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UNITED STATES SENTENCING COMMISSION
REGIONAL HEARINGS ON THE TWENTY-FIFTH ANNIVERSARY OF
THE PASSAGE OF THE SENTENCING REFORM ACT OF 1984
NOVEMBER 19, 2009
AUSTIN, TEXAS
VOLUME 1 OF 2

COMMISSIONERS PRESENT:

- Chair: Judge William K. Sessions, III
- Vice Chairs: William B. Carr, Jr.
Judge Ruben Castillo
- Commissioners: Dabney Friedrich
Judge Ricardo H. Hinojosa
Beryl A. Howell
Jonathan J. Wroblewski

STAFF PRESENT:

- Judith W. Sheon, Staff Director
- Brent Newton, Deputy Staff Director

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

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

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

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

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

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

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

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

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

1 Commission, but at one of these regional hearings.

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

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

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

22 VICE CHAIR CARR: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE CAUTHRON: Well, if we're going

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

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

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

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

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

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

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

25 I think I can say what was wrong with the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 here, and happy to respond to questions.

2 CHAIR SESSIONS: Thank you, Judge.

3 Judge Starrett, do you want to go next?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The Criminal Law Committee has

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

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

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

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

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

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

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

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

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

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

11 Judge Zainey.

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

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

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

1 opportunity.

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

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

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

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

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

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

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

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

1 have to live with statutory minimums.

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

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

25 I'd like to give you a couple of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Two other examples, armed bank robbery.

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

4 again with the flexibility, of course, with the

5 guidelines to even go below the guideline range.

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

7 benefit of parole, probation or suspension of sentence.

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

9 criminal defense lawyer, I represented somebody for

10 distribution of heroin. I was appointed by the federal

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

12 a small amount of heroin which had been distributed,

13 mandatory life imprisonment. My client, in the federal

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

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

16 the federal system he was only receiving 18 months.

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

18 certainly can't be the federal government looking over

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

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

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

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

23 opportunity to be able to discuss those with you.

24 CHAIR SESSIONS: Thank you, Judge Zainey.

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

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

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

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

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

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

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

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

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

8 COMMISSIONER WROBLEWSKI: In whatever order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 That's just common sense.

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

9 CHAIR SESSIONS: Judge Hinojosa.

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

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

22 JUDGE CAUTHRON: No, sir.

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

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

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

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

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

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

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

25 JUDGE CAUTHRON: Well, you do give up

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

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

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

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

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

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

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

13 CHAIR SESSIONS: Commissioner Howell.

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

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

1 short of elimination, revise them in some way.

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

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

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

9 COMMISSIONER HOWELL: Judge Zainey.

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

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

1 JUDGE ZAINEY: Sure.

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

12 Judge Starrett.

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

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

25 Now, all of you have said that you

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

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

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

14 JUDGE CAUTHRON: Yeah, I got those.

15 CHAIR SESSIONS: Yeah, right.

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

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

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

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

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

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

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

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

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

8 CHAIR SESSIONS: Okay.

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

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

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

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

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

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

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

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

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

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

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

22 JUDGE STARRETT: Presentence?

23 CHAIR SESSIONS: Presentence.

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

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

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

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

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

5 CHAIR SESSIONS: Any further questions?

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

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

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

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

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

24 PROFESSOR DI NITTO: DiNitto.

25 CHAIR SESSIONS: DiNitto. Okay. She's

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

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

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

5 MR. GELB: Thank you.

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

19 PROFESSOR MILLER: Brasenose College,
20 yeah.

21 CHAIR SESSIONS: Brasenose College.
22 Welcome.

23 PROFESSOR MILLER: Thank you.

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

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

8 MR. WATKINS: Thank you.

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

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

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

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

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

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

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

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

1 dependence in 2008.

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

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

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

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

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

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

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

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

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

1 treatment and spells of illness occur quite frequently.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I'm also realistic about the barriers to

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

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

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

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

23 Mr. Gelb.

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

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

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

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

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

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

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

1 the seventies and eighties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that Texas, two years ago - am I -

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

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

8 MR. GELB: That's complete coincidence.

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

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

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

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

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

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

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

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

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

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

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

16 Mr. Miller.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 This requires that courts be:

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

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

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

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

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

25 And so if you just take the general

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 COMMISSIONER FRIEDRICH: Thank you.

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

25 My first question is, is that fear

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

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

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

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

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

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

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

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

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

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

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

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

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

6 CHAIR SESSIONS: Mr. Wroblewski.

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

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

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

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

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

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

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

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

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

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

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

13 MR. GELB: Thank you.

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

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

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

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

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

6 MS. BURKS: Since Friday the 13th.

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

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

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

23 MS. BURKS: Thank you.

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

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

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

15 MR. SANCHEZ: My mentor.

16 CHAIR SESSIONS: Your mentor?

17 MR. SANCHEZ: My mentor, yes.

18 MS. BURKS: Can you hear me now?

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

21 MS. BURKS: Can you hear me now?

22 CHAIR SESSIONS: Yes.

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

1 highlights.

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

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

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

1 guidelines every day.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the development of the information that's available to
2 the court for determining an appropriate sentence, and
3 also that is used for the safe supervision of the
4 individual and the community.

5 That's the bulk of my comments. I think
6 I have one other that I did not include in my written
7 comment, and that is that we'd like to see the
8 Commission look at further training opportunities for
9 probation officers in the evaluation process for
10 variances. I remember post-Koon, and maybe I'm dating
11 myself a long time, but there was a departure roadmap
12 that was developed, and it really was helpful for
13 officers, to take them through a step by step process,
14 and I'd like to see something, assuming possible, I
15 think that needs to be looked at, but if there could be
16 something developed in terms of training opportunities
17 for officers, I think that would be beneficial, as well.
18 That's pretty much all I want to comment.

19 CHAIR SESSIONS: Thank you, Mrs. Burks.
20 I will turn to your advisee, mentee for comments.

21 Mr. Sanchez.

22 MR. SANCHEZ: Thank you, Mr. Chair, and
23 welcome this Commission to Western Texas. I hope Austin
24 is treating you well.

25 Because Western Texas and Southern Texas

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

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

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

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

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

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

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

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

6 Judge Hinojosa.

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

24 MS. BURKS: Well, I -

25 COMMISSIONER HINOJOSA: Even different

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. BURKS: Well -

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

16 MS. BURKS: It's too severe.

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

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

25 COMMISSIONER HINOJOSA: All right.

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

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

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

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

17 MR. SANCHEZ: Correct, correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. SANCHEZ: Correct.

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

4 MR. SANCHEZ: It varies, correct.

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

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

25 MR. SANCHