09:16:10 17 counsel are resistant to entering into such agreements with us
09:16:13 18 on behalf of their clients in the hope that they can receive
09:16:16 19 more of a break at sentencing by making a direct pitch to the
09:16:19 20 sentencing judge. The bottom line is that there's inevitable
09:16:23 21 trade-off between the discretion afforded individual judges to
09:16:26 22 render justice as they see fit in an individual case and the
09:16:29 23 ability of the judicial system to minimize disparities in
09:16:33 24 sentencing similarly situated defendants who will be before
09:16:36 25 different judges in different districts for similar conduct.

09:16:39 1 Rightly or wrongly, *Booker* has swung the balance more heavily
09:16:43 2 in favor of judicial discretion at the expense of consistency
09:16:46 3 in sentencing and certainty of punishment.

09:16:48 4 Let me turn for a moment briefly to our appellate
09:16:51 5 practice. In the Seventh Circuit, appellate review is extremely
09:16:55 6 deferential. That is not surprising in light of the Supreme
09:16:57 7 Court's emphasis on the discretion that district judges now
09:16:59 8 enjoy in applying 3553(a) factors in each particular case.
09:17:03 9 Although the government has successfully appealed
09:17:06 10 non-custodial sentences or exceedingly short prison sentences
09:17:10 11 in certain serious cases, appellate review is light. Indeed,
09:17:13 12 recognizing the deferential standard of review, very few of
09:17:17 13 the below-range sentences are appealed in the Northern
09:17:20 14 District of Illinois or, as I understand it, elsewhere. In
09:17:22 15 light of that substantive discretion, however, the Seventh Circuit
09:17:24 16 has imposed on district judges a corresponding procedural
09:17:28 17 responsibility to explain adequately the reasons for selecting
09:17:31 18 the sentence in each case. The duty to explain a sentencing
09:17:34 19 decision promotes better decision-making and gives defendants,
09:17:38 20 law enforcement and victims more confidence in the fairness of
09:17:41 21 the sentencing process, even if a particular party disagrees
09:17:45 22 with the sentence itself.

09:17:46 23 Finally, let me comment on two types of cases that
09:17:50 24 are brought with increasing frequency in our district as in so
09:17:53 25 many others: One, cases involving drugs, guns and gangs, and,

09:17:58 1 two, cases involving child pornography and child exploitation.

09:18:00 2 In the drug and gun context, the guidelines, and
09:18:04 3 mandatory minimum sentences more particularly, have often been
09:18:06 4 criticized as being too harsh. In that regard, I would offer
09:18:10 5 the following comments. Mandatory minimum sentences have been
09:18:13 6 a very effective tool in prosecuting particularly violent
09:18:16 7 offenders. The threat of a mandatory minimum sentence has
09:18:19 8 caused many persons charged with these offenses to become
09:18:22 9 cooperative witnesses, often testifying against persons with
09:18:25 10 greater responsibility in the drug or gang organization. And
09:18:28 11 the threat of mandatory minimum sentences also has caused some
09:18:31 12 people not to commit such offenses and, thus, not to go to
09:18:34 13 jail at all.

09:18:35 14 A scholarly study has shown that released offenders
09:18:38 15 who attend a one-hour forum where they are advised of such
09:18:43 16 penalties are 30 percent less likely to re-offend. In each
09:18:48 17 case where recidivism is deterred, we have the benefit of both
09:18:48 18 less crime and less incarceration.

09:18:50 19 One thing I might add there is I think there's a
09:18:52 20 perception sometimes in the public that prosecutors may be
09:18:56 21 driven by the metrics of how many people we arrest, and I've
22 seen a great change in the way law enforcement goes about the
09:19:01 23 way it does business, from the police to federal agencies to
09:19:03 24 the prosecutors' offices. It is far more intelligence driven.
09:19:07 25 The metrics are far less how many arrests did it make, and the

09:19:10 1 metrics are far more how much violence is reduced.

09:19:14 2 And in situations such as where we've seen a forum
09:19:17 3 where a person attends for one hour as one of 30 people, if we
09:19:21 4 can reduce the likelihood that they will re-offend for by
09:19:26 5 30 percent, that is a far more effective method of law
09:19:29 6 enforcement than prosecuting, incarcerating and sending people
09:19:31 7 to jail. The human cost is far less, the financial cost is
09:19:33 8 far less. And what we do do is try to focus our law
09:19:36 9 enforcement efforts at prosecution, incarceration on those
09:19:40 10 most dangerous offenders, while advertising what we do to
09:19:43 11 discourage others.

09:19:44 12 On the other hand, in recognition of the fact that
09:19:47 13 some offenders who get involved in drug and gun offenses may
09:19:50 14 not have a lot of information to offer, may not pose the same
09:19:53 15 threat as more hardened offenders, Congress enacted the safety
09:19:57 16 valve provision, 18 U.S.C. 3553(f) in 1994. We have not seen
09:20:03 17 the safety valve provision as a serious impediment to law
09:20:06 18 enforcement in Chicago. We actually think it is a good relief
09:20:10 19 valve that ameliorates the harshness of mandatory minimum
09:20:13 20 sentences where the offender does not have an extensive
09:20:16 21 criminal history.

09:20:17 22 In fact, in my office no one has any heartburn about
09:20:19 23 the safety valve, and we've actually looked at it and we're
09:20:22 24 sometimes concerned that when you look at the Criminal History
09:20:24 25 Category requirement having one criminal history point, in

09:20:28 1 some cases, that criminal history point or if they have two
09:20:32 2 may not indicate that this person is not -- should not be
09:20:35 3 eligible for some leniency. And in some cases, we feel
09:20:41 4 comfortable if a person doesn't qualify for a 5K motion and
09:20:44 5 doesn't qualify for the safety valve that, in some
09:20:46 6 circumstances, we think we can do it consistently with DOJ
09:20:51 7 policy, plead people to lesser offenses to avoid the harshness
09:20:55 8 of a mandatory minimum if we don't think they're the most
09:20:58 9 serious offender in the case.

09:21:00 10 Turning to the area of child pornography and child
09:21:03 11 exploitation, there seems to be a striking dissonance between
09:21:06 12 the perspective of some district judges on the one hand and
09:21:09 13 prosecutors who handle those cases on the other. Stated as
09:21:13 14 neutrally as possible, this subject area is one where district
09:21:16 15 judges seem to vary the most and seem to get most frustrated
09:21:20 16 with the government seeking a sentence within the guideline
09:21:21 17 range.

09:21:22 18 It is also the same area where the AUSAs handling
09:21:25 19 these cases privately express the most frustration with the
09:21:28 20 views of sentencing judges. One could posit that perhaps the
09:21:31 21 judges are more lenient because they have less personal
09:21:34 22 contact with the victims and see things more through the lens
09:21:37 23 of the defendant standing before the judge for sentencing.

09:21:38 24 Alternatively, one could posit that AUSAs may seek
09:21:42 25 harsh sentences because they see the case most heavily through

09:21:45 1 the lens of the victims, who have suffered much and to whom
09:21:48 2 they have become very close. Along those lines, the
09:21:49 3 prosecutors have little or no interaction with the defendant.
09:21:52 4 Without taking an advocate's view of it, it is plain as day
09:21:55 5 that there's a deep disconnect. I respectfully suggest that
09:21:57 6 this is an area of sentencing that warrants further study and
09:22:00 7 further education of all involved.

09:22:01 8 When I say not taking an advocate's view of it, I
09:22:06 9 mean that not to pay lip service or to be polite. I think
09:22:08 10 anyone practicing in the area who listens to the AUSAs who
09:22:12 11 come back from sentencings in this area and listens to the
09:22:15 12 judges' remarks in this area, the disconnect is plain as day.
09:22:18 13 And whatever the right answer is, I think we could use further
09:22:23 14 study, further input from the Commission, and further
09:22:25 15 education to all people involved as to what the harms are and
09:22:29 16 are not from child pornography and exploitation, the
09:22:32 17 seriousness of what those harms are, the likelihood of
09:22:35 18 recidivism in those cases so that we can not have a situation
09:22:37 19 where a number of people who sit on the bench who do it in
09:22:43 20 good faith, earnestly believe that the penalties are too
09:22:46 21 harsh; and there are people who practice and represent the
09:22:48 22 government in good faith believe that the penalties should be
09:22:52 23 enforced or that certainly should be a cry, a loud call for
09:22:57 24 people to study this and see what conclusions people can draw
09:23:00 25 because it's plain that there's an issue there.

09:23:03 1 On a practical level, the *Booker* decision has
09:23:06 2 aggravated the situation concerning child pornography. The
09:23:09 3 mandatory minimum sentences imposed for certain child
09:23:11 4 pornography offenses are certainly strict. However, a
09:23:14 5 prosecutor has some discretion not to charge a mandatory
09:23:17 6 minimum sentence or to charge a lesser mandatory minimum
09:23:20 7 sentence where the guidelines range is below the otherwise
09:23:22 8 applicable mandatory minimum sentence.

09:23:24 9 And I note in my remarks that the line between
09:23:27 10 possession and receipt of child pornography which impose
09:23:30 11 different penalties is exceptionally thin, and that's my
09:23:33 12 polite way of saying I've never understood how you can possess
09:23:36 13 something without receiving it. It just doesn't appear there.
09:23:39 14 And so whatever we think about the overall horror of child
09:23:45 15 pornography, it just strikes someone as odd that we have a
09:23:49 16 sentence that punishes possession and receipt in very
09:23:53 17 different fashions.

09:23:54 18 Anecdotal experience suggests that when given
09:23:57 19 discretion in this area, district judges often vary quite
09:24:00 20 substantially from the guidelines range, and this Commission's
09:24:02 21 statistics seem to support those anecdotal observations. But
09:24:07 22 put in simple terms, a prosecutor is far less willing to forgo
09:24:09 23 charging a mandatory minimum sentence when prior experience
09:24:13 24 shows that the defendant will ultimately be sentenced to a
09:24:15 25 mere fraction of what the guidelines range is.

09:24:17 1 When we've seen experiences where we thought a
09:24:19 2 mandatory minimum sentence might be too harsh, that a
09:24:21 3 guidelines range sentence might be more appropriate and then
09:24:24 4 when we forgo the mandatory minimum sentence, instead of
09:24:27 5 getting a guideline sentence, we may get little or no sentence
09:24:29 6 at all. And, again, without saying what the right answer is,
09:24:33 7 when we honestly believe that a guideline sentence is called
09:24:36 8 for, we're less likely to forgo a mandatory minimum if we
09:24:40 9 think the result may end up being probation or a light
09:24:43 10 sentence. And, again, if we could clarify the thinking on the
09:24:46 11 area of child pornography, that would be greatly important.

09:24:48 12 I will close by, again, thanking the Commission for
09:24:50 13 undertaking work that is important as it is difficult. The
09:24:53 14 tension between providing a sentencing judge the ability to
09:24:56 15 impose a sentence he or she believes to be just based upon the
09:25:00 16 facts concerning the particular offense and particular
09:25:02 17 offender before him or her and the need at the same time to
09:25:05 18 eliminate unwarranted disparity between sentences imposed upon
09:25:09 19 people for similar offenses before different judges in
09:25:11 20 different areas does not lend itself to an easy solution. The
09:25:15 21 Commission's insights can be enormously helpful to the process
09:25:18 22 going forward.

09:25:19 23 Thank you.

09:25:20 24 ACTING CHAIR HINOJOSA: Thank you, Mr. Fitzgerald.

09:25:22 25 Mr. Yarbrough, sir?

09:25:23 1 MR. YARBROUGH: Thank you very much, Mr. Chairman,
09:25:24 2 and good morning, ladies and gentlemen. It's certainly a
09:25:27 3 privilege for me to be here before you, and I want to say at
09:25:30 4 the beginning that it's also an honor to be here with
09:25:32 5 Mr. Fitzgerald. I came into the department in 2007, as the
09:25:36 6 chairman noted, and I found out pretty quickly who the most
09:25:42 7 respected United States Attorneys in the group of 93 were at
09:25:46 8 that time, and Pat is certainly at the very top of that, and
09:25:49 9 I'm honored to be here with him today.

09:25:51 10 Having worked in the American criminal justice system
09:25:55 11 for over 36 years as both a prosecutor and defense lawyer, I
09:25:59 12 bring long-term perspective to this subject, but I have no
09:26:03 13 illusions that experience is any substitute for expertise.
09:26:07 14 And when I say that, I have to, I guess, allude a little bit
09:26:12 15 to my advanced age by noting that I remember when the
09:26:15 16 guidelines came into the federal system, and I didn't have an
09:26:19 17 extensive federal practice, but I had enough to understand
09:26:22 18 that that changed the game a bit for those of us who were
09:26:26 19 defending cases at that time, and I think it was perceived by
09:26:30 20 the defense bar as an effort to increase the sentences, and it
09:26:34 21 was perceived by some of our judges as an effort to invade
09:26:37 22 their province. And I think a lot of those hard feelings in
09:26:41 23 the early days have actually been overcome by what's happened
09:26:45 24 since then, particularly in the development of the law in that
09:26:47 25 area.

09:26:48 1 My current position as United States Attorney for the
09:26:50 2 Middle District of Tennessee has taught me that sound federal
09:26:53 3 sentencing policy is essential to the safety of our nation,
09:26:57 4 yet currently federal sentencing presents many vexing issues
09:27:02 5 to judges, prosecutors, and all those whose task it is to
09:27:05 6 fashion proper sentences in serious cases.

09:27:07 7 In my early years as a state prosecutor, I was
09:27:10 8 surprised to learn how much of the sentencing decision-making
09:27:13 9 fell to young assistant D.A.s as a result of plea bargaining.
09:27:17 10 In those days, the trial court had very little control over
09:27:20 11 sentences because sentences were fixed by juries in all cases
09:27:23 12 that went to trial without the benefit of a separate hearing
09:27:26 13 and by prosecutors in all cases that were settled.

09:27:29 14 Later, as judge-imposed sentencing was implemented in
09:27:32 15 Tennessee by statute and as I began my practice in federal
09:27:35 16 court, the issue of disparity of sentences emerged, and that
09:27:39 17 issue, I'm sure, is what drove the implementation of the
09:27:43 18 guidelines initially, and I guess we have learned that that's
09:27:47 19 a struggle we may have in the justice system for a long time
09:27:51 20 to come.

09:27:52 21 One of the principal purposes underlying the U.S.
09:27:55 22 sentencing guidelines is to limit unfair disparity of
09:27:57 23 sentences among defendants with similar records in federal
09:28:00 24 courts nationwide. However, however well one may think this
09:28:05 25 goal has been attained under the presumptive guidelines, the

09:28:09 1 *Booker* case and its progeny have significantly muddied the
09:28:12 2 water and many have questioned whether the present system can
09:28:15 3 and should be saved. My hope is to provide some information
09:28:18 4 to the Commission from my experience that may aid you in
09:28:20 5 meeting the challenges of this new and evolving era of
09:28:27 6 sentencing.

09:28:27 7 Just a short comment or two on the role of the
09:28:31 8 guidelines in what we call now the post-*Booker* world, I
09:28:33 9 suppose. Some have suggested that advisory guidelines are not
09:28:35 10 necessary any longer and that unless the guidelines can be
09:28:40 11 made mandatory again, a totally new system should be devised.
09:28:45 12 Others have suggested keeping the advisory guidelines but
09:28:47 13 limiting or eliminating mandatory minimum sentencing statutes.

09:28:53 14 As you know, a few months ago, the Attorney General
09:28:55 15 created a Sentencing and Corrections Working Group within the
09:28:59 16 department to study these and other policy options. The
09:29:02 17 working group has been reviewing the available research,
09:29:06 18 surveying the U.S. Attorney community, meeting with outside
09:29:10 19 stakeholders, and reviewing the relevant literature all in
09:29:13 20 hope of giving the Attorney General all the information he
09:29:15 21 needs to develop a new sentencing policy for the
09:29:18 22 administration.

09:29:20 23 Policy options under review will build on nearly
09:29:24 24 25 years of experience under the guidelines. No reasonable
09:29:26 25 expert could argue that the science of criminal punishment has

09:29:31 1 not been furthered by the experience under the guidelines.
09:29:34 2 When I say that, you know, every case is obviously an
09:29:40 3 individual case, and every person who comes before the court
09:29:42 4 has individual experiences and needs, and the effort sometimes
09:29:47 5 to fashion the guidelines in such a way that they can be used
09:29:52 6 as a grid to decide matters on any individual case may be more
09:29:59 7 ambitious than it should have been in the beginning.

09:30:01 8 But I think what we've seen from the use of the
09:30:05 9 guidelines and the law that's developed in their use is
09:30:09 10 extremely useful. It helps prosecutors do their job, it helps
09:30:14 11 the court to be more fair, and it also gives a certain level
09:30:19 12 of certainty and deterrence to the potential offender.

09:30:24 13 As you know, judges are now free to both vary and
09:30:27 14 depart from the sentences suggested by the guidelines. Our
09:30:30 15 experience has been that appellate review is a costly,
09:30:33 16 time-consuming and now fairly ineffective remedy for any
09:30:37 17 perceived incorrect sentences. The Sixth Circuit has affirmed a
09:30:40 18 wide range of decisions, sometimes approving a total rejection
09:30:43 19 to the methodology, basis and objectives underlying the ranges
09:30:46 20 provided by the guidelines for certain offenses, such as for
09:30:49 21 crack cocaine and immigration violations.

09:30:52 22 Whether the Commission or Congress can address some
09:30:56 23 of this decisional law, without violating the underlying
09:31:00 24 principle of *Booker*, remains to be seen. My early mentor,
09:31:04 25 Criminal Judge Raymond H. Leathers, often was heard to opine

09:31:09 1 that it is not the length of the sentence but the certainty of
09:31:11 2 punishment that deters crime. Now, when he said that in the
09:31:14 3 1970s, he was dealing in a system that had jury sentencing,
09:31:19 4 and the jury came back with a sentence at the same time they
09:31:21 5 came back with the verdict of guilt or innocence, a system
09:31:26 6 that we now view as being quite bizarre, but it was something
09:31:29 7 that existed in Tennessee and many other states at that time.

09:31:33 8 And it was, I have to, I guess, confess a little bit
09:31:39 9 sometimes the prosecutors perhaps got a little overzealous in
09:31:43 10 their effort to get a large sentence from a jury in the way
09:31:47 11 they proved the case on the issue of guilt or innocence, and
09:31:51 12 we look at that system now as being quite arcane, and I know
09:31:56 13 know nobody wants to go back to that. But that developed a
09:31:58 14 disparity of sentences that would make the federal disparity
09:32:02 15 look mild by comparison.

09:32:04 16 He was not fond, Judge Leathers was not fond of
09:32:08 17 sentencing and decided to retire when Tennessee enacted a
09:32:13 18 judicial sentencing law in 1982. Jury sentencing had produced
09:32:16 19 a sad history of wildly disparate punishments for crime, but
09:32:19 20 he wanted no part of the remedy even though he was a stern
09:32:23 21 judge and demanded strict enforcement of the law. Eventually,
09:32:26 22 Tennessee developed a grid and loosely structured guidelines
09:32:29 23 to address some issues of enhancement and mitigation such that
09:32:33 24 sentencing is now relatively uniform within the state.

09:32:36 25 Could the federal courts use a more relaxed system of

09:32:40 1 guidelines like that in Tennessee or accomplish uniformity
09:32:42 2 without violence to defendants' rights under *Booker*? That is
09:32:45 3 what the Sentencing and Corrections Working Group is
09:32:48 4 exploring. Some have suggested that guidelines with broader
09:32:51 5 sentencing ranges that allow judges to use sound discretion
09:32:55 6 within a consistent paradigm would combine the virtues of the
09:32:59 7 wisdom gained in 25 years of research with case-by-case
09:33:02 8 analysis typically done in the courtroom. It is worth
09:33:05 9 considering, and the Justice Department is doing just that.

09:33:09 10 Recent decisions from the U.S. Supreme Court still
09:33:12 11 stress the need for nationwide consistency and commend the
09:33:15 12 guidelines as a starting point and initial benchmark for
09:33:20 13 sentencing. So it is obvious that the court values the
09:33:22 14 importance of federal sentencing guidelines in the post-
09:33:25 15 *Booker* era.

09:33:26 16 However, the ability of a defendant to appeal his
09:33:30 17 sentence for lack of reasonableness has generated a huge
09:33:33 18 appellate caseload where the issues have no bearing on the
09:33:36 19 issue of guilt or innocence and, in my experience, this kind
09:33:39 20 of deferential appellate review has not been an effective
09:33:42 21 mechanism for the review of district court sentencing
09:33:45 22 decisions.

09:33:46 23 Now a few observations from Middle Tennessee. The
09:33:50 24 Middle District consists of 32 counties and contains the
09:33:53 25 capital city of Nashville, Tennessee's largest metropolitan

09:33:57 1 area. Federal crimes that have been recently prosecuted
09:33:59 2 within the district include a RICO prosecution against 14
09:34:04 3 members of MS-13 gang.

09:34:07 4 A little history on that. We had a police chief in
09:34:09 5 Nashville only a few years ago who was very fond of saying
09:34:12 6 that we had no gangs in Nashville. I think he was concerned
09:34:16 7 about alarming the populace. The truth of the matter is gangs
09:34:23 8 are everywhere, and I'm sure the Commission is well aware of
09:34:26 9 that,

09:34:26 10 Multiple cases of investor fraud involving millions
09:34:29 11 of dollars in loss to victims; scores of felon in possession
09:34:31 12 of firearms cases, including the individual who allegedly
09:34:34 13 provided the gun that killed former NFL football star Steve
09:34:39 14 McNair; many immigration cases generated, in part, by an
09:34:41 15 aggressive 287(g) program being run by the local sheriff;
09:34:45 16 multi-defendant drug cases involving cocaine, heroin,
09:34:48 17 marijuana and methamphetamine, as well as the typical array of
09:34:51 18 crimes common to districts throughout the country.

09:34:54 19 When I came into office almost two years ago, I
09:34:58 20 implemented a special unit for what we call the PSN program,
09:35:03 21 the felons with guns prosecution because it was my view that a
09:35:07 22 robust PSN program in the U.S. Attorney's Office not only has
09:35:11 23 the capacity to take people off the street who are dangerous
09:35:14 24 offenders and that are in possession of firearms, but it also
09:35:17 25 sends a very loud message to the community that this type of

09:35:21 1 offense will be taken seriously by the Justice Department, and
09:35:25 2 I think it does have some deterrent effect.

09:35:26 3 We hear a lot of anecdotal evidence on the jail calls
09:35:31 4 and other information that we get that indicates that the idea
09:35:34 5 of going federal is not a popular thing with street criminals,
09:35:38 6 and we think that's a good deterrent effect.

09:35:41 7 Overall, the guidelines have worked well and continue
09:35:43 8 to work well in our district. Judges continue to give careful
09:35:46 9 attention to the calculation of ranges and consistently apply
09:35:50 10 the various mitigating and enhancing factors, yet a trend has
09:35:54 11 developed to treat the top end of the range as the maximum,
09:35:57 12 while departures and variances to the down side are not
09:36:00 13 uncommon. A notable exception to this trend is a recent case
09:36:04 14 that received national attention as a TARP-related mini-Madoff
09:36:09 15 case in which investors lost their life savings to a Ponzi
09:36:14 16 scheme. This individual, and this case has been concluded,
09:36:18 17 talk about it a little, but this individual had promised some
09:36:20 18 of his investors toward the end of the scheme when he was
09:36:24 19 about to be exposed that even if they lost money in their
09:36:27 20 investments that the Troubled Asset Relief Program would come
09:36:31 21 along and cover their losses. And, obviously, nothing like
09:36:34 22 that existed in the federal system and it was a scam from
09:36:39 23 start to finish, but because he invoked those words, our
09:36:42 24 Special Inspector General for TARP did come in and help us
09:36:46 25 with that case.

09:36:46 1 This defendant entered a quick plea of guilty,
09:36:49 2 attempted to gain favorable consideration by cooperating with
09:36:52 3 investigators. He did not qualify for a departure under
09:36:56 4 Section 5K1 of the guidelines but argued for a low sentence
09:37:00 5 anyway. My assistant called a number of victims to the stand
09:37:04 6 to relate their stories of deceit, fraud and avarice to the
09:37:07 7 judge, and the result was a sentence substantially above the
09:37:10 8 guideline range and a speech from the judge regarding the
09:37:13 9 defendant's callous treatment of his victims.

09:37:15 10 This example demonstrates both the value of
09:37:17 11 guidelines and their limitations, I believe. While a term of
09:37:20 12 imprisonment was clearly warranted and the
09:37:23 13 multi-million-dollar loss figure netted a guideline range that
09:37:26 14 called for incarceration, the judge weighed the human cost and
09:37:29 15 rendered a rare upward departure that might have been more
09:37:32 16 appealable when the guidelines were mandatory. We obviously
09:37:36 17 agree with the sentence, but it might not have occurred before
09:37:39 18 the *Booker* decision.

09:37:40 19 Just last week in another case like this with bigger
09:37:45 20 numbers, however, a judge departed downward because he felt
09:37:48 21 that the enhancement caused by the unusual loss numbers was
09:37:52 22 disproportionate to the punishment needed in that individual
09:37:55 23 case. And even though this particular Ponzi schemer had taken
09:38:02 24 millions more, the sentence was only two-and-a-half years
09:38:05 25 greater than the one I just referred to.

09:38:08 1 As federal prosecutors, one of our highest
09:38:10 2 responsibilities is to give clear voice to the concerns of
09:38:12 3 victims of crime. While vulnerability and loss are taken into
09:38:16 4 account by the guidelines, only specific testimony from actual
09:38:18 5 victims can convey the depth of feeling many victims have
09:38:22 6 concerning their damages. These damages often include
09:38:26 7 physical injury, loss of loved ones, financial ruin,
09:38:29 8 destruction of life, and other consequences caused by a
09:38:32 9 defendant's action.

09:38:35 10 The opposing view has merit as well. Sometimes the
09:38:38 11 valid ends of justice would be better served by probation or
09:38:41 12 other forms of alternative sentence. In drug cases
09:38:44 13 particularly, we often see defendants who need treatment as
09:38:47 14 well as incarceration, but sometimes no workable accommodation
09:38:50 15 is available to the court.

09:38:51 16 The department is considering providing for greater
09:38:54 17 flexibility in certain areas to open the door to more creative
09:38:58 18 use of treatment alternatives without losing sight of the
09:39:02 19 legitimate ends of justice and indeed for punishment and
09:39:05 20 deterrence.

09:39:05 21 Where do we go from here? Most of us would probably
09:39:09 22 agree that one of the dangers of being a rule maker is we
09:39:12 23 might make too many rules. No one wants the manual that
09:39:16 24 contains the U.S. sentencing guidelines to become another
09:39:19 25 Internal Revenue Code. Since the *Booker* decision has placed a

09:39:22 1 significant limitation on the power to enact mandatory
09:39:25 2 sentencing guidelines, it would seem prudent to review all the
09:39:28 3 various options so that we could construct a system that
09:39:31 4 provides a level of structure and guidance to eliminate
09:39:34 5 unwarranted disparity, provide appropriate certainty and
09:39:37 6 fairness in judgment, and does all of that without impinging
09:39:43 7 on the Sixth Amendment right to trial by jury.

09:39:46 8 One way to do this might be to add to the mandatory
09:39:48 9 minimum sentencing statutes already present in federal code.
09:39:53 10 However, the Commission and others have suggested in the past
09:39:57 11 that this may not be the best way to achieving the goals and
09:40:00 12 the purposes of sentencing. Mandatory minimums have had a
09:40:03 13 place in the federal criminal justice system for some time.
09:40:06 14 Traditionally, though, mandatory minimums have been reserved
09:40:09 15 for offenses that pose particularized threats to public safety
09:40:13 16 and for which incarceration is seen as a necessary punishment.

09:40:16 17 If we retain the existing guidelines as presently
09:40:21 18 promulgated, one reform worth considering might be placing
09:40:24 19 some reasonable restrictions on the appellate process. In
09:40:26 20 Middle Tennessee, we find that close to half of all appeals
09:40:29 21 relate to sentences, and the trend is increasing since the
09:40:32 22 *Booker* decision. Litigation over guideline calculations and
09:40:35 23 actual sentences now consume a significant portion of court
09:40:38 24 time whereas this was not the case in the pre-guidelines era.
09:40:42 25 Perhaps some statutory changes could remedy this. And

09:40:46 1 obviously that's something that Congress and the Commission
09:40:50 2 and many others will have to consider.

09:40:51 3 In closing, the Department of Justice is committed to
09:40:55 4 a system of sentencing jurisprudence that protects the public,
09:40:59 5 is fair to both victims and defendants, eliminates unwarranted
09:41:03 6 disparities and prison terms and reduces recidivism. It is my
09:41:07 7 hope that these lofty goals can be obtained without
09:41:11 8 sacrificing the body of laws surrounding the U.S. sentencing
09:41:16 9 guidelines and without placing undue burdens on the court
09:41:18 10 system in our country. Certainly my office stands ready to
09:41:22 11 assist the Commission in its important work, as we all strive
09:41:25 12 to create a strategy that best serves the people whom we are
09:41:28 13 sworn to protect.

09:41:29 14 Thank you.

09:41:30 15 ACTING CHAIR HINOJOSA: Thank you, Mr. Yarbrough, and
09:41:32 16 we'll open it up for questions.

09:41:35 17 QUESTION AND ANSWER SESSION

09:41:35 18 VICE CHAIR CASTILLO: Good morning. Thank you for
09:41:36 19 your testimony. I think it's fair to say the Commission looks
09:41:40 20 forward to working with the working groups at the Department
09:41:44 21 of Justice.

09:41:44 22 My question, of course, would be for Mr. Fitzgerald.
09:41:48 23 As a member of our court, the Northern District of Illinois,
09:41:53 24 what caught my attention was your written testimony, your oral
09:41:58 25 testimony, 42 percent of contested sentencings resulting in

09:42:02 1 below-range sentences, that, coupled with the fact that you
09:42:07 2 said, Patrick, you have anecdotal testimony or knowledge of
09:42:13 3 substantial variations. But wouldn't you say, as I suspect is
09:42:19 4 true, that most of these 42 percent of below-range sentences
09:42:25 5 are rather slight variations from the low end of the
09:42:29 6 guidelines?

09:42:30 7 What's your thought on that?

09:42:32 8 MR. FITZGERALD: I don't think -- I can't give you
09:42:37 9 numbers. I don't want -- I don't want to -- I'm not prepared
09:42:43 10 to disagree with you or agree with you because I haven't
09:42:46 11 looked at the numbers about how far off they are.

09:42:49 12 VICE CHAIR CASTILLO: So you haven't tried to track
09:42:51 13 it.

09:42:52 14 MR. FITZGERALD: I think people in my office may or
09:42:54 15 may not. I could get back to the Commission, but I couldn't
09:42:56 16 tell you how many of those are six months below the range
09:42:59 17 versus --

09:43:00 18 VICE CHAIR CASTILLO: Right.

09:43:02 19 MR. FITZGERALD: -- eight years down to zero.

09:43:05 20 VICE CHAIR CASTILLO: But wouldn't you suspect just
09:43:07 21 that it would be intuitive, if 42 percent were substantial
09:43:08 22 variations, that would be pretty big news that would make its
09:43:11 23 way not only out of Chicago but make its way all the way back
09:43:14 24 to D.C. if we had a district that 42 percent of the judges
09:43:20 25 were substantially varying from the low end of the guidelines?

09:43:25 1 MR. FITZGERALD: What I would say is I would hear --
09:43:26 2 I hear more anecdotally the larger departures. I'll make it
09:43:31 3 concrete, not speaking about a case, but if someone has an 8-
09:43:35 4 to 10-year range, if someone departed down to 7-and-a-half
09:43:38 5 years, they will tell the appellate chief that there was a
09:43:41 6 variance. That wouldn't even be a thought in my mind. Unless
09:43:44 7 there was something radically wrong from our perception in the
09:43:49 8 process or ruling, we wouldn't even think about departure.
09:43:52 9 I'm more likely to hear from an 8- to 10-year range that we
09:43:56 10 got probation --

09:43:57 11 VICE CHAIR CASTILLO: Right.

09:43:58 12 MR. FITZGERALD: -- or that we had one year or
09:44:00 13 two years, where people might talk about whether we want to
09:44:03 14 have -- take an appeal. I have heard anecdotal reports, you
09:44:08 15 know, including quite recently, of sentences where people
09:44:12 16 receive, you know, far below or receive probation on a higher
09:44:17 17 range. But I couldn't sit here and quantify how many times
09:44:20 18 I've heard that as a percentage.

09:44:22 19 VICE CHAIR CASTILLO: Right. I understand that. I
09:44:23 20 won't quibble with you about that.

09:44:24 21 As to the substantial variations that you do hear
09:44:27 22 about where it's difficult for an assistant to really come
09:44:31 23 down and need to talk to people about that, how hard is it to
09:44:34 24 get approval from the Department of Justice to appeal that
09:44:38 25 sentence?

09:44:40 1 MR. FITZGERALD: My sense is we take a high threshold
09:44:45 2 to take that appeal. Recognizing that the law allows for
09:44:49 3 substantial deference to the district court judge, we would
09:44:52 4 look at it and say it's got to be something that we really
09:44:56 5 think we have a chance of winning an appeal. We don't want to
09:45:00 6 lose an appeal. We don't want to make bad law. Also, if
09:45:04 7 there's a remand on appeal if we think it's procedural, we're
09:45:07 8 going to end up to the same place. Because you go back [to] the
09:45:08 9 judge and if the judge's view of the case is clear and we're
09:45:10 10 going through a sort of exercise that it gets sent back to the
09:45:13 11 same judge who may impose the same sentence with a different
09:45:19 12 effort to apply a different procedure, that's not worth it.

09:45:22 13 When we think we should appeal, then we have to go to
09:45:24 14 the Solicitor General's Office, who obviously have a broad
09:45:27 15 view of the law. I can't give you exact numbers, but the
09:45:29 16 number of times we appeal is far less than one percent of the
09:45:33 17 sentences, putting aside cross appeals when the defendant
09:45:37 18 does. So I think we have a high threshold. When we do seek
09:45:41 19 to appeal as an office, I think perhaps because our appellate
09:45:44 20 chief, Ed Chang, has a good sense of where the Solicitor
09:45:48 21 General's Office is, I think we'd probably get authorized
09:45:51 22 because we know a fair amount because we know where the
09:45:53 23 threshold is.

09:45:54 24 VICE CHAIR CASTILLO: Thank you.

09:45:56 25 ACTING CHAIR HINOJOSA: Mr. Fitzgerald, follow-up on

09:45:57 1 the 42 percent. What do you mean by contested hearing and who
09:46:02 2 keeps the record as far as the number of contested hearings?

09:46:07 3 MR. FITZGERALD: My understanding is the 42 percent
09:46:09 4 excludes a 5K agreement, motions where it's agreed. I think
09:46:15 5 those numbers, I thought they came from --

09:46:19 6 VICE CHAIR CASTILLO: From us.

09:46:21 7 MR. FITZGERALD: -- the Commission.

09:46:26 8 VICE CHAIR SESSIONS: Could I just follow up with
09:46:28 9 that. Mr. Fitzgerald, I really appreciate you coming and
09:46:32 10 testifying today.

09:46:33 11 Nationally, the statistics indicate that when there's
09:46:38 12 a departure pursuant to 5K1 based on cooperation, the level of
09:46:42 13 departure basically is double what a departure ordinarily
09:46:47 14 would result in from a variance or from a variance based upon
09:46:51 15 a provisional. So I'd be interested to see if, in fact,
09:46:54 16 there's some difference now, so if you get back to us.

09:46:58 17 But I also found it interesting, your conversation
09:47:02 18 about the safety valve. The prosecutors do not -- I think
09:47:08 19 your expression was do not have heartburn over the safety
09:47:12 20 valve. Initially there were some concerns that that might
09:47:16 21 impact the frequency of cooperation.

09:47:19 22 My question is do you have, in light of your
09:47:21 23 statement about perhaps two criminal history points, we should
09:47:26 24 reconsider that? Do you have any strong feeling as to whether
09:47:30 25 or not the safety valve should be expanded in some

09:47:33 1 circumstances to perhaps persons who have Criminal History
09:47:40 2 Category II?

09:47:40 3 MR. FITZGERALD: What I would simply say is I don't
09:47:42 4 want to advocate, take a position advocating what a member of
09:47:46 5 the department or the department that is studying things.
09:47:50 6 What I would say is there's a debate about mandatory minimums,
09:47:52 7 and I think the debate has often been do we keep mandatory
09:47:56 8 minimums, or do we get rid of mandatory minimums? And I think
09:47:58 9 that is largely a binary option where there are other options.

09:48:02 10 I do think that if you have your intelligence drive
09:48:06 11 who you're prosecuting, if you're going after a particular
09:48:09 12 gang, that can have a devastating impact on a neighborhood
09:48:13 13 that having that mandatory minimum when you get the leader of
09:48:16 14 the gang in that neighborhood who both deserves to be
09:48:18 15 incapacitated if he's causing violence, where the mandatory
09:48:21 16 minimum can help drive cooperation is very important.

09:48:24 17 I also recognize that when you have very large cases
09:48:28 18 that we end up arresting 60 defendants, we have a very good
09:48:32 19 relationship with the state's attorney's office where we can
09:48:34 20 say why don't you take 40 of them and we'll take 20 of them,
09:48:39 21 the ones we think are more appropriate for state prosecution,
09:48:39 22 but in smaller cases, if you arrest four defendants and two of
09:48:42 23 them were leaders of the gang that you knew had been involved
09:48:46 24 in violence and thought it very, very important to the safety
09:48:50 25 of that neighborhood that they be prosecuted, whether tied up

09:48:53 1 in conspiracy with other people who may be worthy of federal
09:48:56 2 prosecution who are not people independently that you would
09:48:58 3 select for the mandatory minimums, the relief valves -- there
09:49:02 4 are three of them. One of them is there's a 5K motion. If
09:49:06 5 one of those people cooperates and testifies against their
09:49:09 6 boss, their sentence can avoid the mandatory minimums.

09:49:12 7 The second relief valve is the safety valve, and if
09:49:16 8 they don't have a Criminal History Category beyond one
09:49:21 9 criminal history point, they qualify, they can avoid the
09:49:24 10 mandatory minimum.

09:49:24 11 Our third way of dealing with that is we view it as
09:49:27 12 consistent with the *U.S. Attorneys' Manual* that we can
09:49:31 13 exercise the discretion to offer phone counts if we think
09:49:34 14 these people warrant it.

09:49:35 15 So my sense is that it's not just should we have
09:49:38 16 mandatory minimums exactly as they are, should we get rid of
09:49:41 17 them completely, which I think would have a devastating impact
09:49:44 18 on the ability to enforce the law, or should we also just bear
09:49:47 19 in mind that one other option is to say you keep the mandatory
09:49:50 20 minimums in place, but one of the things you look at is how is
09:49:53 21 the safety valve working. And in some cases I see in an urban
09:49:57 22 environment a criminal history point might be for something
09:50:00 23 that's dated, you might also see that a criminal history
09:50:03 24 point, one of the things you see in particularly urban drug
09:50:07 25 dealing is the people who are on the street are more likely to

09:50:09 1 be arrested than the people who run the operation who insulate
09:50:12 2 themselves from drug sales. And that's why in some cases
09:50:15 3 often we may not file prior felony information if we think the
09:50:19 4 person with the prior record isn't the worst person in the
09:50:22 5 conspiracy. The boss has never been arrested because he has
09:50:25 6 those other people out doing street sales.

09:50:26 7 And so to me one criminal history point, in some
09:50:31 8 cases people with more than that, may not be people who are so
09:50:34 9 dangerous that you couldn't avail of that; and without
09:50:37 10 advocating a view, what I'd simply say is I think in looking
09:50:40 11 at options, there's an in-between option between keeping
09:50:43 12 things exactly as they are, throwing out the mandatory
09:50:46 13 minimums, or looking at saying is there a way that we can keep
09:50:49 14 the what I believe are the positive effects of mandatory
09:50:52 15 minimums that allow us to enforce the law while allowing a bit
09:50:56 16 more discretion to allow some people out from the harshness of
09:51:01 17 those sentences.

09:51:02 18 VICE CHAIR SESSIONS: Before I pass on,
09:51:05 19 Mr. Yarbrough, you made a really interesting observation based
09:51:11 20 on your experience with a judge, and that is, that judge felt
09:51:12 21 certainty of punishment as opposed to length of punishment is
09:51:15 22 most important.

09:51:16 23 MR. YARBROUGH: Absolutely.

09:51:18 24 VICE CHAIR SESSIONS: To what extent can you meld
09:51:20 25 that together with a system by which you develop alternatives

09:51:24 1 to imprisonment?

09:51:26 2 MR. YARBROUGH: Well, I think the other slogan that
09:51:28 3 we all probably love to quote is the punishment should fit the
09:51:31 4 crime, and when you start fashioning these alternatives, of
09:51:36 5 course, you have to be careful, I think, because if we start
09:51:40 6 to in any way depreciate the whole idea of punishment for
09:51:45 7 crime by creating alternatives that the street people see as a
09:51:50 8 slap on the wrist, then you're going to I think pay for that
09:51:53 9 down the road in terms of behavior.

09:51:56 10 The overall feeling, and I'm not sure I'm supposed to
09:52:02 11 give personal views here because I'm speaking for the
09:52:04 12 department, but certainly those of us with long experience in
09:52:09 13 this -- and I think I heard Mr. Fitzgerald say this a moment
09:52:13 14 ago also -- there is certainly room in what we are doing as
09:52:16 15 prosecutors for alternative sentencing, as long as it's done
09:52:20 16 reasonably and prudently. And it's not something that we
09:52:24 17 ought to just open a door and suddenly rush into a lot of
09:52:28 18 alternative sentencing that will perhaps not work and not
09:52:31 19 achieve the desired result.

09:52:33 20 By the same token, I don't believe we fear it. I
09:52:36 21 don't hear any fear in my colleague's voice, and I certainly
09:52:40 22 don't have any on the idea. But we need to proceed with
09:52:44 23 caution. That's why the working group is certainly a good
09:52:46 24 idea and why the considered opinion of the entire department
09:52:51 25 represented by the Attorney General would be something I would

09:52:54 1 have full confidence in after the study is done and the
09:52:58 2 examination is done because the disparity on the crack
09:53:02 3 sentences has shown us that there is some unrest, and I think
09:53:07 4 unrest in a judicial system is never good. So I'm hoping that
09:53:12 5 the working group will strike a good balance and come up with
09:53:16 6 something that we can all live with.

09:53:21 7 COMMISSIONER HOWELL: Thank you.

09:53:22 8 Mr. Fitzgerald, I want to tell you that I appreciate
09:53:27 9 your remarks about the child pornography guidelines. The
09:53:31 10 disconnect that you note between judges' sentencing and
09:53:36 11 prosecutors' positions on child pornography sentencing is
09:53:40 12 something that we on the Commission have certainly noticed,
09:53:43 13 given the significant rate of non-government-sponsored
09:53:48 14 downward departures in the child pornography area. It's
09:53:53 15 something that is on our priority list to look at in the
09:53:55 16 upcoming year, to take a whole look at the child pornography
09:53:58 17 guidelines, look at the departures under those guidelines to
09:54:01 18 see if additional refinement of those guidelines would be
09:54:04 19 appropriate.

09:54:05 20 I happen to fully agree with you that education is
09:54:08 21 the key component of what is also needed here. The
09:54:16 22 Commission, you know, does have this unique position in
09:54:18 23 communicating a lot with Congress, in particular in the child
09:54:22 24 pornography context. The Commission, you know, has had a very
09:54:27 25 dynamic conversation, as we do formally with amendments and

09:54:32 1 directives from the Congress, in terms of what the appropriate
09:54:34 2 sentence should be and particularly the child pornography
09:54:39 3 possession, and that conversation I'm sure will continue
09:54:44 4 apace.

09:54:44 5 As we are looking at our role in educating the
09:54:50 6 judiciary and the policymakers about child pornography, I
09:54:55 7 wondered if you could elaborate a little bit more about what
09:55:00 8 kind of educational efforts for policymakers and sentencing
09:55:03 9 judges you think would be helpful.

09:55:06 10 MR. FITZGERALD: I think the issues that I see that
09:55:11 11 are important to driving what's an appropriate sentence for
09:55:13 12 child pornography and/or child exploitation I would break into
09:55:16 13 probably three areas.

09:55:19 14 Some people espouse the view that the possession of
09:55:22 15 child pornography is not a predictor of whether or not people
09:55:25 16 will exploit children and, therefore, I think they take the
09:55:27 17 view that the sentences are definitely too high.

09:55:30 18 I've also heard other people say that there's studies
09:55:33 19 that suggest that there's a stronger correlation between
09:55:35 20 possessing child pornography and exploiting children. And
09:55:39 21 having, you know, my sense of the studies and the social
09:55:43 22 sciences is as in many areas, there's not agreement on this,
09:55:46 23 but a sense of the correlation between whether or not a person
09:55:49 24 possesses child pornography, whether or not that correlates
09:55:52 25 with a likelihood that they're abusing children, does that

09:55:55 1 depend on whether they possess it at all? Does it depend on
09:55:59 2 the amount they possess? Does it depend on the type of child
09:56:02 3 pornography they possess? And if they have very young
09:56:04 4 children and very, very horrible acts are depicted, what does
09:56:08 5 that indicate about their dangerousness? Because I do, when I
09:56:11 6 look at sentences and plea agreements, worry about future
09:56:17 7 harm.

09:56:17 8 The second part of that, and I don't know that
09:56:19 9 there's a consensus on that and my guess is if you polled both
09:56:24 10 prosecutors and judges, I think there's a disconnect as to
09:56:27 11 what people believe is the correlation between possession of
09:56:30 12 child pornography and abuse.

09:56:32 13 The second part of that is in actual abuse cases, I
09:56:37 14 am operating under the belief that I believe that there's a
09:56:40 15 strong recidivism rate among people who actually abuse
09:56:43 16 children, and I think a lot of people have said that people
09:56:47 17 who are violent often get aged out of that. When you're
09:56:50 18 25 years, you may be part of a violent gang. Twenty years
09:56:54 19 later, the likelihood of recidivism may drop. I've heard a
09:56:55 20 number of people say that when it comes to child exploitation,
09:56:59 21 people do not age out. And there's something very, very
09:57:01 22 horrid about a person who has been involved in a serious
09:57:05 23 abuse, and they come in and they say do I have to undergo a
09:57:08 24 25-year mandatory minimum or 25-year guideline range, would it
09:57:11 25 really hurt the world if I got out in 20 years? Then you

09:57:13 1 think, well, what is going to happen in 20 years?

09:57:16 2 If in that period between 20 and 25 there were some
09:57:19 3 people who are going to be abused that we can't identify now,
09:57:22 4 then while your human compassion says 20 years is an awfully
09:57:27 5 long time, you do not want to give that person a five-year
09:57:30 6 break that's going to visit harm on someone else. But knowing
09:57:34 7 what the recidivism rate is and how age does or does not
09:57:37 8 affect it for people who are abused would be important.

09:57:39 9 The third thing is understanding the harm in making
09:57:42 10 the market for child pornography. If people possess something
09:57:46 11 that's particularly vile, how much are they creating a market
09:57:51 12 which some other people are making these images to produce?
09:57:56 13 And those are very, very real harms.

09:58:00 14 I guess I would add a fourth piece which is what is
09:58:02 15 the damage to people who are in those photographs knowing that
09:58:05 16 people possessed them? NCMEC, the National Center For Missing
09:58:09 17 and Exploited Children, keeps, I guess, a registry of these
09:58:13 18 photos. And my understanding is if a photo of a victim or a
09:58:16 19 video of a victim is found with someone, is identified to be
09:58:21 20 one of their photos or videos in the registry, my
09:58:24 21 understanding is that then that victim is contacted so that
09:58:27 22 they can make a decision whether or not to make a victim
09:58:30 23 impact statement before the judge.

09:58:31 24 In some cases, those victims do come before the judge
09:58:34 25 and at sentencing a judge would know what that person, you

09:58:37 1 know, what they're feeling about it, how they're impacted.
09:58:40 2 But many do not want to go before the judge because they just
09:58:43 3 want to, you know, have this in their past, and what is the
09:58:47 4 harm, you know, the appreciation of the harm that's caused
09:58:51 5 those victims to get those phone calls again and again and
09:58:54 6 again and saying somebody else somewhere else had your picture
09:58:58 7 and was distributing it.

09:58:59 8 And thinking rationally about a very, very disturbing
09:59:03 9 topic and saying what are the harms here, what are the risks
09:59:06 10 that this person is abusing children; if they have abused
09:59:10 11 children, what are the risks they will re-offend; what are the
09:59:13 12 harms for creating a market for this sort of material; what
09:59:18 13 are the harms to the victims in finding out that it was
09:59:19 14 possessed by someone else would be a useful thing to educate
09:59:22 15 prosecutors, the public, Congress, judges, anything we can do
09:59:26 16 to take the extent of the disconnect and narrow it would be
09:59:30 17 very helpful.

09:59:31 18 I will say that our view in this district, as I think
09:59:35 19 we do less volume of child pornography cases, we do lots of
09:59:40 20 triage. We look to state and local partners, and we look for
09:59:49 21 our what we believe are the most egregious cases, and our view
09:59:49 22 is to bring those cases that warrant these penalties.

09:59:52 23 And I can tell you, just having nothing to do with
09:59:54 24 the policy, the people who do it in my office, I've gone, I've
09:59:57 25 seen them recently. One week we just had an unbelievable

10:00:01 1 number of exploiters of horrible child pornography, where the
10:00:06 2 prosecutors and agents looked at the materials and could not
10:00:08 3 believe what they were seeing, and they've been doing this for
10:00:10 4 a number of years.

10:00:11 5 So this is an area fraught with a lot of emotion, and
10:00:15 6 we shouldn't put people in jail for longer than they deserve
10:00:18 7 or longer than necessary to protect the public, but we
10:00:22 8 shouldn't put them in jail for less than that. And anything
10:00:24 9 we can do to get a better consensus and better understanding
10:00:27 10 of what is behind this problem so we can address it better I
10:00:31 11 think is important.

10:00:34 12 VICE CHAIR CARR: Mr. Fitzgerald, you said that
10:00:35 13 post-Booker you're getting fewer cooperation agreements
10:00:38 14 because defendants and defense attorneys would prefer to make
10:00:41 15 a pitch to the sentencing judge.

10:00:43 16 I assume that means that your cooperation agreements
10:00:45 17 are 11(c)(1)(C) agreements that require a negotiated and
10:00:49 18 binding sentence?

10:00:50 19 MR. FITZGERALD: That's generally what they are, so
10:00:53 20 it's situational. The defense attorneys will examine the
10:00:56 21 case, the facts, the defendant, the judge and decide, well,
10:01:00 22 maybe my fellow wants to cooperate, but we don't want to take
10:01:03 23 your (c)(1)(C) agreement to one-third off the guidelines
10:01:06 24 range. We'd rather just cooperate and go in and make a pitch
10:01:09 25 to the judge in the hope that we'll get -- do better than that

10:01:13 1 and certainly no worse.

10:01:14 2 VICE CHAIR CARR: I understand.

10:01:15 3 Now, do you believe that you're getting less
10:01:17 4 cooperation or just fewer cooperation agreements with a
10:01:20 5 binding sentence?

10:01:21 6 MR. FITZGERALD: My impression is we get somewhat
10:01:25 7 less cooperation, but later cooperation as well, so that the
10:01:29 8 timeliness -- my impression is that we get less cooperation,
10:01:33 9 but almost more importantly that sometimes the cooperation is
10:01:36 10 less timely.

10:01:39 11 VICE CHAIR CARR: And pre-*Booker*, did your plea
10:01:42 12 agreements also require that they be (C) agreements with a
10:01:45 13 binding sentence?

10:01:46 14 MR. FITZGERALD: Yes. Our plea agreements haven't
10:01:48 15 changed. The willingness of the defense bar to have their
10:01:50 16 clients engage in them has changed.

10:01:52 17 VICE CHAIR CARR: Thank you.

10:01:56 18 COMMISSIONER WROBLEWSKI: First, Pat, Ed, thank you
10:01:59 19 both for being here and for participating in this and the
10:02:02 20 working group back at the department.

10:02:04 21 Pat, we heard yesterday from Professor Kennedy -- I
10:02:11 22 almost forgot his name -- Professor Kennedy from the John Jay
10:02:15 23 College about Project Ceasefire and his experiences around the
10:02:20 24 country, including a little bit about what's going on in
10:02:22 25 Chicago.

10:02:23 1 Could you describe a little bit about the Chicago PSN
10:02:26 2 program, the interventions, how you select the people who are
10:02:30 3 going to be prosecuted federally, the work you do with the
10:02:34 4 local police department and other federal agencies and all
10:02:37 5 that?

10:02:38 6 MR. FITZGERALD: We actually have three programs that
10:02:40 7 are somewhat related. There's Project Safe Neighborhoods,
10:02:43 8 there's a gang program that we call The Top 20 Program, and
10:02:46 9 there's a program, a funding program called CAGI, which is
10:02:50 10 Comprehensive Anti-Gang Initiative.

10:02:53 11 The PSN program is a deterrence program where we
10:02:56 12 started with two districts in Chicago. The districts are
10:03:01 13 police areas, in New York they call them precincts, it's
10:03:04 14 different in different areas. We went to the areas that had
10:03:06 15 the largest concentration of violence.

10:03:10 16 In 2002, I believe the homicide rate in Chicago was
10:03:14 17 666 homicides that occurred. The city had not had homicides
10:03:19 18 below the level of 600 homicides per year in 36 years, going
10:03:23 19 back to the '60s. We wanted to see if we could work with our
10:03:27 20 local partners to take the homicide rate down.

10:03:29 21 So one of the things we did besides selecting
10:03:31 22 particular cases to prosecute in conjunction with police and
10:03:34 23 ATF to find what we thought were the worst of the worst to
10:03:37 24 bring federally on gun charges was to try to do deterrence.
10:03:41 25 So we selected the two districts with the highest homicide

10:03:43 1 rates, we expanded it to four, now we're up to six districts,
10:03:47 2 where we select people coming out of the state prison,
10:03:49 3 Illinois Department of Corrections. They are required to show
10:03:52 4 up for a forum for one hour. They are randomly selected.
10:03:56 5 There's a control group that doesn't go to these meetings.

10:03:59 6 In the meeting, we have two prosecutors, one state,
10:04:02 7 one federal, who briefly read the riot act to these guys
10:04:05 8 getting out of prison and tell them that if they're caught
10:04:08 9 with a gun, here are the penalties. We advertise the 15-year
10:04:11 10 mandatory minimum for armed career criminals. We usually cite
10:04:15 11 them examples of recent people who were prosecuted from their
10:04:18 12 neighborhood that they'd know from the streets. So we say,
10:04:21 13 Did you know so-and-so with this nickname? Do you know where
10:04:23 14 he is and what he's doing now? He's in this prison with this
10:04:26 15 sentence because he was caught with a gun and let them know
10:04:28 16 that we're out there looking.

10:04:29 17 We send him a letter personalized, Dear name, you're
10:04:32 18 in the Project Safe Neighborhoods database. If you're caught
10:04:35 19 with a gun, we're going to be notified and your case will be
10:04:39 20 sent for federal prosecution. We also involve the police
10:04:42 21 officers and ATF.

10:04:43 22 Then we switch to service providers, people who offer
10:04:46 23 educational programs, G.E.D. programs, detox programs, job
10:04:50 24 training programs. Often either job counselors or people from
10:04:54 25 the private sector who literally say here's where I work.

10:04:58 1 Here's the job I offer. Show up on Monday if you'd like at
10:05:01 2 9:00, and here's how we work.

10:05:03 3 And then we switch finally to the most effective
10:05:05 4 speaker who is usually an ex-felon. One fellow in particular
10:05:11 5 was on death row, was involved in gangs, involved in violence
10:05:15 6 and talks about his life on the street, his life in prison,
10:05:19 7 what happened to his family, what happened to his mother, what
10:05:21 8 happened to his relationships, what happened to his kids.

10:05:24 9 We also have another very effective speaker who shows
10:05:27 10 up in a wheelchair who was in a gang, was involved in a
10:05:30 11 shooting, paralyzed from the waist down and talks very
10:05:34 12 graphically about what his life is like being paralyzed from
10:05:38 13 the waist down. And the conversations with the parolee, the
10:05:40 14 felon, the guy in the wheelchair, very salty, very
10:05:41 15 down-to-earth, and all the people that we're trying to talk to
10:05:44 16 would sometimes look up when we talked to them. They all
10:05:46 17 looked up when they speak. And the end of the message in one
10:05:49 18 hour is you've got two choices: You can see the fence when
10:05:52 19 you get caught with a gun and this is what's going to happen
10:05:54 20 to you, or you can go see the people about a job.

10:05:57 21 That program has resulted in a 30 percent lesser
10:06:01 22 recidivism rate for the people attending for one hour. We
10:06:04 23 can't do something more effective than that in law enforcement
10:06:07 24 when there's no follow-up cost. There's no human cost of
10:06:10 25 incarceration, no cost of imprisonment, and we try to do more

10:06:13 1 and more of that, and we're trying to refine our message.

10:06:15 2 Separate from that, we have a gang strategy meeting,
10:06:19 3 a team approach. All the districts are congregated into five
10:06:24 4 areas in Chicago. So in each of the areas in Chicago once a
10:06:27 5 month, a federal prosecutor with a state prosecutor and the
10:06:29 6 local police sit down and talk about the violence problem in
10:06:32 7 the area, answering the intelligence which gangs or which
10:06:37 8 individuals are leading that violence, and then we assign
10:06:40 9 AUSAs and assistant state's attorneys for particular gangs and
10:06:44 10 say how do we go about going after this person who's causing
10:06:48 11 particular violence, and let's see what cases we can make.
10:06:50 12 Let's focus our resources on their prosecution.

10:06:53 13 After all those area strategy meetings, then once a
10:06:57 14 month at the offices of DEA we have the top 20 meeting, which
10:07:00 15 is we sit down and we talk through who are the 20 most violent
10:07:03 16 targets in this city, people or groups of people, leaders of a
10:07:07 17 gang or a gang. To those of you who have ever been in federal
10:07:11 18 law enforcement, it would be remarkable to hear that we have
10:07:13 19 the Chicago Police Department, DEA, ATF, FBI and IRS openly
10:07:17 20 talking about what cases they have. When one of the top 20
10:07:20 21 targets is identified, if FBI has a case open, they'll say it.
10:07:23 22 If DEA has an informant or useful information, they will say
10:07:28 23 we'll give the information to the FBI and let you go with it.

10:07:31 24 The next one that comes up they may -- FBI may defer
10:07:34 25 to DEA. If there's an open case, then one federal agency will

10:07:38 1 volunteer and say we're responsible. We'll work with CPD.

10:07:44 2 And those are how we do those cases. So we want to take our

10:07:47 3 resources not to go after the person who happened to deal

10:07:50 4 drugs with the person who happened to get caught, but let's

10:07:52 5 say the people who are making an impact on violence, and

10:07:56 6 that's what we're going to do is have it intelligence driven.

10:07:59 7 I will redact the name when a person who is not

10:08:01 8 involved in law enforcement, very important in the community

10:08:05 9 came once to me and said in my neighborhood, there's one

10:08:06 10 particular gang who's involved in a lot of shootings and

10:08:11 11 they're drawing people away from social service programs, and

10:08:14 12 checked, and he was on the list of important targets. And

10:08:17 13 when he was arrested, we heard back that the community was

10:08:20 14 different. It was safer. People were doing other things.

10:08:23 15 So that's our sort of gang strategy approach.

10:08:26 16 And lastly the CAGI approach, which is where we look

10:08:29 17 at re-entry programs and funding. We receive this grant, some

10:08:32 18 of it's for enforcement, some of it's for re-entry programs,

10:08:36 19 and some of it's for deterrence. We've seen that we just

10:08:38 20 don't want to make arrests, we want to make an impact.

10:08:41 21 We had a case before Judge Castillo involving Aurora,

10:08:43 22 where the Insane Deuces were a very violent group. And after

10:08:46 23 we brought a RICO prosecution there, I woke up one morning and

10:08:50 24 I heard on the radio that the first killing had occurred in

10:08:52 25 Aurora that year. I believe it was last, it was in September

10:08:56 1 when I heard that.

10:08:57 2 And if you had told people a year or two before that
10:09:00 3 the first homicide in Aurora would happen in September, they
10:09:03 4 would have been stunned. There have been other times in
10:09:05 5 Chicago where we take a group out, and another group comes in.
10:09:08 6 And so actually we want to make sure that we put our program
10:09:12 7 money in the right place.

10:09:13 8 We will sit down with the police and we'll sit down
10:09:15 9 with the program people running re-entry programs and say if
10:09:19 10 we've got several violent sections where violence is breaking
10:09:22 11 out in Chicago and we want to crack down on that violence,
10:09:24 12 where do we have the best re-entry programs and support
10:09:27 13 personnel? So if we have two neighborhoods with violence and
10:09:30 14 we can put overtime and try and make a case, let's go where we
10:09:33 15 can also send resources where there's a program where we can
10:09:36 16 take troubled youth, we'll take re-entry and try and fill that
10:09:39 17 in so we're not just arresting the bad gang, but maybe taking
10:09:45 18 the people who are now in a vacuum and driving them into
10:09:47 19 something more productive.

10:09:49 20 And so between the three strategies what we're trying
10:09:51 21 to do is make sure in a city that has estimated to be 70 to
10:09:55 22 100 thousand gang members, we're going to prosecute in the
10:09:58 23 hundreds, not in the thousands. We're not going to
10:10:00 24 incarcerate our way out of a problem by arresting 100,000
10:10:04 25 people. It's to take the people most likely to kill and

10:10:06 1 prosecute them and incarcerate them and market what we're
10:10:08 2 doing to others.

10:10:11 3 VICE CHAIR CASTILLO: I take it as a result of your
10:10:13 4 experience with Project Safe Neighborhoods, you're a big
10:10:16 5 proponent of re-entry programs and would like to see them
10:10:19 6 expanded nationwide.

10:10:21 7 MR. FITZGERALD: I think re-entry programs are
10:10:23 8 critical. I think the number of people released into the
10:10:27 9 Chicago area from the Illinois state system each year is about
10:10:31 10 17,500, and we've actually tried to get the word out because
10:10:36 11 people expect to hear about re-entry not from prosecutors.

10:10:41 12 I try to do a little bit of a speaking tour saying if
10:10:44 13 you want to cut down on crime, here's what a business can do:
10:10:47 14 Be open to hiring felons because this is a chance to do
10:10:50 15 something. And I believe there are an awful lot of companies
10:10:53 16 that are hiring felons, many of whom don't advertise it,
10:10:56 17 they're having very good, positive experiences.

10:10:58 18 But the number of re-entry opportunities and number
10:11:01 19 of employers willing to hire felons coming out of jail
10:11:05 20 doesn't, I think, come close to being able to deal with 17,500
10:11:10 21 a year. And to me, taking off the sentencing guidelines and
10:11:14 22 prosecutor hat, I think one of the key things to reducing
10:11:18 23 long-term violence is to find a way to get people who decide
10:11:23 24 to go straight, to give them that opportunity. And my thought
10:11:26 25 is if in a one-hour meeting we can reduce recidivism by the

10:11:29 1 people attending by 30 percent, you know, if we had more
10:11:33 2 re-entry programs, I wonder if that number couldn't be higher.

10:11:38 3 COMMISSIONER FRIEDRICH: Mr. Fitzgerald, you've
10:11:40 4 testified that at least in this district, your AUSAs have the
10:11:44 5 authority in appropriate cases to seek approval to seek a
10:11:47 6 sentence recommendation outside the guideline range, you have
10:11:52 7 a centralized process to approve those requests.

10:11:54 8 For a long time following *Booker*, we'll hear from
10:11:57 9 prosecutors across the country that they really had one hand
10:12:01 10 tied behind their back, the department's position was that the
10:12:02 11 guidelines adequately take into account the 3553(a) factors
10:12:06 12 and prosecutors are seeking a guideline sentence.

10:12:10 13 I'm just curious, one, whether you know to what
10:12:13 14 extent you're leading other districts throughout the country,
10:12:19 15 other prosecutors' offices, and, secondly, whether Main
10:12:21 16 Justice is considering providing some sort of guidance to the
10:12:24 17 field to ensure that this discretion is exercised
10:12:26 18 consistently?

10:12:27 19 MR. FITZGERALD: Let me tell you what I can about
10:12:30 20 that. I don't want to create the impression that in the
10:12:33 21 Northern District, we're routinely going outside the
10:12:36 22 guidelines. I think we start from sort of a presumption that
10:12:40 23 the guidelines sentence is probably the right sentence, but we
10:12:44 24 want the discretion in the right case to not file a five-count
10:12:49 25 information or not seek a mandatory minimum or to give phone

10:12:52 1 counts, and so we do do it in the appropriate case.

10:12:54 2 I don't -- I don't -- I can't represent that that's
10:12:58 3 the same in other districts, and the one thing I would point
10:13:01 4 out, and I looked it up this morning because I'm starting to
10:13:05 5 think about that, there was the Ashcroft Memorandum, and the
10:13:09 6 Ashcroft Memorandum, like many other things that come out, I
10:13:12 7 sometimes wonder if everyone has the same understanding of the
10:13:15 8 Ashcroft Memorandum.

10:13:16 9 The Ashcroft Memorandum I read in conjunction with
10:13:19 10 the *U.S. Attorneys' Manual*. I don't spend all my days reading
10:13:23 11 the *U.S. Attorneys' Manual*, but this morning I happened to
10:13:25 12 look up something that I think would surprise lots of people.
10:13:28 13 And in the *U.S. Attorneys' Manual* when it talks about charging
10:13:32 14 the most serious offense under section 9-27.330, there are two
10:13:36 15 sentences in one paragraph that sound like what most people
10:13:39 16 understand. It says, "[T]he attorney for the government should
10:13:41 17 charge or should recommend that the grand jury charge the most
10:13:44 18 serious offense that is consistent with the nature of the
10:13:47 19 defendant's conduct," and later says the most serious offense
10:13:50 20 is normally that which yields the highest range of the
10:13:52 21 sentencing guidelines. That paragraph also talks about taking
10:13:55 22 into account the mandatory minimums. That is the presumption
10:13:58 23 from which we start, but the next paragraph continues, and
10:14:01 24 I'll just read it out loud: "However, a faithful and honest
10:14:05 25 application of the sentencing guidelines is not incompatible

10:14:07 1 with selecting charges or entering into plea agreements or the
10:14:11 2 basis of an individualized assessment of the extent to which
10:14:14 3 particular charges fit the specific circumstances of the case,
10:14:17 4 are consistent with the purposes of the purpose of the federal
10:14:21 5 criminal code, and maximize the impact of federal resources on
10:14:24 6 crime. Thus, for example, in determining the most serious
10:14:26 7 offense that is consistent with the nature of the defendant's
10:14:29 8 conduct that is likely to result in a sustainable conviction,
10:14:32 9 it is appropriate that the attorney for the government
10:14:34 10 consider, inter alia, such factors as the sentencing guideline
10:14:37 11 range given by the charge, whether the penalty yielded by such
10:14:40 12 sentencing range or potential mandatory minimum charge, if
10:14:43 13 applicable, is proportional to the seriousness of the
10:14:46 14 defendant's conduct, and whether the charge achieves such
10:14:49 15 purposes of the criminal law: Punishment, protection of the
10:14:52 16 public, specific and general deterrence, and rehabilitation,
10:14:56 17 and note that these factors may also be considered by the
10:14:58 18 attorney for the government when entering into plea
10:15:01 19 agreements."

10:15:01 20 So I read the Ashcroft Memorandum in conjunction with
10:15:04 21 that provision as allowing more discretion. To make it
10:15:07 22 concrete, if we had one of these meetings where we decided
10:15:10 23 that John Smith was causing an awful lot of violence in a
10:15:13 24 particular area, we're going to prosecute him. And my
10:15:16 25 assumption is if John Smith gets a ten-year mandatory minimum

10:15:20 1 and 15-year range and he's been reeking violence in the
10:15:23 2 neighborhood, we're going to argue for that mandatory minimum,
10:15:25 3 we're going to argue under 3553 that he ought to get that
10:15:28 4 sentence.

10:15:28 5 But if, in prosecuting John Smith, we find he has a
10:15:30 6 partner who's equally culpable, we'll do the same. But in
10:15:34 7 making that case, if we deal with lesser players involved in a
10:15:36 8 drug ring with John Smith, then if those lesser players
10:15:40 9 cooperate, that's a great thing. If they qualify for the
10:15:43 10 safety valve, then we ameliorate the harshness there; and if
10:15:47 11 they don't cooperate, don't qualify for the safety valve but
10:15:50 12 our assessment of those defendants is that they don't merit
10:15:52 13 the penalties that we selected for John Smith and/or his other
10:15:57 14 serious violators, we feel it's consistent with the *U.S.*
10:16:00 15 *Attorneys' Manual* that we can offer a phone count under those
10:16:03 16 circumstances.

10:16:04 17 ACTING CHAIR HINOJOSA: And then wouldn't go outside
10:16:06 18 the guidelines, you would go to the guidelines for the phone
10:16:08 19 count is your statement. What you're saying is you used a
10:16:12 20 different charge, but then you would argue for a guidelines
10:16:15 21 sentence within that charge.

10:16:16 22 MR. FITZGERALD: Or in the appropriate case, we could
10:16:18 23 argue for -- that was an example. If there weren't a
10:16:21 24 mandatory minimum, if it wasn't a drug case, if an Assistant
10:16:26 25 U.S. Attorney believes a downward variance is appropriate,

10:16:28 1 that assistant cannot do that on their own. They would then
10:16:32 2 go to their deputy chief or section chief and then it would be
10:16:35 3 approved by the criminal chief to make sure we're consistent.
10:16:39 4 We don't want one assistant giving -- seeking more variances
10:16:42 5 than others.

10:16:43 6 But we do have that authority, and our criminal chief
10:16:45 7 can authorize a downward variance independent of phone counts
10:16:49 8 or mandatory minimums.

10:16:50 9 VICE CHAIR CASTILLO: I wanted to ask one follow-up
10:16:52 10 to that because the Ashcroft Memo is, by its definition, a
10:16:57 11 little bit dated, but I want to bring it more contemporaneous.

10:17:01 12 This year, Mr. Breuer issued a memo to all of the
10:17:06 13 U.S. Attorneys saying that with regard to the controversial
10:17:10 14 issue of crack versus powder cocaine and the disparities, he
10:17:15 15 was giving each of the assistants discretion, in appropriate
10:17:19 16 cases, to agree to either some type of equalization or
10:17:24 17 variation. And what I hear here in this district, and I think
10:17:31 18 you've told me this, Patrick, is that you have a group that
10:17:34 19 decides which cases an assistant would be authorized. Is that
10:17:39 20 essentially what happens?

10:17:40 21 MR. FITZGERALD: Yes.

10:17:41 22 VICE CHAIR CASTILLO: Okay. So let me just ask
10:17:45 23 Mr. Yarbrough, what happens in your district?

10:17:48 24 MR. YARBROUGH: My narcotics chief makes those
10:17:49 25 decisions, for the most part, unless it's something that needs

10:17:52 1 to be up the line beyond his level, and I would say that, in
10:17:55 2 general, we are making a good-faith effort to follow
10:18:01 3 Mr. Breuer's recommendation in his memo.

10:18:04 4 VICE CHAIR CASTILLO: But it is in each case, in
10:18:06 5 Memphis and in Chicago, it is not an AUSA deciding that, but
10:18:11 6 it's more centralized than that.

10:18:14 7 MR. YARBROUGH: It's always a supervisor. Any time
10:18:16 8 we deviate from a standard policy, whether it's the guideline
10:18:21 9 range or our policy on departures or whatever, a supervisor
10:18:26 10 needs to be involved in that. And to the extent there's a
10:18:28 11 controversy, it may go a little higher.

10:18:33 12 VICE CHAIR CASTILLO: I didn't mean to cut you off,
10:18:34 13 Patrick. Did you want to say anything?

10:18:36 14 MR. FITZGERALD: No, that's fine.

10:18:37 15 VICE CHAIR CASTILLO: Okay. Thank you.

10:18:42 16 VICE CHAIR SESSIONS: You were talking about the
10:18:43 17 re-entry programs and the wisdom of the re-entry programs --
10:18:46 18 and this is a question to both of you -- the logical way of
10:18:49 19 approaching re-entry is to actually move it back into the
10:18:52 20 Bureau of Prisons.

10:18:54 21 And I wonder to what extent the working groups are
10:18:58 22 considering re-entry programs within the Bureau of Prisons
10:19:03 23 perhaps by providing incentives for people who are coming
10:19:07 24 toward the end of their sentence, something along the line of
10:19:10 25 the 500-hour drug and alcohol rehabilitation program,

10:19:13 1 something to get people involved in planning re-entry as they
10:19:19 2 come out into the community and really incentivizing that
10:19:24 3 within the Bureau of Prisons? Are you thinking about that at
10:19:28 4 all?

10:19:30 5 MR. YARBROUGH: He can answer that. I don't have any
10:19:31 6 information. I will say, though, I hope they're focusing on
10:19:34 7 something that actually works.

10:19:36 8 MR. FITZGERALD: I have thought about it, and I'm
10:19:40 9 not -- there are so many working groups. I'm not on the
10:19:42 10 working group that deals with re-entry. But I can tell you
10:19:46 11 one concern I would have is making sure that any sort of
10:19:49 12 incentives don't allow the re-entry system to be gamed. And
10:19:53 13 I'll make two points.

10:19:54 14 There's some credit for people who get alcohol
10:19:58 15 rehabilitation, and there's some anecdotal belief that there
10:20:01 16 are some people who may drink a bit but are not alcoholics,
10:20:03 17 understand it's nice to get a sentencing benefit for going
10:20:06 18 through alcohol rehab. So you go through, you say you're an
10:20:09 19 alcoholic, you get some time off at sentencing.

10:20:11 20 You'll probably make the statistics look good because
10:20:15 21 if you're not really an alcoholic, you'll probably do better
10:20:19 22 than the people who are trying to battle it. And I would
10:20:19 23 worry about it being gamed.

10:20:21 24 And there's a real reason for that. In going out and
10:20:24 25 talking to the business community who has seen a federal

10:20:26 1 prosecutor stand up and say you want to think about hiring
10:20:29 2 felons, they do a double take. And then you see the look in
10:20:31 3 their eyes, thinking why in the world would we want Willie
10:20:35 4 Horton working in our office? They have this image that any
10:20:41 5 felon is going to be violent.

10:20:42 6 And even if they get past that, they think even if I
10:20:43 7 believe we should take a risk, why do I want to lose my job or
10:20:45 8 my career by everyone thinking I'm crazy for bringing a
10:20:48 9 convicted felon in our business. And you're trying to get
10:20:51 10 past that, and one of the things I say is lots of these people
10:20:54 11 when they come out to like a parolee forum, they're told you
10:20:57 12 go look for a job, but to look for a job that's going to pay a
10:20:59 13 relatively modest wage. And the difference between the person
10:21:02 14 who's getting out of jail who just wants to get back to the
10:21:05 15 gangbanging life, who's thinking as soon as I get out of this
10:21:09 16 darned forum, I'm going back to my block. I'm going to go
10:21:11 17 take over control. I'm going to sell the drugs. I'm going
10:21:13 18 back to that life, they have no interest in showing up the
10:21:15 19 next day to get training for a job.

10:21:16 20 The person who's been in prison who says this is not
10:21:19 21 a good thing for me, I don't want to ever go back, I've got a
10:21:22 22 family with obligations, I want to turn my life around, will
10:21:26 23 show up and go through the process in trying to seek a job,
10:21:29 24 and if there's no incentive in my mind in terms of a
10:21:32 25 sentencing break for people that go through re-entry programs,

10:21:35 1 you will get the people in the re-entry programs who really
10:21:38 2 want to re-enter and get new jobs.

10:21:42 3 They, to me, will self-select. That's one thing I
10:21:46 4 think the people who self-select without being rewarded I
10:21:48 5 think will be far better candidates for rehabilitation.

10:21:51 6 So I would worry about a system. I'm all for doing
10:21:54 7 more re-entry, all for rehabilitation in prison, but I think
10:21:58 8 we have to watch that if we design a system, we don't crowd
10:22:02 9 out the people who really want to turn their lives around by
10:22:05 10 people who want to game the system. Not only do we crowd out
10:22:08 11 people who could take advantage of it, but we may then make it
10:22:11 12 less marketable to employers if the people who really don't
10:22:14 13 want re-entry game the system, then we'll sort of depress the
10:22:19 14 success stories.

10:22:20 15 Right now from what I hear from the employers who
10:22:24 16 regularly hire people who are felons, they're very, very happy
10:22:27 17 with the people they get. They all are supervised by
10:22:31 18 organizations that have grants. They show up. They do better
10:22:33 19 work for less pay than what some of these companies, usually
10:22:36 20 small to medium companies, get. And I think it's very, very
10:22:39 21 important in the re-entry program we keep up the belief, which
10:22:42 22 appears to be very true from these employers, that the people
10:22:45 23 you get will turn out well.

10:22:47 24 So I think it's an excellent idea to advertise
10:22:50 25 re-entry, excellent idea to bring re-entry back into the BOP

10:22:55 1 system, but I do think we ought to be cautious about creating
10:22:58 2 incentives that might distort.

10:23:00 3 VICE CHAIR SESSIONS: Aren't you just short changing
10:23:02 4 a little the professional staff in the Bureau of Prisons who
10:23:06 5 can basically, since they're living with these folks, can make
10:23:09 6 a real honest assessment as to whether or not they're gaming
10:23:12 7 the system or whether or not, you know, they're really viably
10:23:17 8 participating in the program and to give, within that
10:23:21 9 particular structure, a little discretion to encourage people
10:23:24 10 to participate.

10:23:25 11 MR. FITZGERALD: And maybe I should phrase it more
10:23:28 12 precisely. I'm not saying you can't give them incentive. I'm
10:23:32 13 saying I would worry about that incentive in making sure you
10:23:35 14 design it so that you can make sure that the people who are
10:23:37 15 getting in really want it, and the more incentive you create,
10:23:41 16 the more risk that some people want to game it and can sort of
10:23:45 17 ruin it for others.

10:23:47 18 ACTING CHAIR HINOJOSA: That concludes our time, and
10:23:50 19 I want to thank both of you. Mr. Fitzgerald, just a word of
10:23:53 20 caution with regards to our data. We do not report contested
10:23:58 21 sentencing hearings because when you subtract the
10:24:02 22 non-government-sponsored departure variances, you cannot
10:24:06 23 assume that all the rest of them are contested because we
10:24:09 24 actually get information on cases where the government has not
10:24:11 25 opposed a departure or variance, and so you can't

10:24:15 1 automatically assume that every non-government-sponsored
10:24:18 2 departure variance has been a contested sentence.

10:24:21 3 MR. FITZGERALD: Okay.

10:24:22 4 ACTING CHAIR HINOJOSA: So if you want somebody from
10:24:23 5 your staff to contact our staff, we'd be glad to help you out
10:24:27 6 with regards to that information.

10:24:28 7 MR. FITZGERALD: Okay. If I've inadvertently
10:24:33 8 stated --

10:24:33 9 ACTING CHAIR HINOJOSA: No, I just want to clarify
10:24:35 10 because we don't report contested sentencing hearings, as far
10:24:39 11 as I know, and so you can't make the assumption that they're
10:24:42 12 all contested. In fact, we actually have something on the
10:24:44 13 form that indicates when the government hasn't objected to a
10:24:47 14 departure or variance and it's not government sponsored.

10:24:50 15 MR. FITZGERALD: If I review this with someone on
10:24:52 16 your staff --

10:24:53 17 ACTING CHAIR HINOJOSA: Yes.

10:24:54 18 MR. FITZGERALD: -- somebody will correct my
10:24:56 19 statement.

10:24:56 20 ACTING CHAIR HINOJOSA: We'll be glad to work with
10:24:57 21 you.

10:24:57 22 MR. FITZGERALD: I will submit a revised statement or
10:25:00 23 supplement. I don't want the record to have something that's
10:25:02 24 inaccurate.

10:25:03 25 ACTING CHAIR HINOJOSA: Thank you both. You have

10:25:04 1 been very helpful and very informative, and thank you for your
10:25:07 2 time.

10:25:07 3 MR. FITZGERALD: Thank you.

10:25:09 4 MR. YARBROUGH: Thank you.

10:25:20 5 (Recess from 10:20 to 10:37 a.m.)

10:37:41 6 PANEL VII. VIEW FROM THE DEFENSE BAR

10:37:41 7 ACTING CHAIR HINOJOSA: Our next panel is a "View from
10:37:44 8 the Defense Bar," and we know how busy you are and your taking
10:37:49 9 your time to be here is certainly very helpful to the
10:37:51 10 Commission.

10:37:52 11 We have Ms. Carol Brook who is the executive director
10:37:56 12 of the Federal Defender Program for the Northern District of
10:37:58 13 Illinois. She joined the office in 1976 after graduating from
10:38:03 14 the University of Illinois College of Law.

10:38:05 15 We also have Jacqueline Johnson, who is the first
10:38:08 16 assistant federal public defender for the Northern District of
10:38:12 17 Ohio. Prior to joining the Federal Defender's Office, she was
10:38:15 18 in private practice, litigating both civil and criminal
10:38:19 19 matters. And Ms. Johnson graduated from Cleveland-Marshall
10:38:22 20 College of Law and Wittenberg University.

10:38:25 21 We also have Mr. Thomas W. Cranmer who has been a
10:38:30 22 principal in the law firm of Miller, Canfield, Paddock and
10:38:32 23 Stone since 2005. He also serves as an adjunct professor of
10:38:37 24 law at the Thomas M. Cooley School of Law, and he's served as
10:38:42 25 an assistant U.S. attorney from [the] Eastern District of

10:38:46 1 Michigan. He holds a law degree from Ohio Northern University
10:38:46 2 and a bachelor's degree from the University of Michigan.

10:38:49 3 Ms. Brook, are you going first?

10:38:51 4 MS. BROOK: I am.

10:38:52 5 ACTING CHAIR HINOJOSA: So far the only panel that
10:38:54 6 has changed the order is the appellate panel, and I didn't
10:38:57 7 think I could overrule them.

10:38:59 8 Go ahead.

10:39:00 9 MS. BROOK: There's some message there. I am not
10:39:04 10 going to overrule anybody.

10:39:06 11 Like Patrick, I want to say you appreciate our time,
10:39:11 12 but I think more we appreciate your time going all around the
10:39:15 13 country. I have tried to read all the transcripts with all
10:39:22 14 the information that you have had, and I can't imagine how you
10:39:27 15 do it.

10:39:28 16 I'm actually getting this water because I'm much more
10:39:31 17 comfortable standing up. I need a phone book down here.

10:39:34 18 But --

10:39:37 19 ACTING CHAIR HINOJOSA: You're welcome to stand up if
10:39:39 20 you want.

10:39:41 21 MS. BROOK: Can you hear me?

10:39:42 22 ACTING CHAIR HINOJOSA: Yes.

10:39:43 23 MS. BROOK: Yes, that would be all right? I felt
10:39:45 24 like it might be a little presumptuous, so it would be better
10:39:48 25 for me though.

10:39:49 1 I think what you got yesterday from Chief Judge
10:39:53 2 Holderman was a really good sense of how our district works
10:39:59 3 and how it works together. I feel very lucky to have
10:40:06 4 practiced here as long as I have and to be in a district where
10:40:09 5 there's such amazing respect -- I think you heard it from
10:40:14 6 Patrick today as well -- among everybody here. You, Judge
10:40:19 7 Castillo, probably know better than anybody, since you chair
10:40:23 8 that I know of at least two committees, the Crack Cocaine
10:40:26 9 Committee and the Re-Entry Committee, where you have brought
10:40:30 10 people representing agencies inside and outside the courthouse
10:40:33 11 to really work together for a common good, and I do mean work
10:40:39 12 together for a common good, which brings me to something,
10:40:45 13 Mr. Wroblewski, that you said in New York, which is really
10:40:49 14 where I wanted to start.

10:40:50 15 You were talking about how moving it was to you
10:40:53 16 really that so many people appeared before the Commission and
10:40:58 17 had the same kind of common goals for better sentencing in the
10:41:05 18 same ways, and it seems to me that that desire for a common
10:41:10 19 good is really where we need to start.

10:41:14 20 What we heard yesterday, I thought, at least what I
10:41:17 21 took away from it, was that judges really want to follow the
10:41:23 22 guidelines. They believe in the guidelines. We heard Judge
10:41:30 23 Rosen struggle with how difficult it was for him when he said
10:41:34 24 I can't find my way clear to follow this one child pornography
10:41:42 25 guideline. It seems to me in situations like that or maybe

10:41:46 1 more specifically in this district where we have, I wanted to
10:41:49 2 use the immigration example because in immigration cases, the
10:41:55 3 judicial non-guideline rate is 38 percent, which is higher
10:42:02 4 than the national rate, so I would think the Commission would
10:42:08 5 want to look at that, not to say, oh, my God, this is
10:42:12 6 terrible, unwarranted disparity, but to say, you know, what is
10:42:16 7 going on here? Is there a reason for this? Let's put some
10:42:21 8 research into this and try and understand. Maybe in the
10:42:25 9 immigration guideline across the country that this is a red
10:42:32 10 flag, there's something going on. Certainly, there is.

10:42:38 11 I think without too much research, we would see,
10:42:40 12 number one, is the U.S. Attorney's Office in this district
10:42:43 13 rarely requests a non-guideline sentence in immigration cases.
10:42:47 14 It's 4.2 percent, which is far lower than the national
10:42:50 15 average. And if you added together the judicial rate and the
10:42:57 16 government rate, it actually comes out to the national
10:43:03 17 average.

10:43:03 18 So we don't have fast track, which may be the entire
10:43:08 19 answer to this, I don't know; but it seems to me in those
10:43:12 20 situations, that's something to look deeper at and say may be
10:43:17 21 unwarranted disparity, may be just disparity, may be a problem
10:43:23 22 that we need to be looking at and putting our resources into.

10:43:27 23 Now, this brings me to something that each of you are
10:43:31 24 my heroes for doing. You have created fairness in the
10:43:41 25 crack/powder arena in a way that I don't think any other group

10:43:44 1 of people in the government could have done. You took all the
10:43:53 2 resources of the Commission and did the research, got the
10:43:55 3 empirical evidence, put it in language that we could actually
10:43:59 4 understand, that judges could understand, that the public
10:44:02 5 could understand, that I'm really hoping Congress will
10:44:04 6 understand, and changed the law. That, to me, is an
10:44:13 7 extraordinary thing that can be done -- I'm sure it was an
10:44:17 8 extraordinary effort on your part -- but that can be done
10:44:20 9 really only by the Commission.

10:44:24 10 And it seems to me that it needs to be done in every
10:44:29 11 case, in every guideline, that we need to start building a
10:44:34 12 better guideline system, and the way to do that -- I have
10:44:39 13 heard every single speaker say the same thing -- we want
10:44:44 14 information. We want to be educated. Patrick said that when
10:44:51 15 he was talking about child pornography. I don't know, he said
10:44:54 16 give me information. Every judge yesterday, including Judge
10:44:58 17 Easterbrook, said that. Information is critical to educating
10:45:01 18 the judges.

10:45:04 19 What it would do, I think, is if that information
10:45:07 20 could go in the guidelines so each guideline could say why is
10:45:11 21 this guideline here? Is it from a directive from Congress?
10:45:15 22 Is it to meet a particular goal or goals of sentencing? What
10:45:22 23 are the recidivist rates if we do it at this level versus this
10:45:26 24 level, or where can I get this information? Does it have some
10:45:30 25 racial impact? All of those things would give judges the

10:45:34 1 information they need, I think, to make more informed
10:45:38 2 sentences and would create for us more consistent sentencing,
10:45:42 3 I am certain, and give the guidelines tremendous, tremendous
10:45:47 4 credibility, which is, I think, what everybody wants. Going
10:45:51 5 forward, can we have a credible guideline system? And I think
10:45:55 6 that is the way to do it.

10:46:01 7 In the meantime, I can tell you, at least from my
10:46:04 8 personal position and the defender's that the advisory
10:46:10 9 guidelines are working.

10:46:12 10 She's going to take my picture when I'm about to tell
10:46:15 11 you how old I am. This is not a good thing. Go away.

10:46:18 12 (Laughter.)

10:46:22 13 ACTING CHAIR HINOJOSA: And you will be the only one
10:46:24 14 who ever stood.

10:46:26 15 (Laughter.)

10:46:27 16 MS. BROOK: I'm sitting down right now.

10:46:29 17 It's because I'm short, Judge.

10:46:32 18 When I started practicing law in 1976, I had ten
10:46:38 19 years of practice before the guidelines in this courthouse,
10:46:46 20 and I remember, as clearly as if it just happened, standing in
10:46:52 21 a courtroom with a client in a bank robbery case and hearing a
10:46:59 22 judge impose the longest sentence I had ever heard. The
10:47:06 23 sentence was eight years.

10:47:10 24 Now, I tell that story to the young lawyers in our
10:47:13 25 office, and they laugh at me. I think secretly they don't

10:47:18 1 believe me. They think I'm just kind of making up this
10:47:21 2 apocryphal story. But what I'm telling you why I think it's
10:47:28 3 important to say how shocking it was to me then is to say that
10:47:32 4 I really feel like I have seen sentencing from here and here
10:47:36 5 and here, and I think we are in the best place we've ever
10:47:40 6 been.

10:47:41 7 Judges do have discretion. They can sentence a whole
10:47:45 8 person. If the prosecutors use their discretion -- which they
10:47:50 9 sometimes do, your statistics show it, we know it -- in a way
10:47:56 10 that maybe isn't the best, judges have the opportunity to in
10:48:04 11 the open transparently counterbalance that discretion, which
10:48:10 12 is not true under mandatory guidelines. And, of course,
10:48:15 13 before there were any guidelines, there was kind of a
10:48:17 14 free-for-all, no appeals, a lot of [inaudible], as we like to
10:48:24 15 say.

10:48:25 16 So I can say now to my clients something that I
10:48:29 17 couldn't say before. Under mandatory guidelines, my client
10:48:35 18 would say to me -- I have this example in the testimony -- my
10:48:40 19 parents left me when I was really young. Me and my brothers
10:48:44 20 and sisters became addicted to heroin at age 17. I got
10:48:50 21 diagnosed with mental illness, but nobody did anything about
10:48:54 22 it for 20 years. None of that is uncommon. You've all seen
10:48:58 23 that.

10:49:00 24 And I would say to them under mandatory guidelines I
10:49:04 25 am so sorry. I will try and get you what help I can, but none

10:49:12 1 of that is going to make a difference at sentencing. No
10:49:16 2 matter what I do, I've got to be straight, it's not going to
10:49:20 3 matter. Like I think it was Judge Carr who said under
10:49:24 4 mandatory guidelines, he wanted to do something, but really he
10:49:26 5 walked into the courtroom and knew what was going to happen.

10:49:30 6 That's bad for the clients. It's bad for the justice
10:49:34 7 system. It's really bad for criminal defense lawyers who are
10:49:39 8 struggling every day to figure out how to best represent their
10:49:44 9 clients and feel at that point like what am I doing? Most of
10:49:49 10 our clients are sentenced. This is most of what we can do to
10:49:54 11 help. It's very troubling. And now, it's not true.

10:50:00 12 Now I can listen and I can say I'm really sorry.
10:50:04 13 That's terrible. I will tell the judge. I can't tell the
10:50:08 14 judge -- I can't tell you that the judge is going to say, oh,
10:50:11 15 okay, go home, which, I guess, goes to this question of
10:50:15 16 certainty of punishment which I just want to say one thing on.
10:50:23 17 In my experience, the certainty of what the punishment is
10:50:25 18 going to be is not the question, at least for our clients. I
10:50:32 19 mean, yes, they would love to know what the judge is going to
10:50:35 20 give, but we kind of never have been able to say that anyway
10:50:41 21 for fear that we would be, as we often are, completely wrong.

10:50:46 22 So the idea is that the judge will listen. The judge
10:50:52 23 will hear me represent your life in total and make a reasoned
10:50:59 24 decision, and I can't tell you how important that is to our
10:51:03 25 clients.

10:51:05 1 Now, there is one piece of that that I would ask this
10:51:07 2 Commission to add to, which I think is really important, and
10:51:12 3 that is to go back to 994 and say, yes, we're going to put an
10:51:20 4 in/out decision into the guidelines and judges can look and
10:51:24 5 say before how long, should this person go to prison or not;
10:51:31 6 and if not, what kind of alternatives can we suggest -- we the
10:51:39 7 Commission -- and for what kinds of people in what kinds of
10:51:44 8 cases.

10:51:46 9 Again, I think that kind of information, that kind of
10:51:48 10 research, that kind of education would be amazingly helpful to
10:51:53 11 all of us and create not only credibility for the guidelines,
10:51:58 12 but a desire for everybody to say we're looking to the
10:52:02 13 guidelines first, not just because we have to, but because
10:52:05 14 that's the place where all the guidance is. And that, I
10:52:12 15 think, should be the goal.

10:52:20 16 We have heard from various people, I think, and also
10:52:23 17 from the commissioners, concerns about advisory guidelines
10:52:28 18 creating disparity and perhaps going forward creating more
10:52:32 19 disparity. I want to say just a couple things about that.

10:52:38 20 One is that disparity, I think, is inevitable in an
10:52:44 21 individualized sentencing system. And it's really not
10:52:47 22 disparity that we're concerned with, it's unwarranted
10:52:50 23 disparity.

10:52:53 24 Now, I would say that some unwarranted disparity even
10:52:57 25 is going to exist in any sentencing system. Congress directed

10:53:02 1 the Commission to reduce unwarranted disparity, not eliminate
10:53:07 2 it. And I think as human beings, elimination probably is not
10:53:12 3 possible. But reduce, a goal I think we all can agree on, if
10:53:19 4 it's unwarranted.

10:53:21 5 Culpability differs in different cases. All
10:53:26 6 disparity is not unwarranted. You all know that. I know you
10:53:29 7 know that. I want to give you two statistics now, we're going
10:53:35 8 to see if I can get through these numbers without completely
10:53:38 9 screwing them up. I'm going to do my best. Smile at that and
10:53:42 10 not be looking at me, uh-oh. You can correct me if I'm wrong.

10:53:49 11 As I see the numbers for the extent, and this is now
10:53:54 12 the extent of the variances, I see -- and this is all taken
10:54:01 13 from the preliminary quarterly data that the Commission put
10:54:07 14 out in '06, '07, '08 and the first quarter of '09 -- I don't
10:54:11 15 see any change, virtually any change, in the variances from
10:54:17 16 '06 to now. Like I say, I was kind of surprised at that
10:54:23 17 because I was listening to Patrick say he had this gut sense
10:54:26 18 that sentences were getting bigger and bigger away. But I
10:54:30 19 think Judge Castillo, and I think you said that, too, Judge
10:54:33 20 Sessions, that that's not true. It seems to me that your own
10:54:37 21 data shows that the extent of the variances hasn't changed.

10:54:45 22 The percentage has changed some; but, again, I go
10:54:49 23 back to what I said originally on that, which is I think it's
10:54:53 24 important to look at where those percentages are changing and
10:54:58 25 use your resources to try and pinpoint why that is. Maybe it

10:55:02 1 is unwarranted disparity, or maybe it's something else. Maybe
10:55:06 2 it's a problem you could analyze and help fix.

10:55:17 3 I want to talk for just a minute about how not all
10:55:23 4 non-guideline sentences create this unwanted disparity I guess
10:55:29 5 by talking about the career offender guideline because that's
10:55:33 6 perhaps the most obvious problem, not that there aren't
10:55:37 7 others, but in terms of who it picks up in prior criminal
10:55:41 8 history.

10:55:43 9 So when a judge doesn't sentence someone as a career
10:55:48 10 offender, it seems to me it's very possible that what that
10:55:54 11 judge is doing is preventing unwarranted disparity rather than
10:55:59 12 creating it, although if you look at the numbers that you see
10:56:04 13 here, it would just look like, you know, more non-guideline
10:56:08 14 sentences.

10:56:09 15 Which brings me back to what I say, I think it's
10:56:12 16 really important to look at what these numbers mean. Why are
10:56:17 17 the judges doing this? Clearly the judges want to be doing
10:56:21 18 the right thing. They want to follow the guidelines. If
10:56:24 19 they're not, they're struggling somewhat. Maybe it's not
10:56:29 20 something you in the end decide is important, but maybe it is.
10:56:33 21 And we all would be better off knowing one way or another what
10:56:40 22 it is.

10:56:48 23 My final point is, to me, the most important point
10:56:53 24 and always the hardest thing to talk about, which is race. As
10:56:58 25 defense lawyers, whether you've been around for three years or

10:57:03 1 33 years, as judges and prosecutors, you see that certainly as
10:57:11 2 public defenders, the vast majority of our clients have dark
10:57:15 3 skin, there's no doubt about it, and the vast majority of
10:57:21 4 people that end up in prison.

10:57:24 5 Some of that is necessary, has a significant law
10:57:32 6 enforcement purpose, but some of it does not. And to your
10:57:34 7 great credit, the Commission has really done amazing research
10:57:39 8 on the area of which guidelines actually contribute to
10:57:45 9 unwarranted, I'll say, racial disparity.

10:57:49 10 When I started looking at the research, I was amazed.
10:57:54 11 But that research is hard to find. You have to be really
10:57:58 12 committed to going in there and finding it and trying to
10:58:01 13 figure out what it is that it says. I would ask this
10:58:06 14 Commission to do more of that research, to put that research
10:58:12 15 in the guidelines themselves so that the judges can see it,
10:58:17 16 and probably most importantly, I think, to change those
10:58:20 17 guidelines, like the career offender guideline, that you know
10:58:25 18 from your own research have an unwarranted racial impact on
10:58:31 19 people of color.

10:58:33 20 I think all of that would go a long, long way toward
10:58:37 21 credibility and I know make us all a better nation.

10:58:42 22 Thank you.

10:58:42 23 ACTING CHAIR HINOJOSA: Thank you, Ms. Brook.

10:58:44 24 Ms. Johnson.

10:58:45 25 MS. JOHNSON: Good morning. I want to thank you all

10:58:48 1 for the opportunity to speak and share with you and have a
10:58:53 2 dialogue about these guidelines that I have been laboring
10:58:57 3 under for, off and on, the past 25 years. I just celebrated
10:59:02 4 my 25th year of practice, and I was very surprised but very
10:59:07 5 grateful when I was invited to come and speak to the
10:59:10 6 Commissioners who actually are responsible for these
10:59:13 7 guidelines.

10:59:14 8 So you will see that my statement is very lengthy.
10:59:17 9 I'm only going to highlight it because, as I said, I was so
10:59:21 10 excited when I got the call. How often does a criminal
10:59:23 11 defense attorney have an opportunity to really face the
10:59:25 12 Commissioners who prepared these guidelines?

10:59:28 13 But having said that, in talking to Carol and
10:59:32 14 preparing for today's presentation, it occurs to me that there
10:59:36 15 is a theme that has developed and it's from what I've heard
10:59:41 16 yesterday and in reading the testimony of others. I have to
10:59:45 17 commend the Commission for devoting the time, you've already
10:59:48 18 had several of these dog-and-pony shows behind you, and I
10:59:51 19 looked at your schedule for September and October and I think
10:59:54 20 maybe even November, and so we thank you again for the
10:59:58 21 opportunity to share.

11:00:00 22 The first thing that strikes me is that we were
11:00:03 23 talking about an evolution of the guidelines. First there
11:00:06 24 were no guidelines and then the mandatory guidelines and now
11:00:10 25 the advisory guidelines. And so during that evolution, there

11:00:16 1 have been lots of changes, and I think by having these
11:00:19 2 sessions, you have an opportunity to kind of step back, as I
11:00:22 3 do. I think one of the judges said yesterday in operating
11:00:24 4 under these guidelines, we're sort of in the vortex, and
11:00:27 5 certainly as a defense attorney handling cases and trials and
11:00:32 6 appeals, you don't realize until you can step back and take a
11:00:37 7 look at all the work that the Commission has done and how much
11:00:40 8 I know that in my practice I've relied upon some of the data
11:00:44 9 that you have provided. So there's an evolution.

11:00:46 10 And then second there's been an education, and
11:00:49 11 there's the need for the Commission to educate. You need to
11:00:52 12 educate the users of the guidelines. By that, I mean the
11:00:55 13 judges, the prosecutors and the defense attorneys. And then
11:00:58 14 you need to educate those who are impacted by the guidelines.
11:01:03 15 By that, I mean the community. The community has a right to
11:01:08 16 understand exactly what's going on. And also the defendants.

11:01:12 17 Finally, there is the issue of analysis or the
11:01:16 18 empirical research. I know that there was some concern about
11:01:20 19 whether or not there is credibility for the Commission and
11:01:24 20 with the guidelines. And the way that you can get that
11:01:26 21 credibility is confidence in the guidelines, and if you
11:01:29 22 provide the empirical research as to the reasons for the
11:01:34 23 guidelines, I think that that will go a long way. And
11:01:37 24 certainly what you're doing here today supports both the
11:01:41 25 evolution, the education, and the analysis.

11:01:44 1 We appreciate the work that the Commission has
11:01:47 2 already done to improve federal sentencing. Primarily because
11:01:50 3 of the Commission's work on crack cocaine, the Attorney
11:01:54 4 General has announced the Administration's support for a
11:01:57 5 one-to-one ratio, and Congress seems to be on the brink of
11:02:00 6 enacting legislation to accomplish the result. We hope that
11:02:03 7 the Commission will recommend the statutory change to make it
11:02:05 8 retroactive.

11:02:06 9 The Commission's retroactive two-level reduction in
11:02:10 10 the crack cocaine guidelines has resulted in relief for more
11:02:13 11 than 300 defendants in the Northern District of Ohio and
11:02:16 12 thousands more cross the country.

11:02:19 13 In July of this year, a judge in the Northern
11:02:21 14 District of Ohio adopted a one-to-one ratio after considering
11:02:25 15 the Commission's reports. Other judges have also adopted a
11:02:29 16 one-to-one ratio. This demonstrates that, when the Commission
11:02:31 17 provides empirical research and data, judges trust the
11:02:35 18 Commission's findings.

11:02:36 19 I wish sometimes, though, that I could take Patrick
11:02:39 20 back with me to the Northern District of Ohio because he was
11:02:42 21 saying that they look at their cases on a case-by-case basis
11:02:46 22 and make the determination as to whether a one-to-one crack
11:02:49 23 applies.

11:02:49 24 That has not happened in our district yet. If the
11:02:54 25 defense attorney does not file a sentencing memorandum pushing

11:02:57 1 and encouraging for the court to consider that one-to-one
11:03:01 2 ratio, it isn't something that's brought to the court's
11:03:03 3 attention. And I think that the 3553(a) factors that the
11:03:07 4 courts have to take a look at should be explored not only and
11:03:11 5 presented not only by the defense attorneys, but by the U.S.
11:03:14 6 Attorneys. That doesn't happen in our district either.
11:03:17 7 Seldom is there any type of sentencing memorandum from the
11:03:19 8 U.S. Attorney's Office. It's always from our office, and it's
11:03:24 9 more of an advocacy.

11:03:26 10 In Part I of my discussion, I discuss how the Supreme
11:03:29 11 Court's decisions in *Booker* and subsequent cases have improved
11:03:34 12 sentencing in the district court and have resulted in
11:03:36 13 appellate review that is working as it should be.

11:03:39 14 In Part II, I discuss how the Commission can improve
11:03:42 15 the system by revising the guidelines and advising Congress
11:03:45 16 based on feedback and empirical data and research.

11:03:49 17 In Part III, I discuss evidence showing that judges
11:03:52 18 are exercising their discretion moderately by any measure and
11:03:57 19 address certain anecdotes that can be offered to undermine
11:04:00 20 confidence in judges.

11:04:02 21 The Supreme Court's decisions in *Booker* and
11:04:04 22 subsequent cases have improved sentencing in the district
11:04:06 23 court and have resulted in appropriate appellate review. The
11:04:10 24 sentencing process is more transparent and honest, and
11:04:14 25 sentences imposed are more fair and effective.

11:04:17 1 Like most of the judges, probation officers,
11:04:20 2 academics and community representatives who have testified
11:04:23 3 before you, the defenders believe that the advisory guidelines
11:04:28 4 system is working better than a mandatory guidelines system.
11:04:32 5 We support this system because sentencing is more honest and
11:04:35 6 sentences are more just.

11:04:37 7 At the same time, the sentencing decision still
11:04:39 8 revolves around the guidelines. The sentencing judge must
11:04:43 9 begin all sentencing proceedings by correctly calculating the
11:04:46 10 applicable guideline range. And to secure nationwide
11:04:50 11 consistency, the guidelines should be the starting point and
11:04:53 12 the initial benchmark. A major variance from the guideline
11:04:57 13 range requires a more significant justification than a minor
11:05:00 14 one.

11:05:02 15 We do suggest that appellate review is working
11:05:05 16 appropriately. When Congress enacted the Sentencing Reform
11:05:10 17 Act, its goals for appellate review were to reserve the
11:05:14 18 concept of the discretion of the sentencing judge who has a
11:05:17 19 proper place in sentencing and should not be displaced by the
11:05:19 20 discretion of the appellate court.

11:05:20 21 And I think that we heard that yesterday from one of
11:05:24 22 our judges who said that he didn't believe that he was in a
11:05:27 23 position to make a decision as to the sentencing variance. Is
11:05:32 24 six months appropriate? Is it too much or too little? He
11:05:35 25 says he takes a closer look at those variances that are

11:05:38 1 larger.

11:05:39 2 And the reason that an appellate judge should feel
11:05:43 3 some discomfort in terms of sentencing is that because a
11:05:48 4 district court typically will sentence up to 125 defendants
11:05:50 5 within a year. So certainly, having either tried the case or
11:05:53 6 considered all of the factors, reviewed the sentencing
11:05:57 7 memorandum, and you can't discount the ability to actually
11:06:00 8 have a discourse and a discussion with the actual defendant
11:06:04 9 who's going to be sentenced.

11:06:07 10 The courts of appeals enforce guidelines more rigidly
11:06:12 11 than expected or than the statutes required, even before the
11:06:16 12 PROTECT Act formally enacted de novo review. In *Koon v.*
11:06:21 13 *United States*, the Supreme Court clarified that the standard
11:06:23 14 of review was abuse of discretion, but the courts of appeals
11:06:27 15 continued to reverse departures at a high rate and to reverse
11:06:30 16 denials of departure at a low rate, and, thus, Koon had no
11:06:35 17 significant impact on departure rates. This overly strict
11:06:38 18 enforcement of the guidelines created unwarranted uniformity
11:06:41 19 and stifled feedback to the Commission which had been thought
11:06:44 20 to be essential to proper functioning of the guidelines
11:06:48 21 system. The Supreme Court has now excised de novo review and
11:06:52 22 prohibited extraordinary circumstances review because those
11:06:55 23 standards made the guidelines mandatory and, therefore,
11:06:57 24 unconstitutional.

11:06:59 25 The court also emphasized, as Congress did in

11:07:01 1 enacting the Sentencing Reform Act, that sentencing is
11:07:05 2 properly the function of the district court judge, not the
11:07:07 3 court of appeals, for reasons of institutional competence.
11:07:11 4 The current abuse of discretion standard ensures that the
11:07:15 5 Commission receives necessary feedback from the sentencing
11:07:17 6 judge. The judge's reasoned sentencing judgment, resting upon
11:07:22 7 an effort to filter guidelines' general advice through
11:07:26 8 3553(a)'s list of factors provides relevant information to the
11:07:30 9 Commission so that the guidelines can constructively evolve
11:07:34 10 over time, as both Congress and the Commission foresaw.

11:07:40 11 A sentence must first pass muster under a robust set
11:07:49 12 of procedural requirements. Procedural errors that may affect
11:07:53 13 the kind or length of a sentence, like improperly calculating
11:07:56 14 the guidelines, overlooking relevant factors or clearly
11:07:59 15 erroneous fact-finding are caught and remedied on remand.
11:08:04 16 Inadequate explanations for the chosen sentence are similarly
11:08:07 17 rejected. By requiring district courts to adequately explain
11:08:12 18 the reasons for the sentence imposed, appellate courts are
11:08:15 19 better able to determine whether a sentence is substantively
11:08:20 20 reasonable.

11:08:20 21 Requiring reasoned explanations also guards against
11:08:24 22 arbitrariness and promotes confidence in the justice system
11:08:27 23 because the parties and the public can both understand why the
11:08:31 24 defendant received a particular sentence.

11:08:33 25 The Sixth Circuit has embraced this robust procedural

11:08:38 1 review for all sentences, whether within or outside the
11:08:41 2 advisory guideline range. It has readily remedied or remanded
11:08:47 3 cases involving sentences outside the guideline range when the
11:08:50 4 district court's explanation for the sentence was insufficient
11:08:54 5 or failed to address the defendant's non-frivolous arguments.
11:08:58 6 It has also readily affirmed sentences outside the guideline
11:09:02 7 range when the district court's explanation for sentence was
11:09:06 8 sufficient.

11:09:06 9 The appellate process is working as it should in the
11:09:11 10 Sixth Circuit. As Judge Sutton, writing for the en banc court,
11:09:15 11 observed after the Supreme Court's decisions in *Rita*, *Gall* and
11:09:18 12 *Kimbrough*:

11:09:19 13 "One thing runs through all three cases: *Booker*
11:09:23 14 empowered district courts, not appellate courts and not the
11:09:26 15 Sentencing Commission. Talk of presumptions, plain error and
11:09:29 16 procedural and substantive rules of review means nothing if it
11:09:33 17 does not account for the central reality that *Booker* breathes
11:09:38 18 life into the authority of district court judges to engage in
11:09:41 19 individualized sentencing within reason in applying the
11:09:45 20 3553(a) factors to the criminal defendants that come before
11:09:48 21 them. If there is a pattern that emerges from *Rita*, *Gall* and
11:09:52 22 *Kimbrough*, it is that the district court judges were
11:09:55 23 vindicated in all three cases and a court of appeals was
11:09:59 24 affirmed just once -- and that of course was when it deferred
11:10:03 25 to the on-the-scene judgment of the district court."

11:10:07 1 The endorsement of the sentencing judge as the
11:10:10 2 primary decisionmaker comes with an active insistence that
11:10:14 3 sentencing judges give detailed reasons for their sentences.
11:10:17 4 In this matter, the Sixth Circuit not only receives better
11:10:20 5 information upon which to base its review, but also paves the
11:10:24 6 way for unfettered feedback to the Commission that can, if the
11:10:28 7 Commission chooses to act on it, help the guidelines to
11:10:30 8 constructively evolve over time. It is through this evolution
11:10:34 9 that the guidelines will remain an important component in
11:10:37 10 federal sentencing.

11:10:38 11 Of course, I don't always agree with the Sixth Circuit,
11:10:41 12 but I'm encouraged overall that it requires adequate
11:10:45 13 explanations whether the sentence is within or without the
11:10:49 14 guideline range, and that it has demonstrated a willingness to
11:10:52 15 consider arguments that a sentence is substantively
11:10:55 16 unreasonable, including because it is greater than necessary
11:10:58 17 to achieve the purposes of sentencing.

11:11:00 18 In 2003, when 4,925 defendants were sentenced in the
11:11:07 19 Sixth Circuit, the government filed eight appeals involving
11:11:10 20 sentencing issues and won 50 percent of them. In 2005, when
11:11:16 21 5,353 defendants were sentenced in the Sixth Circuit, the
11:11:21 22 government filed 15 appeals involving sentencing issues and
11:11:24 23 won 60 percent of them. In 2008, when 5,409 defendants were
11:11:29 24 sentenced in the Sixth Circuit, the government filed 15 appeals
11:11:33 25 involving sentencing issues and won 73.4 percent of them.

11:11:39 1 The government won 55.7 percent of appeals on issues
11:11:43 2 related to departures or variances compared to 39 percent in
11:11:48 3 1999 and 44 percent in 2005. In contrast, defendants in 2008
11:11:55 4 won on issues related to departures or variances only
11:11:59 5 5.9 percent of the time, and that would explain why at least
11:12:03 6 in our district, oftentimes there is not an appeal that is
11:12:06 7 filed when there has been a departure or a variance because
11:12:10 8 the U.S. Attorney's Office has made the determination that
11:12:13 9 it's not an unwarranted disparity for that individualized
11:12:19 10 individual.

11:12:19 11 And that's in response to Attorney Fitzgerald who
11:12:22 12 said that he thought that nationwide that appeals were
11:12:25 13 dropping. We fail to see why the government would be
11:12:28 14 discouraged from filing appeals of below-guideline sentences
11:12:32 15 when it's winning 55.7 percent of those appeals. At least it
11:12:36 16 was in 2008.

11:12:38 17 The Commission can improve the system by revising the
11:12:41 18 guidelines and advising Congress based on feedback from judges
11:12:45 19 and empirical data and research. We're glad to see that the
11:12:49 20 Commission plans to study and possibly address some of the
11:12:52 21 outstanding problems in federal sentencing, including
11:12:54 22 mandatory minimums. We understand that most of the problems
11:12:57 23 in the guidelines are traceable to mandatory minimums,
11:13:00 24 congressional directives and, less visible, political
11:13:04 25 pressure. The Commission should take this opportunity to

11:13:09 1 revise those guidelines that it can without violating a
11:13:11 2 specific congressional directive and to educate the Congress
11:13:14 3 about how and why its mandatory minimums and specific
11:13:18 4 directives have resulted in sentences that are unnecessarily
11:13:20 5 severe.

11:13:21 6 This is contemplated by the Sentencing Reform Act and
11:13:24 7 has been strongly urged by the Supreme Court, invited by the
11:13:27 8 leadership in Congress, and urged by the judges, defense
11:13:30 9 lawyers, probation officers, and academics who have testified
11:13:33 10 before you.

11:13:34 11 It was surprising to me to learn from Judge Simon
11:13:38 12 that he said he was unaware of the fact that when considering
11:13:42 13 age, that the recidivism rate dropped significantly past a
11:13:46 14 certain age. And that's information that comes directly from
11:13:49 15 your own research. And we would suggest to the Commission
11:13:52 16 that, one, you may want to simply make the specific
11:13:57 17 characteristics under 5H a part of the historical notation,
11:14:02 18 but that you would include the information as to why now age
11:14:05 19 should be something that can be considered when you're looking
11:14:08 20 at the issue of recidivism. If it's right there in the
11:14:11 21 guidelines, it's going to be a much bigger help to the judges
11:14:14 22 and to the other parties.

11:14:15 23 I think that Judge Carr suggested that you shouldn't
11:14:20 24 be as concerned about the fact that there is a frequency of
11:14:24 25 departures in specific areas, especially child pornography,

11:14:29 1 but that you should take a look at the reasons for those
11:14:33 2 variances or departures and take a look at the length of time.
11:14:39 3 And I think that that is something that the Commission would
11:14:41 4 want to take a closer look at as it reviews that particular
11:14:45 5 guideline.

11:14:46 6 Empirical evidence shows that the guidelines
11:14:50 7 recommend and mandatory minimums require punishment that is
11:14:54 8 greater than fully informed members of the public believe is
11:14:57 9 just. Judge Gwin of the Northern District of Ohio has
11:15:02 10 conducted a study aimed at answering the question: "Do the
11:15:05 11 sentencing guidelines accurately reflect community sentiment
11:15:09 12 on just punishment?" Judge Gwin's study is entitled, "Juror
11:15:14 13 Sentiment on Just Punishment: Do the Federal Sentencing
11:15:18 14 Guidelines Reflect Community Values?" And it will be
11:15:21 15 published in Volume 4.1 of the *Harvard Law & Policy Review*,
11:15:25 16 and he's graciously allowed me to share some of the
11:15:28 17 information from the draft that he has prepared.

11:15:30 18 I mentioned to Judge Gwin that I would be testifying
11:15:33 19 before the Commission, and he shared with me that he had been
11:15:37 20 conducting this informal poll for his last 20 jury trials. I
11:15:42 21 knew that I had been spending a lot of time in his courtroom,
11:15:45 22 but I didn't realize that two of the cases that he cites in
11:15:48 23 his law review article were cases that I tried, and I did not
11:15:52 24 know at the time that he was conducting this poll.

11:15:55 25 He was concerned about the federal sentencing

11:15:58 1 guidelines reflecting what he calls the community sentiment,
11:16:02 2 and he refers to it as the just punishment. And in doing
11:16:06 3 that, he decided that he would prepare a simple questionnaire
11:16:09 4 that he would have his law clerk to present at the conclusion
11:16:14 5 of the trials in which there were convictions. And he would
11:16:17 6 not have contact with the jurors, but that the questionnaire
11:16:20 7 would ask, "What do you think an appropriate sentence is for
11:16:24 8 this defendant in months?" And he provided the defendant's
11:16:30 9 prior criminal record.

11:16:31 10 He thought that he might be able to gain some insight
11:16:35 11 from an informed citizenry. That would be jurors who actually
11:16:39 12 sat through the trial, considered the evidence and the
11:16:41 13 testimony, had an opportunity to view the defendant and to
11:16:46 14 listen to the arguments by both the government and by the
11:16:50 15 defense attorney.

11:16:51 16 And we certainly want to say to you that we are not
11:16:54 17 in favor of polls as a reason or as a basis for making a
11:17:00 18 determination as to what an appropriate sentence is, but this
11:17:02 19 is a judge who was very concerned and wanted some feedback
11:17:06 20 because he had heard from his clerks that when -- the judge
11:17:10 21 would often say at the end of the case you're now released.
11:17:13 22 If you have any questions about what happens with this case,
11:17:16 23 feel free to call my clerk back.

11:17:17 24 And what he was getting was calls from the jurors
11:17:19 25 saying, well, what was the sentence for that particular

11:17:22 1 individual? And he was surprised that they were always
11:17:25 2 shocked that the penalties were so harsh. And I've detailed
11:17:30 3 in my statement that in looking at the 20 cases, the jurors
11:17:37 4 recommended sentences that were 21 percent of the minimum
11:17:43 5 guidelines that was recommended. Of 239 jurors, 221,
11:17:48 6 92 percent, recommended a sentence below the low end of the
11:17:51 7 guideline range, and that prompted Judge Gwin to ask the
11:17:55 8 question: "If a system of sentencing should impose deserved
11:17:58 9 just punishment, can it be credible if it is so dissonant
11:18:02 10 from community beliefs?"

11:18:04 11 One of the purposes the guidelines are required to
11:18:08 12 meet is the need for the sentence imposed to reflect the
11:18:10 13 seriousness of the offense, to promote respect for the law and
11:18:15 14 to provide just punishment for the offense. Although the
11:18:19 15 Commission has never adopted just desserts, academics have
11:18:24 16 observed that this is, in fact, the focus of the guidelines.
11:18:26 17 If so, the guidelines should reflect the seriousness of the
11:18:29 18 offense, measured by the harm it causes and the offender's
11:18:33 19 blameworthiness for that harm.

11:18:35 20 Several of the factors Congress directed the
11:18:39 21 Commission to consider in developing the guidelines relate to
11:18:42 22 this purpose, including circumstances that mitigate or
11:18:46 23 aggravate the seriousness of the offense, the nature and
11:18:49 24 degree of the harm caused by the offense, the community view
11:18:53 25 of the gravity of the offense, and the public concern

11:18:56 1 generated by the offense.

11:18:57 2 As to the first two factors, the only mitigating
11:19:00 3 factor bearing on blameworthiness the guidelines include is
11:19:04 4 role in the offense, and that factor is underused and often
11:19:09 5 dwarfed by quantity or amount-based adjustments.

11:19:12 6 The Commission's research and other empirical
11:19:15 7 research show that quantity is a poor proxy for offense
11:19:20 8 seriousness and does not correlate with the offender's role in
11:19:23 9 the offense.

11:19:24 10 As to the last two factors, Congress thought that
11:19:27 11 significant changes in community views might justify
11:19:29 12 increasing or decreasing the guidelines' recommended
11:19:34 13 penalties. Such adjustments were not to be undertaken in
11:19:37 14 response to public outcry about a particular case, but were to
11:19:40 15 be based on research and data collection.

11:19:46 16 Judge Gwin's study indicates that the guidelines do
11:19:50 17 not accurately reflect community views regarding just
11:19:53 18 punishment. It is consistent with the feedback the Commission
11:19:57 19 has been receiving from judges and with the Commission's
11:20:00 20 empirical research indicating that certain guidelines and
11:20:03 21 mandatory minimums are greater than necessary to achieve the
11:20:07 22 purposes of punishment.

11:20:11 23 Surveys conducted by the Commission show that both
11:20:13 24 the public and judges believe that the guidelines that are
11:20:16 25 based on mandatory minimums and congressional directives are

11:20:20 1 overly harsh. A 1997 public opinion survey, based on
11:20:24 2 vignettes incorporating elements of the guidelines, reveal
11:20:29 3 that the guidelines produce much harsher sentences in drug
11:20:33 4 trafficking cases than survey respondents would have given,
11:20:36 5 and that respondents did not support the severity of increases
11:20:40 6 under habitual offender rules like career offender guidelines.

11:20:46 7 And as Attorney Fitzgerald suggested, certainly more
11:20:50 8 study would be made when he was speaking specifically about
11:20:53 9 the safety valve. In our district, if an individual does not
11:20:57 10 qualify for safety valve by having just one Criminal History
11:21:01 11 Category point, a Criminal History Category I, then typically
11:21:05 12 the U.S. Attorney's Office will not recommend safety valve.

11:21:09 13 We have argued directly to the judges that the
11:21:13 14 Criminal History Category I isn't low enough, but the fact
11:21:17 15 that it includes only one point for safety valve knocks out a
11:21:23 16 lot of our clients who might have more than one Criminal
11:21:25 17 History point. They might have two Criminal History points.

11:21:28 18 And so we would urge the Commission to consider
11:21:30 19 whether or not it should re-evaluate that not only safety
11:21:33 20 valve, but the criminal history categories, that Criminal
11:21:38 21 History Category I, you might want to consider expanding it
11:21:42 22 for the purposes of safety valve.

11:21:43 23 The Commission should amend the guidelines consistent
11:21:48 24 with judicial feedback and empirical research. If the
11:21:53 25 Commission revises the guidelines, there will be more good

11:21:57 1 sentences overall. The Commission can avoid excessive
11:22:00 2 sentencing disparities through ongoing revision of the
11:22:03 3 guidelines in response to sentencing practices, and as that
11:22:09 4 occurs, district courts will have less reason to depart from
11:22:12 5 the guidelines.

11:22:13 6 And that relates back to the drug guidelines. We
11:22:17 7 join the many judges who have urged the Commission to de-link
11:22:20 8 the drug guidelines from the arbitrary quantity-based
11:22:23 9 punishment levels in the mandatory minimum statute. We urge
11:22:26 10 the Commission to create a set of drug guidelines based
11:22:29 11 primarily on functional role in the offense, with quantity
11:22:33 12 given lesser weight. Congress may have thought that quantity
11:22:37 13 would approximate functional role, but empirical research and
11:22:41 14 experience have shown that that was mistaken, and that's a
11:22:44 15 part of the evolution and the education.

11:22:46 16 I'm just going to speak very briefly about, I think
11:22:49 17 that Carol has already addressed career offender, but I'll
11:22:52 18 speak briefly about firearms, acquitted conduct, and then rely
11:22:56 19 upon my written testimony for the rest.

11:23:00 20 All but two of the districts in the Sixth and Seventh
11:23:09 21 Circuits have a higher-than-average firearms caseload, some as
11:23:14 22 high as 20 to 30 percent. Many firearms cases, and most in
11:23:18 23 some districts, are taken from state court, where the
11:23:20 24 sentences are much lower. Many of the offenses have no
11:23:24 25 connection to violence or drugs.

11:23:28 1 In Ohio, the average time served for possessing a
11:23:31 2 weapon in the state system under disability is 1.15 months. I
11:23:37 3 have a case now where ATF agents and local police were
11:23:41 4 conducting surveillance at a gun show in a semi-rural
11:23:46 5 community where few African-Americans live. They observed a
11:23:50 6 black woman and a black man buy two guns and simply assumed
11:23:54 7 that one or both of them were straw purchasers or convicted
11:23:58 8 felons.

11:23:59 9 They followed the couple more than 20 miles into the
11:24:01 10 City of Cleveland, and they observed the male give a gun to my
11:24:04 11 client on the streets of the East Side of Cleveland. My
11:24:08 12 client confessed immediately to possessing the weapon and to
11:24:11 13 being a convicted felon. His friend had purchased the gun for
11:24:14 14 him to give to his father -- and my client lives with his
11:24:17 15 father -- for his upcoming birthday and because my client says
11:24:22 16 that his home had recently been broken into. And,
11:24:26 17 fortunately, I was able to obtain a police report that
11:24:29 18 reflected that.

11:24:30 19 The reason that that's significant is that my client
11:24:30 20 had been raised by his father and had lived with him most of
11:24:33 21 his adult life, but that as a young child, there was a home
11:24:37 22 invasion in which his father was seriously injured and my
11:24:40 23 client found his father in a pool of blood, and that was
11:24:43 24 traumatizing to him.

11:24:44 25 So when there was another recent break-in in their

11:24:48 1 home, this is 15 years after the original event, when his
11:24:51 2 friend called him and said I have a gun here, he said, yeah, I
11:24:55 3 think my dad would need that gun because we did that have
11:24:57 4 break-in.

11:24:58 5 This client is 26 years old, and he has a Criminal
11:25:02 6 History Category of IV. And that sounds like it's rather
11:25:04 7 high, but then you have to take a close look at what exactly
11:25:07 8 the conduct was that was involved.

11:25:09 9 He has two misdemeanors for which he received two
11:25:12 10 points, one conviction for public gambling, three convictions
11:25:16 11 for driving while under suspension -- he received three points
11:25:19 12 for that -- and then he has one conviction for drug
11:25:22 13 trafficking, which he received no time in prison at the state
11:25:26 14 level, but he was assessed one point for that conviction,
11:25:30 15 which puts him in a Criminal History Category IV.

11:25:33 16 If he were to proceed to trial and be convicted of
11:25:36 17 the offense, he's looking at a guideline range of 51 to
11:25:39 18 63 months. If he pleads guilty and receives that third point
11:25:42 19 for acceptance of responsibility, he's looking at a possible
11:25:45 20 sentence of 37 to 46 months. And, fortunately, the guidelines
11:25:50 21 are now advisory, and I will at least have the opportunity to
11:25:53 22 make an argument as to an individualized sentence for this
11:25:57 23 individual, and some of the arguments that I'm going to use is
11:26:00 24 that in our district, we have a wonderful work force program.

11:26:04 25 I think there was some discussion about whether or

11:26:06 1 not programs regarding re-entry or rehabilitation should start
11:26:13 2 at the Bureau of Prisons or whether it should be with the U.S.
11:26:16 3 Probation Office.

11:26:16 4 In the Northern District of Ohio, we have a program
11:26:18 5 where even individuals who are on pretrial supervision, they
11:26:24 6 can take part in a program where they learn what their skills
11:26:28 7 and attributes are. They're not promised that they'll be able
11:26:33 8 to get a job, but they'll receive job training, and there will
11:26:35 9 be analysis. If they need to obtain a G.E.D., they're placed
11:26:38 10 into a G.E.D. program because generally there's two to
11:26:42 11 three months between the time of the initial case and the
11:26:45 12 sentence.

11:26:46 13 And what we've learned, and this is a program that
11:26:49 14 has just begun in the last six months, is that out of a group
11:26:54 15 of, say, 20 individuals, maybe 15 of them stick with the four-
11:26:58 16 or six-week program because what they want is they want a job.
11:27:02 17 And they're not promised a job.

11:27:04 18 There is some drop-offs, so there is some
11:27:07 19 self-selection. My client is currently participating in that
11:27:10 20 program, and he's been placed with an organization where he
11:27:13 21 can receive his G.E.D. He started doing this several times
11:27:18 22 before in between his stints in the local jail but never
11:27:22 23 completed it.

11:27:22 24 So what the probation department does is they
11:27:24 25 actually direct the individuals and say come and meet with us

11:27:27 1 for several hours during the week. We will find out what your
11:27:30 2 needs are, analyze them, and then direct you to exactly what
11:27:34 3 program you should receive.

11:27:35 4 My client's been doing very well. He's been
11:27:39 5 drug-free since he's been in the program. He's currently
11:27:41 6 obtaining his G.E.D., and the program confirmed for him that
11:27:46 7 he should be in the construction business.

11:27:47 8 I think that those are characteristics that are not
11:27:51 9 accounted for in the guidelines, and by them being advisory, I
11:27:53 10 have an opportunity to present that information to the judge.

11:27:57 11 Turning to acquitted conduct, the Commission should
11:28:01 12 state expressly that acquitted conduct may not be considered
11:28:04 13 in calculating the guidelines. The Commission indicates that
11:28:10 14 the guidelines do not direct judges to consider acquitted
11:28:12 15 conduct when calculating the guideline range. If so, then the
11:28:16 16 Commission has allowed to go uncorrected an erroneous
11:28:20 17 interpretation of the guidelines that has resulted in many
11:28:22 18 hundreds or thousands of years of imprisonment that not only
11:28:25 19 were unauthorized by jury verdicts, but were unauthorized by
11:28:29 20 the guidelines.

11:28:30 21 Application Note 3 of the rules states [that]
11:28:35 22 application [of] 1B1.3 "does not require the defendant, in fact,
11:28:38 23 to have been convicted of multiple counts." 1B1.3 Comment Note
11:28:44 24 3. The background commentary states: "Relying on the entire
11:28:47 25 range of conduct, regardless of the number of counts that are

11:28:51 1 alleged or on which a conviction is obtained, appears to be the
11:28:54 2 most reasonable approach to writing workable guidelines for
11:28:58 3 these offenses."

11:29:00 4 Although neither 1B1.3 nor its commentary uses the
11:29:06 5 word "acquitted," the courts have naturally concluded that the
11:29:09 6 reference to counts for which a conviction was not obtained
11:29:12 7 means counts of which the defendant was acquitted. By the
11:29:15 8 mid-1990s, 1B1.3(a)(2) was viewed by every court of appeals
11:29:21 9 except the Ninth as creating a mandate requiring the
11:29:24 10 consideration of acquitted crimes -- if found by a
11:29:31 11 preponderance of the evidence, as with every other guideline
11:29:33 12 component -- in determining the guideline range, and we would
11:29:35 13 urge the Commission to clarify this mistake.

11:29:39 14 I think that there was a lot of testimony yesterday
11:29:48 15 from the judges regarding their concerns about child
11:29:53 16 pornography and the sentences that are required. We are glad
11:29:56 17 to see that the Commission has made it a priority to review
11:29:59 18 the child pornography guideline and to possibly amend the
11:30:03 19 guideline, report to Congress, and recommend statutory
11:30:07 20 changes. 2G2.2 is dramatically flawed, and many judges have
11:30:11 21 found it to be unsound and inhumane, as described in numerous
11:30:15 22 published decisions.

11:30:17 23 In the first two quarters of 2009, judges departed or
11:30:20 24 varied in 41.5 percent of these cases, and the government
11:30:24 25 sponsored below-guideline sentences in 9.9 percent of the

11:30:28 1 cases, 7.6 for reasons other than substantial assistance.

11:30:32 2 And certainly it's important for a defendant to know
11:30:37 3 what the possibilities are for his sentence. I'm currently
11:30:42 4 representing an individual, however, who is a 37-year-old
11:30:46 5 attorney who was charged with receipt and distribution of
11:30:50 6 child pornography. He is exposed to the five-year mandatory
11:30:55 7 minimum sentence, but it was of small comfort to him for me to
11:30:58 8 explain to him that because of the enhancements involved that
11:31:02 9 if he were to go to trial and be convicted, that he would be a
11:31:05 10 criminal -- he's a Criminal History Category I, but offense
11:31:10 11 level 40 and that with a plea of guilty he would be an offense
11:31:13 12 level 37.

11:31:14 13 I think he's much more encouraged by the fact that I
11:31:18 14 can argue that, yes, there's the certainty of a 17-to-20-year
11:31:21 15 sentence, but what he really wants to know is whether or not
11:31:24 16 the judge has the power to consider something less than
11:31:28 17 17 years. As he said to me, as an attorney, that he was in
11:31:31 18 custody with other individuals who were in and out of prison
11:31:34 19 for several violations, and he is looking at what he views as
11:31:38 20 a life sentence for one violation which he is prepared to
11:31:42 21 admit was certainly a violation. We don't in any way diminish
11:31:46 22 the harm that is created by those who may view child
11:31:52 23 pornography, but we think that there needs to be more research
11:31:55 24 and empirical study done.

11:31:57 25 I believe that Judge Caldwell yesterday said that in

11:32:00 1 her district that only child pornography cases that are
11:32:03 2 prosecuted typically in the federal system are those where
11:32:06 3 there is some evidence that that individual is a pedophile or
11:32:10 4 has assaulted a child. That isn't the case in the Northern
11:32:14 5 District of Ohio. In fact, to the contrary, in almost all of
11:32:18 6 the cases that are prosecuted under child pornography, there
11:32:21 7 isn't any indication that the individual has in any way
11:32:24 8 assaulted a child or has had contact with a child. So, again,
11:32:30 9 we would urge the Commission to take a closer look at child
11:32:34 10 pornography.

11:32:34 11 In conclusion, the goal, as Carol has said, is not
11:32:39 12 that you are to dispel all disparity, that it's unwarranted
11:32:46 13 disparity, that certainly there should be some disparity
11:32:49 14 because there should be individualized sentences. It's
11:32:53 15 important that you build a better guideline, and you can do
11:32:57 16 that in your evolutionary review of the guidelines, by
11:33:01 17 educating those who are affected by it, and by sharing so much
11:33:05 18 of the empirical research that you've already done and
11:33:09 19 continue to provide that information so that there will be
11:33:12 20 credibility for the Commission and so that there will be a
11:33:16 21 greater confidence by the judges who are sentencing, by the
11:33:20 22 prosecutors who are prosecuting, and by the defenders who are
11:33:24 23 representing the defendants who are impacted the most, along
11:33:27 24 with the community.

11:33:28 25 I thank you for the opportunity to share this

11:33:29 1 information.

11:33:30 2 ACTING CHAIR HINOJOSA: Thank you, Ms. Johnson.

11:33:31 3 Mr. Cranmer, do I have your name right?

11:33:34 4 MR. CRANMER: You do.

11:33:35 5 ACTING CHAIR HINOJOSA: Mr. Cranmer.

11:33:37 6 MR. CRANMER: Mr. Chairman, thank you very much.

11:33:40 7 Like my fellow panel members, I want to thank the Commission

11:33:43 8 for giving me the opportunity to appear before you today.

11:33:46 9 It's certainly an honor.

11:33:48 10 I suppose there's always a risk when you are the last

11:33:51 11 panel member to speak. Probably a risk in two ways,

11:33:57 12 particularly if your other two panel members are lawyers. One

11:34:00 13 is that they will have already very eloquently covered the

11:34:03 14 material that you want to touch upon. And the second, I

11:34:06 15 guess, is that they may have used up a bit of your time, and I

11:34:10 16 think perhaps that's happened in both instances.

11:34:12 17 ACTING CHAIR HINOJOSA: Both standing and sitting.

11:34:14 18 MR. CRANMER: That's true.

11:34:15 19 So as opposed to perhaps repeating or even

11:34:19 20 summarizing my written testimony, I wanted to share with you

11:34:22 21 for just a moment the topic that I chose to write on and

11:34:27 22 submit to you and indicate to you why I did that.

11:34:31 23 My experience is somewhat similar to Carol's. I've

11:34:33 24 been practicing about as long as she has, actually starting in

11:34:37 25 1975.

11:34:38 1 MS. BROOK: Stand up.

11:34:41 2 (Laughter.)

11:34:42 3 MR. CRANMER: It's better to sit down.

11:34:43 4 And I've had the opportunity, as perhaps others who
11:34:47 5 have appeared before you, to kind of be on both sides of the
11:34:50 6 fence. I started as a state prosecutor and from there had the
11:34:54 7 wonderful opportunity to go to the United States Attorney's
11:34:57 8 Office in Detroit, where I was a federal prosecutor for a
11:35:00 9 period of time and then, in 1982, left to go into private
11:35:03 10 practice.

11:35:04 11 And the past 25 or 27 years I've been representing
11:35:08 12 people who largely fall under the rubric of white collar
11:35:14 13 criminal defendants. And for the most part, the clients that
11:35:17 14 I represent do not really fall within the area of concern that
11:35:22 15 I wrote about, which is mandatory minimum sentences. For the
11:35:25 16 most part, I do not represent individuals charged with gun
11:35:28 17 offenses or offenses of child pornography.

11:35:32 18 But to me in my 35 years or so of practice, again
11:35:37 19 both as a prosecutor and a defense lawyer, one of the great
11:35:40 20 concerns that I have is the impact of mandatory sentencing and
11:35:46 21 its impact on the criminal justice system itself.

11:35:49 22 I recognize that this is an issue that the Commission
11:35:52 23 itself recognizes. It's one that the Commission has never
11:35:56 24 shied away from. I think as early as 1992, the Commission
11:35:59 25 offered comments to Congress about its view of what I'll call

11:36:04 1 the dangers and problems with regard to mandatory minimum
11:36:07 2 sentencing.

11:36:09 3 And so perhaps I will just leave my comments with
11:36:11 4 that, that I know the Commission has already received a great
11:36:13 5 number of comments about mandatory minimum sentencing. I
11:36:17 6 think it is an issue that needs to continually be revisited.
11:36:20 7 There needs to be a greater degree of education, particularly
11:36:23 8 with members of Congress and the public, and I would hope that
11:36:26 9 the Commission would continue its efforts in that regard.

11:36:30 10 What I thought I might do, with the Commission's
11:36:34 11 concurrence, is perhaps tackle a couple of the questions that
11:36:38 12 the Commissioners had for Mr. Fitzgerald. I thought that his
11:36:41 13 comments, as always, were very insightful and eloquent, and
11:36:47 14 for the most part, I would tell you I agree with many of his
11:36:49 15 comments.

11:36:50 16 But a couple of the comments that he had struck me,
11:36:54 17 and I was a little bit surprised to some extent at his answer.
11:36:58 18 I think, Judge Castillo, if I recall correctly, you asked
11:37:01 19 Mr. Fitzgerald the question -- and I'll paraphrase it, I may
11:37:05 20 get it wrong -- but essentially I think it was a thoughtful
11:37:08 21 question asking about Mr. Fitzgerald's experience with regard
11:37:14 22 to cooperation and cooperating defendants in what I'll call
11:37:19 23 kind of the post-Booker era, and has he seen any diminution in
11:37:23 24 the cooperation of defendants.

11:37:27 25 If I recall his testimony, I think he suggested

11:37:30 1 perhaps there was some diminution in the cooperation and, in
11:37:33 2 particular, the timing of that cooperation. And I will tell
11:37:38 3 you that I'm sure that is his experience. I was a little bit
11:37:43 4 surprised to hear his comments.

11:37:45 5 That has not been my experience, and I would be
11:37:47 6 surprised if prosecutors, federal prosecutors, in my district
11:37:50 7 had a similar view.

11:37:52 8 I recognize in theory the reason why there may be
11:37:56 9 some less cooperation and why prosecutors would favor the
11:38:01 10 notion of mandatory guidelines as perhaps having a greater
11:38:05 11 degree of leverage than perhaps the advisory guidelines, but
11:38:10 12 certainly in my day-to-day practice, I have not seen that take
11:38:13 13 effect, and I would be surprised if there was any real
11:38:17 14 empirical evidence to support that notion.

11:38:20 15 Judge Sessions, I think you asked a question about
11:38:23 16 re-entry programs and the idea of incentivizing individuals to
11:38:28 17 come back out, somewhat along the lines of the residential
11:38:34 18 drug and alcohol program. I would agree with Mr. Fitzgerald
11:38:38 19 that, without revealing any client secrets, certainly I've
11:38:43 20 discovered more than one client along the way who has suddenly
11:38:46 21 found that he or she has a drug or alcohol problem that
11:38:50 22 perhaps didn't seemingly exist at the time we initially sat
11:38:55 23 down and discussed their case or situation because somewhere
11:38:58 24 along the line, they became educated about the benefits, if
11:39:02 25 you will, of going through a drug and alcohol program.

11:39:05 1 But I do think the idea of incentivizing people in
11:39:09 2 connection with re-entry makes some sense, and I do believe
11:39:12 3 that relying upon, to some extent, the professionals there at
11:39:17 4 the Bureau of Prisons, people who have the opportunity to
11:39:20 5 interact with individuals, giving them some degree of
11:39:22 6 flexibility in trying to assess whether or not there's an
11:39:26 7 earnest effort to re-enter and whether or not they have, for
11:39:30 8 example, a serious or real substance abuse problem makes some
11:39:34 9 sense to me, and I would hope that there would be some thought
11:39:39 10 and consideration given to those kinds of efforts.

11:39:41 11 I suspect, again, it may be helpful to the
11:39:44 12 Commission, without being too presumptuous, if you have some
11:39:48 13 time to ask the panel some questions. So with that, I'll
11:39:52 14 perhaps cede any additional time on my behalf, Mr. Chairman.

11:39:56 15 ACTING CHAIR HINOJOSA: Thank you, Mr. Cranmer.

11:39:57 16 Are there any questions?

11:39:59 17 QUESTION AND ANSWER SESSION

11:39:59 18 VICE CHAIR SESSIONS: Well, let me just follow
11:40:02 19 through with reincentivize people or incentivize people, and
11:40:09 20 I'm interested in the program that you have in Cleveland.

11:40:12 21 The idea is that you're getting people who are
11:40:15 22 released prior to sentencing or prior to trial?

11:40:19 23 MS. JOHNSON: Well, originally, the program was for
11:40:23 24 those who were placed on supervised release when they were
11:40:27 25 first returned to the community, but they've expanded.

11:40:30 1 VICE CHAIR SESSIONS: In a re-entry kind of program.

11:40:33 2 MS. JOHNSON: In a re-entry kind of program. But
11:40:34 3 they've expanded it to those who are in custody during
11:40:38 4 pretrial supervision, after they've been charged, but before
11:40:42 5 they have been sentenced.

11:40:44 6 VICE CHAIR SESSIONS: So these are people who are
11:40:46 7 actually in custody awaiting sentencing or --

11:40:50 8 MS. JOHNSON: Most of these people are out on bond.
11:40:52 9 They're in the community. They are not in custody. They are
11:40:56 10 out on bond.

11:40:57 11 VICE CHAIR SESSIONS: Are these post-plea, between
11:40:59 12 the period of plea and the period of sentencing, or are they
11:41:01 13 after release after an initial appearance?

11:41:05 14 MS. JOHNSON: I would say it's after the initial
11:41:07 15 appearance for those who are placed on pretrial supervision.
11:41:12 16 When they are interviewed, then they are asked whether they
11:41:14 17 are interested in participating in this particular program.

11:41:17 18 VICE CHAIR SESSIONS: We had testimony from a judge
11:41:20 19 last -- well, yesterday which focused in upon incentivizing
11:41:25 20 rehabilitation beginning really from the date of the initial
11:41:28 21 appearance up until the date of sentencing, literally what he
11:41:32 22 said, and suggested to us that we try to put something into
11:41:38 23 the guidelines to create that incentive.

11:41:42 24 My question is: Is that something that we should do?
11:41:47 25 And, if so, do you have any words of wisdom as to how one does

11:41:53 1 that?

11:41:53 2 MS. JOHNSON: I'm not prepared to answer that
11:41:57 3 question in full. I think it is something that the Commission
11:42:00 4 should certainly take a look at. As I said, this program is
11:42:04 5 new to me. It came to my attention because the pretrial
11:42:09 6 services officer learned that my client was about to be
11:42:13 7 sentenced and asked the probation department -- this is in the
11:42:17 8 probation department -- but asked the probation officer if she
11:42:19 9 could add several paragraphs to say that the basis for
11:42:23 10 departure or variance is how well another one of my clients
11:42:27 11 was doing in that program.

11:42:29 12 And so I think it's certainly something that the
11:42:32 13 Commission should take another look at in determining whether
11:42:35 14 or not it's something that should be included in terms of
11:42:37 15 making the individualized sentencing that we're talking about,
11:42:41 16 and encouraging the judges to take a look at it.

11:42:44 17 So I think it's information that you might want to
11:42:47 18 include, but I haven't thought it through as to exactly how
11:42:50 19 you could accomplish that.

11:42:53 20 MS. BROOK: Judge, could I just comment on that for a
11:42:55 21 second? I'll be short.

11:42:56 22 I think that the participation in those programs at
11:43:01 23 the front end, taking what we're learning about the back end,
11:43:06 24 could be used a lot better if -- I think I actually said this
11:43:11 25 in my testimony -- the Commission could spend some time

11:43:13 1 looking at what those incentives might be for participating in
11:43:17 2 those programs and then thinking about how that might work in
11:43:23 3 terms of a sentence, which I have to say, like Ms. Johnson, I
11:43:29 4 don't know the answer to.

11:43:30 5 But I do want to say that the idea of doing much
11:43:33 6 rehabilitation in prison seems to me to be not likely, not
11:43:40 7 just because Congress has said pretty much over and over in
11:43:44 8 the statutes that prison really shouldn't be used to
11:43:46 9 rehabilitate; but in my experience, talking to Bureau of
11:43:50 10 Prisons officials, they really don't feel like that's what
11:43:55 11 they're equipped to do.

11:43:57 12 So I feel like maybe we should be looking more at
11:44:00 13 probation or alternatives to probation, some kind of split
11:44:05 14 sentence, than back to the Bureau of Prisons, which will, if
11:44:09 15 nothing else, save a lot of money.

11:44:11 16 VICE CHAIR SESSIONS: When you propose alternatives
11:44:13 17 to imprisonment, isn't it logical to somehow tie in programs
11:44:19 18 like those ones that exist in Cleveland, having gotten
11:44:24 19 somewhat involved in rehabilitation, involved in treatment,
11:44:28 20 using the possibility of alternatives either by way of base
11:44:34 21 offense levels or alternatives in some other way to
11:44:37 22 incentivize people to participate in those kinds of programs?

11:44:42 23 That's just thinking if you have ideas about how we
11:44:46 24 could do that within a guideline structure which would
11:44:49 25 encourage participation in those exact kinds of programs that

11:44:54 1 exist in Cleveland.

11:44:56 2 That's -- I guess I was testifying there. I'm sorry.

11:45:00 3 I was supposed to be questioning, right?

11:45:02 4 MS. BROOK: Well, amen. I agree.

11:45:05 5 ACTING CHAIR HINOJOSA: I guess I have a question.

11:45:08 6 The first three-quarters of fiscal year 2009 show that

11:45:13 7 42 percent of the defendants, in the federal system at

11:45:16 8 least -- at the felony level in the Class A misdemeanor if

11:45:19 9 this is even reported -- are non-citizens of the United

11:45:22 10 States. They tend to be held without bond in most cases, and

11:45:27 11 what would your suggestion be with regards to anything at the

11:45:30 12 front end for those defendants?

11:45:32 13 And then my next question is somewhat unrelated.

11:45:37 14 It's about supervised release terms. Obviously drug

11:45:41 15 trafficking cases, it's mandatory when you sentence somebody

11:45:43 16 to prison to impose a supervised release term. There's a high

11:45:48 17 percentage of defendants who get supervised release terms.

11:45:52 18 Some of it may be guideline driven because the guidelines are

11:45:56 19 written in such a way that there's a supervised release term.

11:46:00 20 Some other statutes also require supervised release terms.

11:46:03 21 And so my question is with regards to those two

11:46:06 22 issues what, if anything, should the Commission look at in

11:46:10 23 regards to those two issues?

11:46:13 24 MS. BROOK: You know, Judge Hinojosa, I think what

11:46:17 25 you see in terms of the immigration cases and what we see here

11:46:20 1 are very, very different. Actually, Judge Gettleman actually
11:46:25 2 wrote an article about the amazing difference.

11:46:30 3 For us in the right case, we are actually able to get
11:46:35 4 our immigration clients out on bond in both courts, in the
11:46:39 5 Northern District and from the immigration court, so there is
11:46:42 6 some --

11:46:43 7 ACTING CHAIR HINOJOSA: Even when they're here
11:46:47 8 illegally, when the allegation is they're here illegally?

11:46:50 9 MS. BROOK: Yes. Yes. I know, that's why I'm
11:46:52 10 saying, it sounds amazing, but we have a very different makeup
11:46:56 11 of cases.

11:46:57 12 So I think it's different in different areas of the
11:47:00 13 country and may be worth looking at if there is something that
11:47:04 14 can be done. Maybe it can't be done in Texas, but I do think
11:47:09 15 something could be done in Illinois even for that population.

11:47:14 16 ACTING CHAIR HINOJOSA: Somebody want to talk about
11:47:15 17 the supervised release issue?

11:47:19 18 MS. BROOK: You have to ask the question again.

11:47:21 19 ACTING CHAIR HINOJOSA: The question is obviously
11:47:23 20 it's imposed in a very high percentage of cases. People have
11:47:29 21 served their terms except for the 15 percent good time, and
11:47:33 22 then they're on supervised release, which kind of took over
11:47:36 23 the parole period in the old system.

11:47:39 24 Some statutes require it. Others don't. The
11:47:43 25 guidelines address it and indicate that if it's a sentence of

11:47:51 1 more than one year, that supervised release terms should be
11:47:55 2 imposed.

11:47:55 3 My question is do you find that helpful? Is that
11:47:57 4 something the Commission should look at? What is your view on
11:48:01 5 that?

11:48:04 6 MS. BROOK: My view, without actually thinking too
11:48:06 7 much about it or consulting with anybody, is that any place in
11:48:12 8 the guidelines where there can be more individualized
11:48:16 9 discretion without interfering with some statutory issue is
11:48:21 10 probably a good thing. It probably allows a judge to fashion
11:48:27 11 a package front end, middle and back end, more individualized
11:48:36 12 to a particular person.

11:48:39 13 And as I'm sitting here, I'm just thinking about the
11:48:43 14 immigration issue, and I'm thinking maybe there's something
11:48:45 15 that actually -- we've already talked about this in a
11:48:48 16 different context -- that needs to be done with the
11:48:51 17 immigration guideline altogether to take into account that
11:48:56 18 problem. Another place to study, like you don't have enough.

11:49:03 19 MR. CRANMER: Judge, if I could weigh in briefly on
11:49:06 20 your question about supervised release, I would tell you that
11:49:08 21 with my clients, for the most part, that's not an issue that
11:49:11 22 they focus on very much. It's really one of secondary
11:49:16 23 importance, if that, because they're really concerned about am
11:49:19 24 I going to prison and, if so, for what period of time.

11:49:22 25 But I will tell you that oftentimes, again, with the

11:49:26 1 clients that I tend to represent, supervised release, by the
11:49:29 2 time we get to it, is really superfluous. I think it serves a
11:49:33 3 limited purpose, and oftentimes thankfully in our district, we
11:49:36 4 find that the probation officer, even before I have the
11:49:40 5 opportunity to step in, will suggest to the court that this
11:49:44 6 period of mandatory supervised release can and should be
11:49:47 7 shortened.

11:49:48 8 So I'm not sure that I can even recall, candidly, a
11:49:52 9 sentence in which there wasn't some type of supervisory
11:49:55 10 release that was imposed, but to the extent, I would agree
11:49:59 11 with Carol, that it could be made more discretionary to kind
11:50:02 12 of fit the individual case and circumstance, I would certainly
11:50:04 13 be in favor of something like that.

11:50:07 14 COMMISSIONER HOWELL: Yes. Thank you all for being
11:50:10 15 our last panel to testify today, and I find all --

11:50:14 16 ACTING CHAIR HINOJOSA: We have one more.

11:50:16 17 COMMISSIONER HOWELL: We have one more? Sorry.

11:50:19 18 (Laughter.)

11:50:19 19 MS. BROOK: Sorry.

11:50:20 20 COMMISSIONER HOWELL: I thought the day was over. We
11:50:24 21 have other meetings.

11:50:25 22 I wanted to talk about one of the points, Ms. Brook,
11:50:27 23 that you brought up about racial disparity in sentencing,
11:50:30 24 which is something that all of the commissions, including this
11:50:33 25 one, has taken very seriously and has studied very closely,

11:50:37 1 particularly in crack context and in other contexts, including
11:50:41 2 in our review of criminal history and how criminal history
11:50:47 3 points are computed under the guidelines, resulting in our
11:50:52 4 amendment in 2007 with revisions to criminal history
11:50:56 5 computation.

11:50:57 6 We heard testimony in our July hearing from Professor
11:51:01 7 Stone from Harvard's Kennedy School about how racial disparity
11:51:06 8 in trivial arrests at the state and local level may be
11:51:10 9 contributing to racial disparity in our criminal history
11:51:17 10 categorizations at the federal level, which was, you know,
11:51:20 11 something that we want to look at more closely.

11:51:22 12 And I was just interested, particularly hearing,
11:51:25 13 Ms. Johnson, about your description of your client with
11:51:28 14 Criminal History Category IV predicated, in part, on DWI
11:51:34 15 arrests.

11:51:35 16 MS. JOHNSON: DWS, driving under suspension, not even
11:51:41 17 driving under the influence.

11:51:41 18 COMMISSIONER HOWELL: Right, whether there are, just
11:51:43 19 based anecdotally or in your experience, any of the trivial
11:51:49 20 offenses that you see appearing frequently that you think the
11:51:55 21 Commission should look at that are contributing to higher
11:51:58 22 criminal history scores for your clients?

11:52:02 23 MS. BROOK: Well, certainly all the driving offenses,
11:52:06 24 all of them across the board. The ACLU actually just filed a
11:52:12 25 report in Illinois showing -- I can't remember the exact

11:52:14 1 figures -- but the number of Black and Hispanic drivers who
11:52:19 2 are stopped over White drivers. Even though more contraband
11:52:23 3 is eventually found, they have these arrests and convictions,
11:52:28 4 which increases their criminal history basically because
11:52:32 5 they're people of color.

11:52:35 6 In Illinois, most recently what we've been dealing
11:52:39 7 with are misdemeanor convictions, for example, domestic
11:52:43 8 battery misdemeanor convictions, that if you get two of them,
11:52:46 9 they become a felony. So now you have two what may be very
11:52:51 10 minor misdemeanor convictions, but they added up to a felony.

11:52:58 11 And I suspect in all the states, there are lots of
11:53:03 12 different kinds of traps, I guess, like that, that you don't
11:53:08 13 know about.

11:53:09 14 MS. JOHNSON: I do think you should take a closer
11:53:11 15 look at some of the misdemeanor offenses that are included for
11:53:15 16 Criminal History Category points, which is one of the reasons
11:53:17 17 that I shared with you my client's situation, driving under
11:53:22 18 suspension without a license, and part of that reason is that
11:53:28 19 he said that he didn't have the money that he would need for
11:53:31 20 insurance, and there were all kinds -- because he didn't have
11:53:35 21 his G.E.D. It was just one thing after another, sort of
11:53:38 22 complicated. He has three driving under suspensions.

11:53:41 23 And it's certainly true that we know that many times
11:53:44 24 people of color are stopped more frequently and it doesn't
11:53:48 25 mean that they have committed any crime or that there's

11:53:51 1 contraband that is found. In fact, I know that that has
11:53:54 2 happened to my 19-year-old son who drives his Camaro in our
11:53:58 3 community, which is a mixed community. And within the first
11:54:01 4 year that he was driving, he was stopped on at least three
11:54:05 5 different occasions and wasn't speeding.

11:54:08 6 Once they said it was because he was driving a car
11:54:10 7 that had an out-of-town license. And my son, who is the child
11:54:16 8 of criminal defense attorney, would ask what reason are you
11:54:20 9 stopping me, and they would say, well, young man, we just
11:54:23 10 wanted to check out your driver's license because you're
11:54:25 11 driving an out-of-state license with your car.

11:54:29 12 Well, that seemed a little unusual to him, but a lot
11:54:33 13 of our clients are stopped frequently, and they do not have
11:54:36 14 their license. So we would urge the Commission, not to just
11:54:40 15 stop with just the driving offenses, but to take a closer look
11:54:44 16 at the misdemeanor offenses in which the individuals receive
11:54:48 17 the Criminal History Category.

11:54:49 18 ACTING CHAIR HINOJOSA: Ms. Johnson, the two
11:54:51 19 misdemeanor convictions that your client has are what? You
11:54:55 20 said there were two misdemeanors and then the driving while
11:54:59 21 license suspended.

11:55:01 22 MS. JOHNSON: The two misdemeanors were drug
11:55:03 23 possession cases.

11:55:04 24 ACTING CHAIR HINOJOSA: And is he put in Criminal
11:55:07 25 History Category IV in any way because of recency points, that

11:55:10 1 he was on probation or that he committed this within two
11:55:16 2 years?

11:55:17 3 MS. JOHNSON: No, he was not. In fact, I brought his
11:55:19 4 criminal history.

11:55:20 5 ACTING CHAIR HINOJOSA: There weren't any recency
11:55:22 6 points?

11:55:23 7 MS. JOHNSON: Right.

11:55:23 8 No, in fact, he wasn't on probation or parole or
11:55:26 9 supervision at all, and that is another catch phrase that we'd
11:55:29 10 like the court or the Commission to take a closer look at, is
11:55:33 11 that the fact that individual is on supervised release or
11:55:37 12 probation. Even if it's at the end of that particular term,
11:55:39 13 sometimes it's two or three years that they've actually been
11:55:43 14 on the supervision and they've had no problems and they pick
11:55:46 15 up the new federal case, and then suddenly they're socked with
11:55:49 16 the additional points.

11:55:50 17 But for my client, no, it was strictly his prior
11:55:53 18 criminal history. And the last two convictions were for
11:55:56 19 driving, the last few convictions were for driving under
11:56:00 20 suspension.

11:56:03 21 VICE CHAIR CASTILLO: I just want to close by
11:56:06 22 commending you all for your testimony. I have to tease Carol,
11:56:10 23 all the times I've seen you appear before the court, you've
11:56:14 24 always been standing, so old habits are hard to vary from.

11:56:20 25 But I will tell you, in all seriousness, your written

11:56:24 1 testimony is just absolutely the best in terms of making
11:56:30 2 points and picking up on prior testimony before the
11:56:33 3 Commission. So all of your helpers are to be commended with
11:56:38 4 regard to that.

11:56:39 5 I found in particular, Carol, your points about what
11:56:44 6 we need to do on departures very helpful. I found,
11:56:51 7 Ms. Johnson, your points on what has happened to sentences in
11:56:56 8 Appendix 2, the point that sentences have not dropped after
11:57:00 9 *Blakely* and *Booker*, much to your dismay, but that is a fact as
11:57:06 10 confirmed by our own information.

11:57:08 11 And I also found your Appendix 1 to be the first
11:57:13 12 compilation of appeals that's ever been put forth that I've
11:57:17 13 ever seen in my ten years on the Commission, summarizing
11:57:21 14 what's happened with government appeals, so I'd be
11:57:25 15 interested --

11:57:25 16 MS. JOHNSON: I have to thank my helpers for that.

11:57:27 17 VICE CHAIR CASTILLO: I can imagine.

11:57:31 18 MS. BROOK: Our associate counsel were terrific.

11:57:33 19 VICE CHAIR CASTILLO: So I just really want to
11:57:35 20 commend you for that written testimony. Your oral testimony
11:57:37 21 here has been great, but there's no way any advocate can come
11:57:42 22 in and summarize what you put in writing, and we will take
11:57:44 23 that very seriously.

11:57:45 24 So thank you.

11:57:47 25 MS. JOHNSON: Thank you, your Honor.

11:57:48 1 MS. BROOK: Thank you.

11:57:49 2 ACTING CHAIR HINOJOSA: Thank you all very much.

11:57:50 3 MS. JOHNSON: Thank you again.

11:57:56 4 ACTING CHAIR HINOJOSA: We'll take a five-minute
11:57:58 5 break.

11:57:58 6 (Recess from 11:58 to 12:12 p.m.)

12:11:27 7 PANEL VIII. ALTERNATIVES TO INCARCERATION

12:11:27 8 ACTING CHAIR HINOJOSA: We're ready for our next
12:11:31 9 panel, which is a panel on "Alternatives to Incarceration."

12:11:36 10 We're very fortunate with the three individuals that are on
12:11:38 11 this panel having taken their time off from their schedules to
12:11:43 12 be here and share some of their thoughts with us.

12:11:45 13 We have Mr. James Van Dyke, who is the executive
12:11:48 14 director of the Salvation Army Correctional Services here in
12:11:51 15 Chicago. He oversees a 200-bed community corrections center
12:11:56 16 under contract with the Federal Bureau of Prisons and also the
12:11:59 17 U.S. Probation Office.

12:12:01 18 Previously, Mr. Van Dyke spent 13 years with the
12:12:04 19 Circuit Court of Cook County performing various jobs there,
12:12:09 20 and he is a licensed attorney who has also taught high school
12:12:12 21 and worked in a youth home.

12:12:14 22 We also have the Honorable Roger K. Warren, who has
12:12:22 23 served as president of the National Center For State Courts
12:12:26 24 where he led initiatives to promote public trust and
12:12:29 25 confidence, best practices, civil justice reform and racial

12:12:34 1 fairness from 1996 to 2004. Mr. Warren presently serves both
12:12:40 2 as a consultant to the National Center For State Courts and as
12:12:44 3 a scholar and resident for the California Administrative
12:12:49 4 Office of Courts. He's a graduate of the University of
12:12:53 5 Chicago Law School and has served as a judge in the past with
12:12:55 6 the superior court in Sacramento.

12:12:57 7 We have Mr. Carl Wicklund, who is executive director
8 of the American Probation and Parole Association. Previously
12:13:01 9 he served as the director of a three-county adult and juvenile
12:13:05 10 probation and parole department. He has served on numerous
12:13:08 11 nationally oriented advisory groups and is currently the vice
12:13:12 12 chair of the Global Justice Information Sharing Initiative
12:13:15 13 Advisory Committee, which advises the U.S. Attorney General.

12:13:19 14 And we'll start with Mr. Van Dyke.

12:13:21 15 MR. VAN DYKE: Thank you, Mr. Chair, members of the
12:13:24 16 Commission. I'm grateful for the opportunity to testify
12:13:27 17 before you today on behalf of the Salvation Army, which has
12:13:31 18 had a long history of working with offenders and ex-offenders.

12:13:36 19 I'm familiar with the comprehensive amount of
12:13:39 20 information that this Commission received last year in its
12:13:42 21 symposium on alternatives to incarceration, so I don't want to
12:13:47 22 repeat a lot of that. My intent today is simply to give an
12:13:50 23 informal, sort of ground-level view of alternatives to
12:13:54 24 incarceration from the standpoint of an agency that is
12:13:58 25 providing services to offenders and also because I see

12:14:06 1 alternative sentencing working.

12:14:08 2 The Salvation Army here in Chicago runs a community
12:14:12 3 corrections center that houses about 200 individuals, most of
12:14:15 4 whom are re-entry residents coming from federal prisons, but
12:14:20 5 at any given time, 15 or 20 percent are people under the
12:14:23 6 supervision of the U.S. Probation Office, and they're there
12:14:28 7 either for residential services or out-patient services
12:14:31 8 through our clinical department.

12:14:33 9 Prior to this time when I worked for the Circuit
12:14:36 10 Court of Cook County, I oversaw interventions of various kinds
12:14:41 11 for problem offender populations, domestic batterers, family
12:14:46 12 violence perpetrators, persons with mental health and
12:14:51 13 substance abuse issues, and I also helped design and implement
12:14:56 14 the local drug court.

12:14:57 15 It's interesting to me that 20 years ago when I
12:14:59 16 started working in corrections, that was sort of the advent of
12:15:03 17 conversations about alternative sentencing, largely driven by
12:15:08 18 the high cost of incarceration, and it's that same factor that
12:15:12 19 seems to be bringing the conversation back up.

12:15:16 20 But simultaneously with my entry into the
12:15:19 21 correctional field, there began to be a vast amount of
12:15:23 22 research into what can be done to really change offender
12:15:27 23 thinking and behavior, and that research has yielded rich
12:15:32 24 results and I think offers much to us as far as cutting
12:15:36 25 recidivism, really decreasing the social costs of crime, and

12:15:43 1 seeing to it that people can lead productive lives.

12:15:46 2 I read with interest the report of this Commission
12:15:49 3 issued last January on alternative sentencing in the federal
12:15:53 4 criminal justice system. I noted that according to that
12:15:57 5 report in the previous ten years, 15 to 25 percent of
12:16:01 6 offenders had received alternative sentencing, but though
12:16:06 7 alternatives were available for up to 25 percent, courts still
12:16:11 8 tended to impose prison, and the actual use of alternative
12:16:15 9 sentencing had been decreasing slightly.

12:16:18 10 It might be that one thing that could promote the
12:16:22 11 greater use of alternative sentencing would be if local courts
12:16:27 12 were simply more aware of the contours of sentencing
12:16:32 13 alternatives in their areas, exactly what would happen to
12:16:36 14 individuals sentenced to alternatives to incarceration. And
12:16:41 15 similarly I think that much could be gained by conversations
12:16:45 16 among judges, prosecutors, the defense bar and probation
12:16:51 17 administrators about the utility and the availability of
12:16:55 18 alternative sentencing. I witnessed that being very helpful
12:17:00 19 when we began the drug courts here in Cook County.

12:17:03 20 Alternative sentencing, I think, can hit a number of
12:17:07 21 serious interests. First of all, yes, it can reduce the costs
12:17:12 22 of imprisonment.

12:17:14 23 Secondly, it can provide very concrete consequences
12:17:17 24 for criminal activity and even give the court a bit more
12:17:22 25 latitude in crafting a punishment that fits the crime.

12:17:25 1 Thirdly, it can do something to protect and promote
12:17:30 2 public safety by adequate supervision and monitoring and
12:17:33 3 accountability measures.

12:17:34 4 And, finally, it can promote changes in individuals
12:17:38 5 that will go beyond the time that they are going to be under
12:17:41 6 sentence. In fact, changing offender behavior is really the
12:17:45 7 truest basis for public safety and, I think, one of the chief
12:17:50 8 values potential within alternative sentencing. Cutting the
12:17:55 9 cycle of recidivism even slightly can yield significant
12:17:59 10 benefits to our culture.

12:18:02 11 In its fullest sense, alternative sentencing is about
12:18:07 12 much more than community supervision or confinement. It's
12:18:10 13 about programming that addresses what are called criminogenic
12:18:14 14 needs, needs of individuals that give rise to criminal
12:18:18 15 activity, needs associated with such characteristics as
12:18:22 16 anti-social behavior or anti-social associates, lack of
12:18:27 17 self-control, a need for substance abuse or mental health
12:18:30 18 treatment.

12:18:33 19 Individuals sentenced to alternatives to
12:18:34 20 incarceration can continue to work to support themselves and
12:18:40 21 their families or to seek work. They can pursue treatment.
12:18:45 22 They can participate in change-producing programs without
12:18:50 23 losing their ties to their community or their family and
12:18:53 24 without having to undergo the very significant transitional
12:18:57 25 difficulties of persons coming out of prisons.

12:19:00 1 Alternative sentencing requires at its basis a very
12:19:04 2 comprehensive and thorough assessment of an individual's
12:19:09 3 criminogenic needs and potential for re-offending. The
12:19:13 4 assessment can occur, in part, before sentencing and even
12:19:16 5 inform the Court's decision about the type of sentence to be
12:19:19 6 given.

12:19:21 7 Alternatives to incarceration can also use this type
12:19:26 8 of assessment in setting the road map for what's going to
12:19:30 9 happen to offenders subsequently because assessment should be
12:19:35 10 an ongoing activity during the course of the person's sentence
12:19:38 11 to monitor change and progress.

12:19:41 12 Assessment leads to a case plan. The case plan is
12:19:45 13 what we hope will take the person from being an offender to
12:19:49 14 making the person an ex-offender. The case plan has very
12:19:54 15 specific goals and objectives that the offender will work
12:19:58 16 through when serving his or her sentence, but it's more than
12:20:02 17 that.

12:20:02 18 Many persons caught up in the criminal justice system
12:20:05 19 lack internal structures of self-discipline and self-control,
12:20:11 20 and the case plan provides sort of an external structure that
12:20:15 21 the individual can begin to internalize.

12:20:19 22 Beyond that, involving the person in creating the
12:20:23 23 case plan and making, as it were, a behavioral contract with
12:20:28 24 the offender enhances the offender's commitment to change, to
12:20:32 25 living up to the case plan and motivates him or her more

12:20:35 1 highly.

12:20:36 2 At the program that the Salvation Army conducts in
12:20:40 3 Chicago, part of our assessment and case planning process is a
12:20:45 4 survey that offenders themselves fill out early in their time
12:20:49 5 with us where they self-identify area of needs. Our
12:20:53 6 experience is that individuals sometimes are not aware of the
12:20:57 7 needs they have or lack the vocabulary to articulate them.
12:21:02 8 And by providing this kind of instrument, we can engage them
12:21:06 9 more intelligently in the process that they will undergo.

12:21:10 10 Assessment also gives a very good basis for
12:21:14 11 determining how to best use scarce resources. If an
12:21:19 12 assessment indicates that a person's risk level is relatively
12:21:23 13 low, then let's not waste resources on this person. There's a
12:21:27 14 temptation if so-and-so is a low-risk individual, let's
12:21:31 15 involve him in some programming anyway to keep him that way.
12:21:36 16 It's an unnecessary use of resources that can even be
12:21:41 17 counterproductive because there is some research that shows
12:21:45 18 having some low-risk individuals go through programming
12:21:48 19 actually increases the likelihood that they will recidivate.

12:21:53 20 Rather, the resources should be channeled to those
12:21:55 21 higher-risk individuals who not only benefit from them but who
12:21:59 22 can actually perform quite well with the structure that they
12:22:02 23 provide.

12:22:03 24 I believe it's crucial to engage the offender in
12:22:07 25 change-related services and programming starting from the

12:22:10 1 earliest possible moment within that individual's sentence.
12:22:15 2 In addition to addressing criminogenic needs, these services,
12:22:19 3 these programs can get at some of the underlying issues that
12:22:23 4 are common to persons who fall within the criminal justice
12:22:26 5 system: Lack of communication skills, inability to plan or to
12:22:34 6 set goals, to solve problems, to control behavior.

12:22:40 7 I have seen mandated treatment work. I have seen
12:22:43 8 individuals ordered to pursue substance abuse treatment who
12:22:47 9 otherwise might not have done so who, once they become
12:22:51 10 involved, embrace it for other than simply compliance reasons.
12:22:55 11 And I think there are many individuals who, but for their
12:22:58 12 involvement in the criminal justice system, would never have
12:23:02 13 experienced the interventions they need to become productive
12:23:05 14 citizens.

12:23:06 15 Now, to give some examples of the kinds of programs
12:23:10 16 and services beneficial to offenders, let me just quickly run
12:23:14 17 through a short list.

12:23:16 18 Educational services from basic education to job
12:23:20 19 preparation and employment skills training.

12:23:25 20 Employment-related services for individuals who are
12:23:27 21 not employed. Few things give a greater stake in lawful
12:23:32 22 citizenship than having a job, being able to support one's
12:23:36 23 self and one's dependents. Providing pre-employment services,
12:23:42 24 job referrals, as well as assistance in dealing with that
12:23:45 25 question "have you ever been convicted of a felony?" can be a

12:23:49 1 major service for offenders.

12:23:51 2 Life skills classes because many offenders lack some
12:23:55 3 of the basic know-how to navigate daily living. Life skills
12:24:00 4 classes may be something as fundamental as money management.
12:24:05 5 I've seen even white collar offenders require that type of
12:24:10 6 life skill training. Additional examples would be anger
12:24:14 7 management or control and parenting skills.

12:24:19 8 That leads to another type of service and programming
12:24:23 9 of benefit, and that's the whole array of services that can be
12:24:26 10 made available to families of offenders. While the court
12:24:31 11 might not be able to sentence the family, I think the court
12:24:34 12 needs to be aware of the family's influence.

12:24:37 13 The family remains the single largest influence and
12:24:41 14 source of support for offenders; and to the degree that family
12:24:45 15 members also need help, support, understanding, I think that
12:24:50 16 the likelihood of positive outcomes increases.

12:24:54 17 Assistance in finding appropriate housing is a need
12:24:58 18 of a fair number of offenders. They may lack any kind of
12:25:03 19 stable housing situation, or they may need to move away from
12:25:07 20 their negative environments, their anti-social associates, to
12:25:13 21 more positive opportunities.

12:25:15 22 A more common need is that of substance abuse or
12:25:19 23 mental health treatment. Clinicians dealing with offenders
12:25:23 24 having these two types of problems need special know-how
12:25:27 25 because in addition to understanding the problem itself, these

12:25:33 1 therapists need to understand how criminal thinking and
12:25:37 2 conduct can be an overlay to the substance abuse and mental
12:25:42 3 health problems and need.

12:25:46 4 Specialized programming for female offenders is a
12:25:50 5 burgeoning and very necessary field. Previously, all offender
12:25:53 6 programming was pretty much designed on the majority, the male
12:25:55 7 model, but female offenders have different characteristics and
12:25:59 8 needs. They're more likely to have suffered some form of
12:26:04 9 abuse. They have higher incidence of mental health and
12:26:08 10 substance abuse problems than male offenders, and they're more
12:26:11 11 likely to have custodial care of their children.

12:26:16 12 Both male and female offenders can benefit from the
12:26:20 13 cognitive behavioral programming that's I think one of the
12:26:25 14 most significant fruits of the last 20 years of research as to
12:26:30 15 what can make offenders change.

12:26:33 16 A good number of offenders lack even some of the
12:26:37 17 basic constructs of living sensible, normal lives. For
12:26:43 18 instance, they don't have communication skills. They lack
12:26:47 19 insight into the connection between their thinking patterns
12:26:50 20 and their behavior patterns and how their faulty thinking has
12:26:55 21 led them to make bad choices.

12:26:57 22 They don't recognize the manner in which their
12:27:00 23 emotions influence their behavior. They're not able to follow
12:27:04 24 simple problem-solving techniques and, as a result, act more
12:27:09 25 on impulse or reactively.

12:27:11 1 Cognitive behavioral programming addresses all of
12:27:15 2 these elements with offenders in ways that have been proven by
12:27:20 3 research to be effective. The individual gains greater
12:27:25 4 control of his life by involving himself in very detailed,
12:27:31 5 serious homework and classroom exercises that really bring him
12:27:36 6 out a different person than when he entered.

12:27:38 7 Now, because we're talking about involving offenders
12:27:42 8 in quite a bit of change, a related need is to keep the
12:27:46 9 motivation level high. I think all of us realize that even
12:27:49 10 engaging in positive change can cause efforts to keep the
12:27:55 11 motivation going. Any of us who have ever tried to diet or
12:27:59 12 get involved in an exercise program can attest to that.

12:28:02 13 For offenders, some of the most significant
12:28:05 14 incentives to keep motivation going can be a reduction in
12:28:09 15 community confinement time or the frequency in supervision
12:28:15 16 context or in residential settings, such as the one where I
12:28:18 17 work, more use of discretionary passes to do personal business
12:28:22 18 and have contact with family members.

12:28:25 19 In fact, staff working to provide either supervision
12:28:29 20 or services for offenders need to be consciously aware of the
12:28:33 21 continual need to shore up and keep motivation going. We
12:28:38 22 found that issuing certificates of completion or holding drug
12:28:43 23 court graduations can be very significant moments in the lives
12:28:48 24 of these individuals.

12:28:49 25 A more subtle way of reinforcing and sustaining

12:28:53 1 motivation is to use the techniques of what's called
12:28:57 2 motivational interviewing, where a case manager asks an
12:29:03 3 offender to articulate what is your next step? What do you
12:29:06 4 plan to do now and when and how?

12:29:09 5 The person providing supervision can also offer
12:29:12 6 feedback as to what the offender is doing, deciding to do, how
12:29:17 7 he is acting, to become sort of a voice in the offender's
12:29:22 8 head, commenting on his or her decisions and actions, and
12:29:25 9 filling in for a lack of self-reflective ability that's common
12:29:30 10 among offenders.

12:29:31 11 Now, counterbalancing this need for incentives and
12:29:36 12 sustaining motivation is a need for prompt and very specific
12:29:40 13 response to violations. If a person is not living up to the
12:29:45 14 conditions of his or her community sentencing order, there
12:29:49 15 needs to be some sort of consequence, but it need not be
12:29:52 16 incarceration. It can be community confinement. It can be
12:29:58 17 GPS monitoring. It might be more appropriate to require the
12:30:02 18 person to go through some kind of programming that relates
12:30:05 19 directly to whatever the violation was.

12:30:09 20 I believe that anyone working with offenders does an
12:30:12 21 injustice if they don't also address with the person the
12:30:16 22 possibility of relapse. Relapse prevention is a term from
12:30:20 23 substance abuse treatment, but I think it can equally apply
12:30:24 24 here because we're aware of the very high recidivism rate
12:30:27 25 common to offenders.

12:30:29 1 And to sit with an offender and say let's take a look
12:30:33 2 at how your offense happened. Let's work backward from the
12:30:37 3 time of the offense through the chain of decisions and actions
12:30:41 4 that brought you to that point. Perhaps it's a matter of
12:30:45 5 pointing out to the offender that he or she opted for
12:30:48 6 immediate gratification, rather than thinking of the long-term
12:30:52 7 or more delayed negative consequences.

12:30:56 8 Clearly the staff who are offering supervision and
12:30:59 9 services and programming to offenders need to be adequately
12:31:03 10 trained and supervised and evaluated because the court and the
12:31:08 11 public are putting a great deal of trust in their hands.

12:31:13 12 At our Salvation Army program in Chicago, beyond
12:31:17 13 training people for what they need to know specifically for
12:31:20 14 their positions, we do yearly retraining on issues of
12:31:24 15 integrity and accountability, warning staff about the fact
12:31:29 16 that offenders can be very manipulative individuals. Also
12:31:33 17 admonishing them not to cross a line to have an inappropriate
12:31:37 18 friendship or show favoritism toward offenders. And just as
12:31:42 19 individual staff need to be accountable, so, too, the larger
12:31:47 20 programs that provide the supervision and services to
12:31:49 21 offenders.

12:31:50 22 The American Probation and Parole Association, the
12:31:54 23 American Correctional Association have very good guidelines
12:31:58 24 and standards for program design and performance. I would
12:32:03 25 expect, too, that any entity that's providing alternative

12:32:07 1 sentencing service and supervision would have its own series
12:32:11 2 of outcome measures, statistical feedback in order to measure
12:32:16 3 progress, and also be open to audits by exterior agencies.

12:32:22 4 Our program in Chicago is monitored and audited
12:32:26 5 yearly by the U.S. Probation Office, the Bureau of Prisons,
12:32:30 6 the American Correctional Association, and Salvation Army
12:32:34 7 Services, and we believe that this is the best way of making
12:32:38 8 sure that we don't become complacent in what we're doing.

12:32:44 9 In summary, I believe that alternative sentencing is
12:32:47 10 not only about what does not happen to the person; namely,
12:32:51 11 incarceration, but it's also about what does or can happen to
12:32:54 12 the person: accountability, consequences, and significant
12:32:59 13 change. And in view of the burgeoning prison population and
12:33:04 14 also in recognition of the evidence-based programming that has
12:33:10 15 emerged in the last 20 years, I encourage re-examination and
12:33:14 16 re-evaluation and further implementation of sentencing
12:33:18 17 alternatives.

12:33:19 18 Thank you.

12:33:20 19 ACTING CHAIR HINOJOSA: Thank you, Mr. Van Dyke.

12:33:22 20 Mr. Warren?

12:33:24 21 JUDGE WARREN: Thank you, Judge.

12:33:26 22 Over the last several years, my principal area of
12:33:30 23 interest and experience has been evidence-based sentencing in
12:33:34 24 the state courts, by which I mean to refer to state sentencing
12:33:39 25 policies and practices that are effective in reducing offender

12:33:43 1 recidivism.

12:33:44 2 I have published extensively on the topic over the
12:33:47 3 last several years, working with the Pew Foundation and the
12:33:52 4 National Center For State Courts, developing model curriculum
12:33:56 5 for judges around the country, training judges in 15 or 20
12:34:02 6 states and other criminal justice professionals as well.

12:34:07 7 I am not an expert on federal sentencing. I'm not an
12:34:11 8 expert on the Sentencing Reform Act.

12:34:14 9 I will offer a few cautious comments about
12:34:19 10 considerations you might undertake if you are persuaded that
12:34:24 11 it's important to import into the federal sentencing structure
12:34:30 12 and process some of the experiences and learnings in the state
12:34:33 13 courts.

12:34:34 14 The main point I want to make is that I think the key
12:34:38 15 to alternative sentencing, what you call alternative
12:34:43 16 sentencing, expanding the use of alternative sentencing is the
12:34:47 17 ability to safely and effectively supervise and treat
12:34:54 18 offenders in the community. If we do not have that ability,
12:34:58 19 policymakers and judges are not going to expand the use of
12:35:02 20 alternative sentencing.

12:35:04 21 Judges are not going to put people on probation or
12:35:07 22 into treatment that they think are going to fail and provide
12:35:09 23 some further risk to the community. And we know from
12:35:13 24 historical experience what happens when you do put folks on
12:35:17 25 probation who fail. Policymakers and the public at large

12:35:22 1 become disenchanting.

12:35:25 2 What led to the rapid increase in incarceration over
12:35:31 3 the last 30 years was that the violent crime rate in this
12:35:35 4 country tripled from 1960 to 1975, and that led the states
12:35:41 5 first and then at the federal level to much more extensive
12:35:45 6 reliance on incarceration and imprisonment for dealing with
12:35:49 7 criminal offenders.

12:35:50 8 So it was the failure of community supervision and
12:35:54 9 treatment and the perception, even in the research community
12:35:59 10 and among policymakers and the public, it was fed up with what
12:36:05 11 was going on at the community level, that led to our current
12:36:09 12 reliance on imprisonment and incarceration.

12:36:12 13 So the tragic consequences of putting people into
12:36:17 14 treatment that doesn't work are ones that we are familiar
12:36:19 15 with, and we will only repeat that cycle if we expand the use
12:36:24 16 of alternative sentencing with supervision and treatment
12:36:27 17 programs that don't work. So the key, I think, is to have the
12:36:30 18 ability to do this work well.

12:36:32 19 Now, today, unlike 20 or 30 years ago, we know how to
12:36:36 20 do this work well. There is a voluminous body of research
12:36:39 21 that teaches us what works and what doesn't work to reduce
12:36:46 22 offender recidivism. And at the state level, there are
12:36:50 23 experiences over the last three years in a number of states
12:36:54 24 that have experimented with implementing evidence-based policy
12:36:58 25 and practice and have done so effectively and have good

12:37:05 1 results.

12:37:06 2 But it's true that we have a long way to go on the
12:37:08 3 state side in fully implementing evidence-based practice in
12:37:12 4 supervision and treatment. I have tried to outline in my
12:37:16 5 written statement some of the basic principles of
12:37:19 6 evidence-based practice to reduce recidivism. Mr. Van Dyke
12:37:22 7 has given you a terrific summary of what those practices
12:37:27 8 consist of at the ground level, and what I tried to do was
12:37:30 9 just outline some of the basic principles that have emerged
12:37:34 10 from the research.

12:37:35 11 And I'm not going to take the time to cover material
12:37:40 12 that Mr. Van Dyke has already covered or to discuss the
12:37:44 13 principles in particular further in my oral testimony, but
12:37:49 14 what I do want to emphasize is that the benefits of using
12:37:57 15 evidence-based practice and having sentencing policies and
12:38:02 16 practices that promote reducing the risk of offender
12:38:06 17 recidivism are significant. We can realistically reduce
12:38:12 18 offender recidivism by 10 to 20 percent just applying what we
12:38:16 19 now know about how to do this.

12:38:22 20 One of the most, I think, persuasive discussions of
12:38:27 21 the benefits of evidence-based practice comes from the
12:38:30 22 Washington State Institute For Public Policy. Now, this is a
12:38:34 23 group created by the Washington legislature who, when it has
12:38:38 24 public policy issues before it, wants to turn, wants to be
12:38:42 25 able to turn to its own research center for data and

12:38:46 1 information and research that surrounds the public policy
12:38:51 2 issues affecting society.

12:38:55 3 So when the day came when the corrections department
12:38:57 4 told the Washington legislature that they needed to build two
12:39:01 5 new prisons over the course of the next 20 years to house the
12:39:05 6 increasing prison population, they asked the Washington State
12:39:08 7 Institute to take a look and see whether or not there was a
12:39:12 8 realistic possibility of expanding the use of evidence-based
12:39:17 9 programming for criminal offenders in lieu of building some or
12:39:20 10 all of the new prison beds.

12:39:22 11 At the end of that research, the Institute reported
12:39:25 12 that if the State of Washington modestly increased its use of
12:39:31 13 existing evidence-based programs in the State of Washington,
12:39:35 14 it would not have to build the two new prisons, it would save
12:39:40 15 \$2 billion, and, most importantly from my point, it would
12:39:43 16 reduce the crime rate by eight percent.

12:39:46 17 So the central reason why evidence-based practice is
12:39:51 18 important is not just that it's cheaper, it's not just that it
12:39:56 19 reduces the economic and social cost of crime, not just that
12:40:01 20 it reduces the cost of families and communities and to the
12:40:11 21 offenders themselves, not just that it frees up prison bed
12:40:16 22 space that can be used for the more serious offenders, but it
12:40:19 23 reduces crime, and it reduces crime more effectively than our
12:40:24 24 current crime control policies.

12:40:28 25 What's particularly noteworthy about the Washington

12:40:31 1 study is that it took into account the extent to which the use
12:40:36 2 of incarceration and incapacitation and general deterrence
12:40:40 3 reduces crime in making its projections, and it found that the
12:40:46 4 crime reduction impact of evidence-based practice outweighed
12:40:51 5 the crime increasing tendency of the less frequent use of
12:40:58 6 incarceration for deterrence and incapacitation purposes to
12:41:03 7 the extent that the use of evidence-based practice was
12:41:06 8 resulting to some extent reduced use of incarceration. But
12:41:11 9 primarily because there were fewer crimes being committed in
12:41:14 10 the future, fewer people going into incarceration on new
12:41:20 11 crimes, found that it outweighed that to the extent that it
12:41:22 12 reduced crime from the current level in Washington by eight
12:41:26 13 percent.

12:41:27 14 So the primary reason why alternative sentencing is
12:41:31 15 important is not the things I mentioned earlier, but because
12:41:34 16 it reduces crime, and that's what we should be about in the
12:41:38 17 criminal justice system, public safety.

12:41:42 18 It also better holds offenders accountable. It
12:41:48 19 certainly holds offenders better accountable than we currently
12:41:51 20 do in probation and parole situations. It expects and
12:42:01 21 anticipates offenders to become responsible for their own
12:42:03 22 behavior, something that doesn't happen with a prison
12:42:07 23 sentence, where offenders are not in a position to make
12:42:11 24 independent decisions in their life and be held accountable
12:42:13 25 for the decisions that they make. So it encourages the

12:42:17 1 development of skills and abilities and thinking on the part
12:42:21 2 of an offender that allow the offender to live a more
12:42:27 3 law-abiding life in the community. And it is not an
12:42:31 4 alternative punishment, which is why I wince a little bit at
12:42:36 5 the phrase "alternatives to incarceration."

12:42:39 6 Evidence-based practice, effective probation
12:42:43 7 supervision is not an alternative punishment. From the
12:42:47 8 judge's point of view in having an offender before you at
12:42:52 9 sentencing, the judge's responsibility certainly is to impose
12:42:58 10 a punishment on the offender that's fair and proportionate to
12:43:02 11 the gravity of the offense that has been committed on the one
12:43:06 12 hand. That's looking back at what has happened and exacting
12:43:10 13 some accountability for past conduct on the part of the
12:43:12 14 offender by imposing a fair and just punishment.

12:43:17 15 But what we have tended not to do as judges and what
12:43:22 16 we should be doing much more of as judges is then looking
12:43:25 17 forward and saying what can I do as a judge to reduce the
12:43:28 18 likelihood of this offender committing another offense?
12:43:32 19 That's what we tend not to do.

12:43:34 20 And that's where the whole topic of evidence-based
12:43:37 21 practice is. There's no reason in most cases why a judge
12:43:41 22 cannot impose a sentence that fairly punishes on the one hand
12:43:45 23 and is also designed to reduce the likelihood of re-offense on
12:43:49 24 the other.

12:43:50 25 If the seriousness of the offense in light of all the

12:43:54 1 circumstances requires a prison sentence, then the
12:43:57 2 responsibility for recidivism reduction passes significantly
12:44:02 3 to the folks running the prisons or doing re-entry or
12:44:08 4 post-prison supervision. But in instances where the gravity
12:44:13 5 of the offense does not require a prison sentence, then
12:44:17 6 there's no reason why the judge shouldn't be equally focused
12:44:20 7 on the public safety aspects of the sentence, looking forward
12:44:24 8 what the judge can do to avoid further victimization.

12:44:29 9 Effective probation is punishment. I think we tend
12:44:33 10 to have in mind images of probation from years ago, or maybe
12:44:39 11 even in many places today with high caseloads, ineffective
12:44:43 12 supervision, violations piling up until finally the probation
12:44:50 13 officer has decided to do something about it, high recidivism
12:44:52 14 rates, probation being ineffective. That is not
12:44:57 15 evidence-based supervision today.

12:45:01 16 So let me just close with three comments about what
12:45:03 17 this could mean, I think, for the federal courts.

12:45:07 18 First of all, if you want to be serious about
12:45:12 19 recidivism reduction, establishing that as one of the purposes
12:45:17 20 of the federal sentencing system, you need to say so. You
12:45:21 21 need to have a policy that says that one of the principal
12:45:25 22 goals of the federal sentencing system is recidivism
12:45:29 23 reduction, which you don't currently do.

12:45:35 24 Acknowledging that this is not my field, I have
12:45:37 25 looked at some of your work, and you acknowledge that among

12:45:44 1 the goals of sentencing, rehabilitation is not of the same
12:45:47 2 priority as the other sentencing purposes: deterrence,
12:45:53 3 incapacitation, sanctions, punishment.

12:45:58 4 You need to say at least that rehabilitation is
12:46:03 5 equally as important. It's the one of those, other than
12:46:06 6 incapacitation, and it's a stronger crime reduction strategy
12:46:13 7 than incapacitation, so it is your strongest public safety
12:46:19 8 objective.

12:46:21 9 And I quarrel a little bit with the use of the word
12:46:24 10 rehabilitation because I think it tends to focus on making the
12:46:28 11 person a better person, and that is certainly a laudable
12:46:34 12 objective. But in the criminal justice system, I think what
12:46:37 13 we should really be focusing on more specifically is crime
12:46:41 14 reduction. And the real interest why we are interested in
12:46:44 15 rehabilitation, our niche in this area is reducing crime and,
12:46:48 16 through reducing crime, helping people to be rehabilitated and
12:46:53 17 helping communities to be rehabilitated.

12:46:56 18 By using the phrase "reducing crime" or "recidivism
12:46:59 19 reduction" or "risk reduction," I think you focus more
12:47:02 20 squarely on the criminal justice interest in rehabilitation
12:47:07 21 and you focus everyone's attention on that is what we want to
12:47:11 22 try to do, not just rehabilitate, but we want to focus on
12:47:14 23 crime reduction.

12:47:15 24 Secondly, as we've already talked about, it doesn't
12:47:19 25 make any sense for you to have a significant policy support

12:47:26 1 for recidivism reduction if probation doesn't have the
12:47:30 2 capacity to do that work. And so I think it's also critically
12:47:35 3 important that you collaborate with the U.S. Administrative
12:47:40 4 Office of the Courts and U.S. Probation to make sure that they
12:47:43 5 have the resources, the training, the know-how, the policies,
12:47:47 6 the leadership to do this work. Otherwise, we're into this
12:47:53 7 vicious cycle again where you are -- where the system is kind
12:47:58 8 of designed to fail.

12:47:59 9 And then thirdly, the question is, well, what is the
12:48:02 10 role of the judge in all of this?

12:48:03 11 As I see, the work that has to be done to change
12:48:07 12 offender behavior is primarily work that the folks that I'm
12:48:10 13 flanked by are going to do, is the treatment providers and the
12:48:14 14 probation officers that are to do that work.

12:48:17 15 Our role, I think, as judges, we're sort of the
12:48:20 16 gatekeepers and we put people on probation and we take people
12:48:23 17 off probation. So the question is, well, what is that
12:48:26 18 gatekeeping role for the judiciary? And I think that in the
12:48:29 19 federal courts, it could be expanded.

12:48:33 20 I noted, first of all, that you have about one person
12:48:38 21 on probation for every 11 prisoners that you have. On the
12:48:42 22 state side, we have three people on probation for every
12:48:46 23 prisoner we have, about a 30-to-1 kind of disparity. Now, I
12:48:49 24 acknowledge that federal offenders are a different lot than
12:48:52 25 state offenders, but then I look at a statute which says that

12:48:58 1 your probation services focus on first-time offenders
12:49:03 2 committing nonviolent offenses.

12:49:06 3 That is a pretty small subset of any offender
12:49:09 4 population, and it relies exclusively on static risk
12:49:14 5 assessment; that is, it purports, I guess, to weigh the risks
12:49:21 6 to the public presented by the offender in the future based
12:49:24 7 solely on what has happened in the past, the crime committed
12:49:29 8 and the prior criminal record.

12:49:31 9 If that's all we were guided by, we wouldn't be able
12:49:34 10 to reduce recidivism at all. Those things aren't going to
12:49:37 11 change with anyone. That is not going to distinguish the
12:49:39 12 person that doesn't commit any further crimes from the person
12:49:42 13 that does. They both have the same past when they come before
12:49:45 14 us.

12:49:45 15 And the use of those static indicators also does not
12:49:53 16 allow us to determine what are the characteristics about this
12:49:57 17 offender that we need to target in order to be successful? It
12:50:01 18 doesn't allow us to tell whether we're making any -- whether
12:50:04 19 we're accomplishing anything or not.

12:50:06 20 So I think my final suggestion is that you consider
12:50:14 21 complementing the current emphasis on the offense background
12:50:18 22 of the offender with more offender-based information, where
12:50:24 23 you're sentencing individual offenders based on information
12:50:27 24 about them, not just what they've done in the past, but what
12:50:32 25 they are likely to do in the future and what are the

12:50:35 1 criminogenic needs, the dynamic risk factors that you can,
12:50:40 2 through your probation agents and treatment providers, the
12:50:44 3 places where you can effectively intervene, and that you try
12:50:47 4 to not only maybe change the statutory guidance about
12:50:50 5 offenders that might be amenable for evidence-based
12:50:53 6 programming, but also incorporate into guidelines risk
12:50:58 7 assessment information so that in those category of offenses
12:51:02 8 where it makes sense to consider sentencing in the community,
12:51:06 9 the judge can be guided, not only by the offense information,
12:51:09 10 but also by offender information that helps the judge and
12:51:14 11 probation and the treatment providers predict the risk of
12:51:18 12 recidivism by an individual offender and helps guide the
12:51:21 13 supervision and treatment programming.

12:51:25 14 Thank you.

12:51:27 15 ACTING CHAIR HINOJOSA: Thank you, Mr. Warren.

12:51:28 16 Mr. Wicklund.

12:51:29 17 MR. WICKLUND: Thank you, Judge, and Commissioners.

12:51:32 18 Well, the good news is they said most of what I
12:51:36 19 wanted to say, so I'll be brief and try not to be redundant.

12:51:41 20 A little background. The American Probation and
12:51:46 21 Parole Association represents nearly 40,000 federal, state,
12:51:49 22 local, tribal probation, parole and community corrections
12:51:55 23 professionals. I have followed and am aware of *U.S. v. Booker*
12:52:03 24 and have talked to our members who are federal probation
12:52:07 25 officers about that.

12:52:10 1 Some other background, I started my professional
12:52:12 2 career in Minnesota, which is one of the first places to have
12:52:16 3 guidelines. And as director of probation and parole,
12:52:20 4 including presentence investigations and looking at people
12:52:27 5 that had not been into prison yet and those that were coming
12:52:30 6 out of prison, we saw -- we had sort of a creed that prison
12:52:37 7 was the alternative sentence.

12:52:41 8 We didn't see community supervision as an
12:52:46 9 alternative. We saw prison as the alternative. And if you
12:52:50 10 start from that standpoint, it gives you a whole different
12:52:53 11 perspective on where you're going forward.

12:52:56 12 But with 20 years of experience in Minnesota and
12:53:02 13 watching the guidelines come together, watching them being
12:53:07 14 altered, knowing some of the commissioners on their guidelines
12:53:12 15 committee and talking to them while I was a professional, I've
12:53:18 16 come to believe that guidelines are not necessarily a bad
12:53:21 17 thing if they're advisory.

12:53:24 18 In fact, I think mandatory guidelines is sort of an
12:53:26 19 oxymoron, but I think that advisory guidelines can provide
12:53:33 20 some uniformity and some certainty in sentencing, while also
12:53:38 21 allowing some judicial discretion.

12:53:41 22 Certainty and uniformity should not get in the way of
12:53:45 23 justice. One of my all-time favorite sayings, it's on my wall
12:53:50 24 in my office, says that, "There can be no justice if rules are
12:53:53 25 absolute."

12:53:55 1 That's attributed to Captain Jean-Luc Picard,
12:54:00 2 Starship Enterprise, by the way.

12:54:01 3 Certainty and uniformity should not quell creativity
12:54:10 4 or the aspiration for long-term public safety.

12:54:17 5 I was on a school board for a while when they
12:54:20 6 implemented zero tolerance. And I thought that was okay until
12:54:24 7 I found it meant zero creativity. It meant that any time
12:54:28 8 someone did something that was part of their zero tolerance
12:54:31 9 policy, they were expelled.

12:54:36 10 I had some very, very emotional arguments about that
12:54:44 11 and prevailed in many cases because I said just because I
12:54:48 12 don't tolerate something doesn't mean that I have to go to the
12:54:51 13 extreme every time.

12:54:56 14 The federal system is very, very fortunate in that
12:55:02 15 judges in the federal system get very comprehensive
12:55:07 16 presentence investigation reports from the probation
12:55:11 17 department. I can't say that all around the country. In
12:55:15 18 fact, many places where mandatory minimums have come into
12:55:18 19 play, guidelines have come into play, judges have pretty much
12:55:22 20 eschewed presentence investigations.

12:55:26 21 And prior to the *Booker* case, many of the people that
12:55:32 22 I know in the federal probation system used to refer to them
12:55:36 23 as pre-incarceration reports because all you were doing was
12:55:42 24 writing a report to help the prison system better understand
12:55:45 25 this individual. It didn't have much to do with what was

12:55:48 1 going to happen if they were in the community. They now refer
12:55:54 2 to them as presentence investigation reports.

12:55:56 3 And a good presentence investigation report is going
12:56:00 4 to consider the totality of the individual, as Roger was
12:56:03 5 saying, looking at the offender, not just the offense. They
12:56:07 6 are going to consider victim impact. They're going to look at
12:56:11 7 the role that that individual plays in a crime.

12:56:15 8 I can't tell you how many different times I saw drug
12:56:21 9 agents and the prosecutor cut a deal with the most savvy and
12:56:29 10 sophisticated person in a drug bust because they were smart
12:56:35 11 enough to cut the deal first. The stooges, the lookouts, the
12:56:39 12 people who were looking out are the ones that did the real
12:56:43 13 time because they didn't know what to do and how to work the
12:56:46 14 system.

12:56:46 15 And I think it's important to take a look at how
12:56:49 16 people, you know, what their involvement in crime is while
12:56:53 17 also weighing any victim impact along those lines, too.

12:56:57 18 I'm not going to get into all the assessment tools.
12:57:02 19 That's what they talked about earlier. But I think they're
12:57:04 20 important as part of the sentencing process. And I think
12:57:09 21 departures are a very, very important part of sentencing
12:57:16 22 guidelines. I don't think that that's a failure of guidelines
12:57:18 23 if there are departures. I think the guidelines is where you
12:57:23 24 start. If you can defend a departure based on mitigating or
12:57:28 25 aggravating factors, I don't see that as a failure, but you're

12:57:33 1 all starting from the same place.

12:57:38 2 And I think it would be helpful, and I don't know to
12:57:41 3 what degree this occurs, to even encourage the people doing
12:57:45 4 the presentence investigations when they're making
12:57:49 5 recommendations that if they think that there should be a
12:57:51 6 departure based on aggravating or mitigating factors, that
12:57:56 7 they should include that.

12:58:00 8 As for the actual sentencing, Roger does a wonderful
12:58:06 9 job of talking about evidence-based sentencing, but I'd like
12:58:11 10 to talk about the three Rs of sentencing: Is the sentence
12:58:17 11 realistic? Is it relevant? And/or is it supported by
12:58:21 12 research?

12:58:24 13 By realistic, I mean, I can't tell you how many -- in
12:58:30 14 fact, I would be willing to bet that there isn't a person in
12:58:33 15 this room that could live up to the conditions of supervision
12:58:35 16 that a lot of people get put on. They're that onerous and
12:58:41 17 that difficult to deal with, especially if you don't have the
12:58:46 18 resources and the wherewithal that they have.

12:58:50 19 People have conditions placed on them to attend a
12:58:58 20 drug treatment program. Does anybody know if there's even an
12:59:01 21 open slot in that drug treatment program? What if they have
12:59:05 22 to wait six months and they have an addiction? Chances are,
12:59:09 23 you're going to see them back in front of you for a violation
12:59:11 24 at that point.

12:59:13 25 Can the supervision agency even live up to the

12:59:18 1 conditions that are placed on them? Can a prison, if they're
12:59:23 2 going to prison, live up to the conditions of the sentence?
12:59:29 3 So I think it's important to look at, you know, whether, first
12:59:32 4 of all, whether or not a sentence is realistic.

12:59:35 5 Is it relevant? Jim talked about consideration of
12:59:42 6 age and gender and culture, proportionality, the type of
12:59:49 7 treatment. Jim talked about gender considerations. I
12:59:55 8 remember a woman being sentenced to a drug treatment program
12:59:58 9 that was highly confrontational. She had been abused most of
01:00:04 10 her life, sexually and physically. She became a puddle in
01:00:09 11 that program and ran away and immediately started using again.
01:00:17 12 You know, we have to look at the relevance of what we're doing
01:00:20 13 through that process.

01:00:21 14 And are the sentences and the conditions research
01:00:26 15 supported? They all did a wonderful job of talking about
01:00:30 16 evidence based. I was here earlier though, and I was struck
01:00:34 17 by something that U.S. Attorney Fitzgerald said about gaming
01:00:41 18 for incentives. Yeah, that happens. The Bureau of Prisons
01:00:47 19 staff are probably some of the best-trained prison staff
01:00:51 20 throughout the country, much better trained than most state or
01:00:55 21 private institution staff. But I also thought about the
01:01:01 22 number of people in organizations that I've been in,
01:01:07 23 businesses that I've seen that gain from incentives, and what
01:01:13 24 we look at is the outcomes and base it on that.

01:01:16 25 So I wouldn't get too caught up on the gaming for

01:01:20 1 incentives because I've seen incentives, simple incentives
01:01:26 2 like "geez, you did a nice job" work miracles. And so when
01:01:31 3 we're talking about incentives, we're not always talking about
01:01:35 4 cutting out time. We're talking about recognizing someone's
01:01:39 5 actual doing something, catching them doing something right.

01:01:43 6 Jim talked about motivational interviewing. I don't
01:01:47 7 know if you're aware of this, but the roots of motivational
01:01:50 8 interviewing are in the medical field, getting people to
01:01:52 9 follow their treatment regimens, which is sort of funny
01:01:59 10 because I think if we held the criminal justice -- or if we
01:02:03 11 held the medical profession to the same standards we hold the
01:02:06 12 criminal justice system to, we probably wouldn't have open
01:02:09 13 heart surgery, given how effective that was when they first
01:02:13 14 started out, or we wouldn't be treating people with diabetes
01:02:16 15 because they have a much higher failure rate than people going
01:02:21 16 into drug treatment.

01:02:23 17 It's also important, you talked, Roger talked about
01:02:27 18 probation being punishment. If I were to tell you right now
01:02:34 19 that you had to go to drug treatment, my guess is that you
01:02:38 20 wouldn't necessarily -- your first thought wouldn't be, oh,
01:02:42 21 gee, thank you. Almost every condition that's placed on
01:02:47 22 people, at least initially, is seen as punishment.

01:02:52 23 There are studies that show that people would rather
01:02:55 24 be in prison or jail than out on probation having to live up
01:02:59 25 to the conditions that are placed on them. They find it less

01:03:02 1 onerous. They don't have any responsibility.

01:03:06 2 So back to the sentencing guidelines. My experience
01:03:11 3 with sentencing guidelines, you know, you have grids, correct?
01:03:19 4 Is that correct? Why can't you have grids within grids, where
01:03:23 5 you have a menu of options that can have some weight placed on
01:03:28 6 them that judges can look at and they can assign those options
01:03:37 7 within that grid within a grid, if you will, so that it's not
01:03:41 8 simply you're in this grid and this is what happens. You're
01:03:45 9 in this grid, and here's a whole set of options that you can
01:03:48 10 take a look at. And then allow for administrative adjustment
01:03:53 11 within the subgrid and administrative responses. That doesn't
01:03:59 12 always have to come back to court.

01:04:07 13 Just a couple of other quick comments. There was
01:04:11 14 discussion about re-entry earlier, too. I was listening to
01:04:16 15 the U.S. Attorneys speaking, and re-entry really begins at the
01:04:22 16 time of arrest. The minute someone is placed in jail, their
01:04:27 17 life's been disrupted significantly. The minute they're
01:04:33 18 arrested, their life has been disrupted significantly, and at
01:04:39 19 that point, they're going to be re-entered into society in a
01:04:43 20 different way.

01:04:44 21 So I think that when we talk about re-entry at the
01:04:46 22 federal level, it isn't simply when they're going to prison.
01:04:49 23 It isn't simply when they're sentenced. It goes all the way
01:04:52 24 back to how their lives are disrupted.

01:04:58 25 I think that, you know, one of the analogies I use of

01:05:04 1 this is that the Gemini astronauts, when they were shot up and
01:05:09 2 when Carpenter was shot up into the outer atmosphere and came
01:05:14 3 right back down, didn't do an orbit, his re-entry was just as
01:05:18 4 traumatic as John Glenn's when he went around several times.

01:05:26 5 It doesn't take long for someone's life to get disrupted.

01:05:30 6 But, in closing, I would just like to say let's teach
01:05:33 7 the research to the practitioners, the research that these
01:05:37 8 guys talk to, and then let's let the research drive the
01:05:41 9 practice.

01:05:42 10 Thank you.

01:05:43 11 ACTING CHAIR HINOJOSA: Thank you, Mr. Wicklund.

01:05:46 12 Now it's time for questions.

01:05:49 13 QUESTION AND ANSWER SESSION

01:05:49 14 COMMISSIONER WROBLEWSKI: Hello, Mr. Wicklund.

15 MR. WICKLUND: Hello.

01:05:54 16 COMMISSIONER WROBLESKI: Mr. Wicklund came to one of
01:05:55 17 our discussions at the Department of Justice a month or so
01:05:59 18 ago, but thank you all for being here and for participating in
01:06:02 19 this.

01:06:02 20 First of all, let me say to Judge Warren, I hope it's
01:06:06 21 at least a little bit of comfort that the President and the
01:06:08 22 Attorney General have embraced reducing recidivism as a very
01:06:11 23 important goal of sentencing and corrections, and I think this
01:06:15 24 Commission will be embracing that, and so we appreciate your
01:06:20 25 comments on that.

01:06:20 1 One concern that I have in the whole discussion of
01:06:25 2 alternatives to incarceration is the nature of the federal
01:06:30 3 docket and who is likely to benefit from the use of
01:06:36 4 alternatives and how that plays into racial disparities. Our
01:06:42 5 system, our federal system, is majority minority. It is
01:06:49 6 almost a third immigration cases, a huge chunk of white collar
01:06:55 7 cases, firearms and drugs. That's basically, you know,
01:06:58 8 90 percent of the federal system.

01:07:00 9 If we use the risk assessment tools that I have seen
01:07:05 10 that focus, in part, on age, on prior convictions, on the
01:07:12 11 chaotic nature of someone's background and so forth, am I
01:07:17 12 wrong to think that the majority of the people who are likely
01:07:23 13 to be seen as appropriate candidates for alternatives to
01:07:26 14 incarceration are those people who have a higher education,
01:07:30 15 who are older, nonviolent offenders, and there may, it seems
01:07:36 16 to me, there may be a racial impact on that.

01:07:39 17 Have you seen any of that in the state systems -- I'm
01:07:42 18 specifically directing this to Judge Warren -- and should this
01:07:45 19 be a concern of ours or not?

01:07:47 20 JUDGE WARREN: Well, it absolutely should be a
01:07:50 21 concern.

01:07:54 22 In short, we have not really. As a matter of fact, I
01:07:58 23 think one of the virtues of using the kind of risk assessment,
01:08:03 24 risk/needs assessment tools that we're talking about is that
01:08:06 25 it tends to -- the folks that wrote these and sponsor them

01:08:13 1 claim that it will reduce the adverse impact of race and
01:08:17 2 ethnicity on sentencing outcomes.

01:08:20 3 One of the main contributors to racial and ethnics
01:08:24 4 disparities and outcomes is the prior criminal record. You
01:08:28 5 know, it's kind of a circular argument. If there are
01:08:32 6 disparities in the system, and we know that there are, the
01:08:36 7 question is why and where do they come in.

01:08:40 8 On the state side, we know that there's sort of like
01:08:43 9 a four-to-one disparity at the time of pretrial commitment, arrest
01:08:50 10 and confinement that turns into an eight-to-one disparity by the
01:08:54 11 time we're looking at folks that are going to prison. So --
01:08:59 12 and we know that it builds during the course of the criminal
01:09:01 13 justice process.

01:09:03 14 And so by its nature, the criminal justice -- if
01:09:06 15 you're relying on criminal justice history, you tend to build
01:09:10 16 in those previous disparities. One of the virtues of the
01:09:15 17 research that we're talking about is that it really is based
01:09:18 18 more on social psychology than on sociology. It purposely
01:09:23 19 does not use factors like social economic, you know, status.
01:09:31 20 It doesn't even take race and ethnicity into consideration.
01:09:34 21 That is not one of the factors that is measured on a
01:09:39 22 risk/needs assessment instrument, the ones we're talking
01:09:42 23 about.

01:09:42 24 So what it tries to do is focus on the mind of the
01:09:47 25 offender and what is going on there. What are those

01:09:50 1 attitudes, what is that personality that is predisposing this
01:09:58 2 person to be more likely to commit crime than someone else.
01:10:01 3 And so it intentionally is trying to focus on factors that are
01:10:05 4 as neutral as possible from kind of socio-economic status.

01:10:10 5 So I think that one of the reasons there is
01:10:13 6 excitement about the use of these tools in the community
01:10:16 7 corrections field is precisely because they are less likely to
01:10:21 8 result in the kinds of disparities that you're wanting to
01:10:24 9 avoid.

01:10:25 10 COMMISSIONER WROBLEWSKI: And are those available
01:10:27 11 through the National Center For State Courts? Because the
01:10:29 12 ones I have seen before in terms of who would be more
01:10:32 13 eligible, not in terms of what kind of programming would be
01:10:35 14 the most appropriate, but who would be eligible, the ones that
01:10:38 15 I have seen do take into consideration things like age,
01:10:41 16 education, background, and those types of things.

01:10:44 17 Are the ones that you're talking about, are those
01:10:46 18 available to us from the National Center?

01:10:49 19 JUDGE WARREN: They're available -- they're much more
01:10:52 20 available through the National Institute of Corrections and
01:10:55 21 the American Probation and Parole Association because they
01:10:59 22 came out of the corrections field, not out of the judicial
01:11:01 23 field, although you can get access to them through the
01:11:03 24 National Center, also.

01:11:05 25 But I didn't mean to say, and almost all these

01:11:08 1 instruments do take age into consideration, and they do take
01:11:12 2 educational background into consideration, but the finding
01:11:16 3 from the research is that the things that we tend to now focus
01:11:19 4 on are not the most highly criminogenic factors.

01:11:23 5 As I mention in my paper, we tend to focus on those
01:11:25 6 kinds of factors, but the factors that are the most highly
01:11:28 7 associated with likelihood of further criminality are the
01:11:32 8 anti-social attitudes, the anti-social personality, the
01:11:36 9 anti-social peers and associates, those things that we can
01:11:39 10 change.

01:11:40 11 So it's not that you disregard all of the static
01:11:44 12 factors and all the historical factors, but you balance them
01:11:47 13 with other things you can do something about. If you're only
01:11:51 14 going -- if you're going to give up on a young kid because
01:11:53 15 he's a young kid as a high risk of recidivism, you're not
01:11:58 16 going to get anywhere. That young kid is also probably the
01:12:00 17 person that you will have the most likelihood of success with
01:12:04 18 because if you look at all of the other factors, some of the
01:12:08 19 adverse static factors get outweighed in the overall mix.

01:12:13 20 The risk category that the treatment providers and
01:12:17 21 probation supervisors are the most effective with are the
01:12:20 22 high-risk offenders. Now, you have to distinguish between --
01:12:25 23 when we talk about risk here, we're talking about the risk of
01:12:28 24 re-offense. We're not talking about the level of the
01:12:31 25 seriousness of the crime that's being committed. But if

01:12:33 1 you're just focusing on the risk of re-offense, the high-risk
01:12:37 2 offenders are the ones that you do want to tie to these
01:12:40 3 programmings if the offense that the offender has committed is
01:12:44 4 not so serious that they become ineligible for a community
01:12:48 5 sentence because of the gravity of the offense.

01:12:49 6 COMMISSIONER WROBLEWSKI: But as you suggested in
01:12:51 7 your testimony, there is this statute that we deal with that
01:12:53 8 talks about first offender, nonviolent or otherwise
01:12:57 9 non-serious offense. It's sort of a filter as to who should
01:13:01 10 generally get a probationary sentence --

01:13:03 11 JUDGE WARREN: Yes.

01:13:04 12 COMMISSIONER WROBLEWSKI: -- and who should not get a
01:13:06 13 sentence.

01:13:06 14 JUDGE WARREN: Yes.

01:13:08 15 COMMISSIONER WROBLEWSKI: What is your suggestion,
01:13:09 16 you're suggesting we should go to Congress and see if we can
01:13:12 17 change that.

01:13:13 18 What should be the filter in terms of getting into
01:13:15 19 the program, as opposed to an incarceration sentence?

01:13:19 20 JUDGE WARREN: Well, you know, two answers, I guess.
01:13:23 21 At least I think you would want to change the language of the
01:13:26 22 statute so it doesn't focus so exclusively on first-time
01:13:29 23 offenders committing a nonviolent offense.

01:13:32 24 In the state system, oh, I think something like
01:13:36 25 20 percent of the felony probationers have committed a violent

01:13:41 1 offense. There are a lot of violent offenses in the state
01:13:43 2 system that are misdemeanors. Domestic violence offenses in
01:13:48 3 the state systems are misdemeanors. They're obviously serious
01:13:51 4 crimes of violence, but they're not felonies in most state
01:13:54 5 systems.

01:13:55 6 So there are violent offenses where the offenders are
01:13:59 7 still amenable to treatment -- domestic violence, I think, is
01:14:03 8 one of them -- and where imprisonment is not necessarily
01:14:07 9 called for by the nature of the crime.

01:14:09 10 And then secondly, just because if you give up on all
01:14:14 11 offenders who have committed one offense and say, well, we're
01:14:18 12 not really going to focus on you anymore, we're just going to
01:14:21 13 send you to prison, you're not doing everything you can do to
01:14:26 14 protect public safety because there are many folks that have
01:14:29 15 committed two, three and four offenses who are still prime
01:14:32 16 targets where our practice has never been to try to change
01:14:36 17 their behavior.

01:14:37 18 When you go into a new era, when you are actually
01:14:40 19 investing in changing these folks' behavior, there are folks
01:14:43 20 out there that have built up a record that if you put your
01:14:47 21 mind to it, you can have some success in changing their
01:14:50 22 behavior.

01:14:51 23 And then the long-term thing is I think that you
01:14:53 24 would want to move away from defining eligibility based on
01:14:58 25 offense characteristics, you know, first offender, nonviolent

01:15:02 1 offense, to more of the risk/need-assessment-based approach,
01:15:06 2 where you're also considering the criminogenic needs that the
01:15:13 3 treatment providers and probation folks are talking about.

01:15:15 4 If you're not looking at something that you can
01:15:17 5 change about the offender, you're going to fail from the
01:15:21 6 outset. I mean if you only look at things that you can't
01:15:25 7 change about someone -- their age, their prior criminal
01:15:28 8 record -- those things aren't going to change. I mean the
01:15:34 9 person could be, you know, could be saved, and, you know, have
01:15:43 10 a job, be married, have a family, have lived in the community,
01:15:49 11 be president of the Rotary Club. All those things can be true
01:15:53 12 and the person could have that same background.

01:15:55 13 So if you want to change people's behavior, you have
01:15:58 14 to look at characteristics of the offender that you can do
01:16:02 15 something about. And if you don't take that -- if a judge
01:16:04 16 does not take that into consideration, you know, you're going
01:16:08 17 to strike out from the get-go.

01:16:10 18 So you somehow have to give the judge discretion to
01:16:14 19 look at offenders as human beings that can change their
01:16:19 20 behavior in the same way that you and I and everyone else in
01:16:23 21 this room has learned to change their behavior when you take a
01:16:26 22 look at yourself and you wince and you say, you know, I don't
01:16:30 23 like drinking this much, I don't like smoking this much, I
01:16:33 24 don't like weighing this much, and we struggle, but we change
01:16:36 25 our behavior.

01:16:37 1 Offenders can do the same thing, too, if they have
01:16:40 2 the proper treatment and supervision.

01:16:42 3 VICE CHAIR CASTILLO: I want to thank you, all three
01:16:44 4 gentlemen, for your testimony.

01:16:45 5 My question is for Mr. Van Dyke. First, let me start
01:16:48 6 out by thanking you on behalf of our court for all the
01:16:52 7 Salvation Army does for us.

01:16:54 8 As I understand it, there's basically three sources
01:16:57 9 of business that you do with our court. One is re-entry
01:17:03 10 people coming back from serving prison sentences in the
01:17:06 11 Chicago area that you work with as you described.

01:17:09 12 Two is when judges on our court have people accused
01:17:15 13 of violating their supervision, the Salvation Army offers an
01:17:19 14 alternative to just re-incarcerating.

01:17:22 15 But isn't there a third source of clients for you;
01:17:27 16 that is, aren't there judges on my district who are using the
01:17:33 17 Salvation Army to create sentences right from the get-go, sort
01:17:41 18 of a quasi-alternative to incarceration? Isn't that
01:17:45 19 happening?

01:17:45 20 MR. VAN DYKE: That is, Judge.

01:17:50 21 VICE CHAIR CASTILLO: Can you expand on that a little
01:17:51 22 bit?

01:17:52 23 MR. VAN DYKE: It's interesting to me because I would
01:17:54 24 not be able to identify the individuals who fall into that
01:17:57 25 category from the other two flows if I were to just take a

01:18:00 1 look at our population or talk to them.

01:18:02 2 I think this is one of the larger services that we
01:18:05 3 can offer the court right now, referring back to previous
01:18:10 4 discussion in the reports that it gives the court a bit more
01:18:15 5 of an alternative -- it gives a bit more of an array of
01:18:19 6 options to a judge who truly wants to have something useful
01:18:22 7 happen for the benefit of the public, for the benefit of this
01:18:25 8 individual, and, again, long term, not just while he or she is
01:18:29 9 serving the sentence.

01:18:31 10 We think that the same types of services can be very
01:18:35 11 effective, and, in fact, to piggyback on your remarks,
01:18:39 12 sometimes it's an individual who has been in the system more
01:18:44 13 than once who is ripest for a change because he or she now
01:18:49 14 sees themselves as having a criminal conduct problem, as
01:18:53 15 opposed to this was just a one-time mistake. And being able
01:18:58 16 to work with those individuals from whatever source I think
01:19:02 17 can be highly effective. And I know that those are some of
01:19:05 18 the individuals that the court, the local court has sentenced.

01:19:09 19 VICE CHAIR CASTILLO: So instead of incarcerating
01:19:11 20 someone, a judge would impose a sentence of probation with a
01:19:16 21 condition of the probation that they serve some time in your
01:19:20 22 program.

01:19:21 23 MR. VAN DYKE: That's right. The individual would be
01:19:23 24 part of the residential population at our program for a time
01:19:26 25 and have some of the same basic expectations placed on him or

01:19:30 1 her, regarding orientation and fundamental assessment, being
01:19:37 2 tracked into whatever the appropriate interventions are, and
01:19:39 3 so on.

01:19:40 4 VICE CHAIR CASTILLO: Okay. Thank you.

01:19:43 5 MR. VAN DYKE: Yes.

01:19:45 6 VICE CHAIR CARR: Is there any evidence that it's
01:19:46 7 more difficult to have a successful re-entry experience with
01:19:51 8 someone who has been incarcerated longer rather than a shorter
01:19:55 9 amount of time?

01:19:56 10 MR. VAN DYKE: I wouldn't be able to cite statistical
01:19:59 11 evidence, but certainly observational anecdotal evidence, yes.
01:20:04 12 The longer a person's been out of the mainstream, the more
01:20:07 13 severe the dislocation. Separation from family, from the
01:20:12 14 community and so on, and just a feeling of not being in touch
01:20:17 15 with the modern world. We have people who are still mystified
01:20:21 16 by ATM machines, let alone computers or some of the other
01:20:26 17 things that have come along.

01:20:28 18 It's not unusual for an individual coming to us to
01:20:33 19 experience a minor meltdown the first time he or she is
01:20:36 20 allowed out on a pass, say, to get personal credentials,
01:20:42 21 because they just can't cope with the noise, the hurly-burly.

01:20:47 22 A favorite quote of mine from a gentleman who was
01:20:50 23 with us about four years ago, he said, "There's just too much
01:20:53 24 freedom out there, and I can't handle it," having come from
01:20:56 25 the structured world of the prison to the far less structured

01:21:01 1 world, even with the structure that our program provided.

01:21:06 2 MR. WICKLUND: Just a quick comment on that.

01:21:07 3 There is some issues that show that there's some
01:21:10 4 diminishing returns. The longer someone is in prison, the
01:21:14 5 less likely they're going to be able to make a good adjustment
01:21:18 6 when they come out, so I think you can look at that.

01:21:20 7 But there's also the issue that when they do come
01:21:24 8 out, they just -- they have lost so many of their social
01:21:29 9 skills that to come back out -- and it is. One of my favorite
01:21:37 10 quotes is a person told me "I feel like my brain is throwing
01:21:40 11 up" when he got out. He said, "I just can't handle it all,"
01:21:44 12 and the research is pretty clear that those first three
01:21:48 13 months, three to six months out, are critical. More people
01:21:52 14 violate and end up back in prison within the first three to
01:21:55 15 six months.

01:21:58 16 VICE CHAIR CARR: And to the extent that family
01:21:59 17 support matters, I guess it's rather obvious that the longer
01:22:03 18 someone is in prison, if they had a family support structure
01:22:06 19 before, that may have dissipated.

01:22:10 20 MR. VAN DYKE: That's also true, plus the family's
01:22:12 21 going to face additional challenges of its own as this
01:22:15 22 individual comes back in deciding or figuring out just how to
01:22:20 23 reincorporate the person into the family.

01:22:22 24 VICE CHAIR CARR: Judge Warren, I think you were
01:22:25 25 about to say something.

01:22:26 1 JUDGE WARREN: Yes. I just looked up the citation.
01:22:28 2 There is a 2002 study, a meta-analysis, that looked at all of
01:22:33 3 the data sets they could find, I think they found 20 to 25,
01:22:36 4 that compared the recidivism rates -- slightly different
01:22:39 5 question -- the recidivism rates of folks that had served,
01:22:42 6 like, 6 months in prison, 7 to 12 months, 12 to 24 and more
01:22:47 7 than 24. And they found that the folks that, on average, the
01:22:53 8 mean recidivism rate increased with a longer prison sentence,
01:23:01 9 but modestly. I mean for those of you that follow research,
01:23:06 10 the R value was like .03 for one group, .05 for the next, and
01:23:14 11 .07 for the next. So the statistical relationship between
01:23:17 12 length of incarceration and subsequent recidivism was a
01:23:21 13 positive and escalating one, but relatively small.

01:23:24 14 VICE CHAIR CARR: Okay.

01:23:25 15 ACTING CHAIR HINOJOSA: Judge Warren, one last
01:23:28 16 question, I guess. You quoted some figures with regards to
01:23:32 17 the numbers on probation versus the number in prison in the
01:23:36 18 state system. You said there are three on probation for every
01:23:40 19 one person in prison in the state system. Does that include
01:23:42 20 misdemeanors?

01:23:44 21 JUDGE WARREN: Yes, it does. This figure does
01:23:47 22 include misdemeanors. About -- there are about 4.2 million, I
01:23:53 23 think, on probation, state probation, in this country and
01:23:56 24 about 1.2 in the state prisons.

01:24:00 25 ACTING CHAIR HINOJOSA: And of those on --

01:24:02 1 JUDGE WARREN: Half of them are felons. The last
01:24:05 2 statistic I saw, about half of the folks on formal probation
01:24:09 3 in the state system were misdemeanors, and about half were
01:24:13 4 felons.

01:24:13 5 ACTING CHAIR HINOJOSA: So of the four-point-some
01:24:16 6 million, two million or so are misdemeanors.

01:24:19 7 JUDGE WARREN: Yeah. We may have a slightly -- it's
01:24:21 8 changing because increasingly, the misdemeanors are not being
01:24:27 9 placed on probation because there just aren't the resources
01:24:29 10 there, and the felons are taking up more and more of the
01:24:31 11 slots.

01:24:32 12 MR. WICKLUND: The misdemeanor offenses are usually
01:24:35 13 multiple DWI and domestic violence, so two very high
01:24:43 14 recidivism rate classes. So you're not getting, you know, a
01:24:51 15 lot of shoplifters that are on probation unless they've been
01:24:56 16 picked up multiple times. Most of the misdemeanors that are
01:25:00 17 being supervised are for your violent offenses or things
01:25:04 18 like --

01:25:05 19 ACTING CHAIR HINOJOSA: This is strictly supervision
01:25:06 20 or include somebody that's just on probation without
01:25:09 21 supervision, these numbers that you quoted, Judge Warren?

01:25:13 22 JUDGE WARREN: Well, the numbers I quoted are on
01:25:15 23 formal probation.

01:25:17 24 ACTING CHAIR HINOJOSA: So they are under
01:25:19 25 supervision.

01:25:20 1 JUDGE WARREN: They are at least technically under
01:25:22 2 supervision. In many states -- I spent a lot of time where I
01:25:25 3 was a judge in California. Half of all of the folks on
01:25:28 4 probation in California are not actively supervised at all.
01:25:31 5 They're just on a bank caseload consisting of 1,000 or 2,000
01:25:36 6 offenders, but all of the numbers I provided are people who
01:25:40 7 are at least technically under supervision.

01:25:43 8 COMMISSIONER WROBLEWSKI: Judge Warren, I practice in
01:25:45 9 California, also.

01:25:46 10 When someone gets their first DUI, they typically got
01:25:50 11 a three-year probation, a fine, DUI school, a couple of days
01:25:54 12 picking up trash. Does that person count in the numbers that
01:25:57 13 you're talking about? If it was unsupervised probation,
01:25:59 14 everybody knew it. It was just you're on probation, if you
01:26:00 15 pick up a new offense, though, we can do something to you.

01:26:03 16 JUDGE WARREN: Yes, that person would count in the
01:26:05 17 numbers that I had provided.

01:26:06 18 COMMISSIONER WROBLEWSKI: Thank you.

01:26:07 19 JUDGE WARREN: If they're on formal probation. A lot
01:26:09 20 of times folks in California are on informal probation that
01:26:13 21 is, in theory, supervised by the court and not by probation,
01:26:16 22 and they typically are on informal or summary probation, it's
01:26:20 23 called in many communities, where the main reason they're on
01:26:23 24 that probation is to collect money, fines, fees, forfeitures
01:26:28 25 and things like that.

01:26:30 1 ACTING CHAIR HINOJOSA: Well, thank you all very
01:26:32 2 much. We certainly appreciate it.

01:26:34 3 MR. WICKLUND: Thank you.

01:26:34 4 ACTING CHAIR HINOJOSA: And on behalf of the
01:26:36 5 Commission, I want to thank the Northern District of Illinois
01:26:38 6 again and the Seventh Circuit for letting us use their courthouse
01:26:45 7 and their facilities, the chief judge, the clerk and all the
01:26:49 8 judges. Thank you all very much.

01:26:55 9 (Hearing adjourned at 1:27 p.m.)

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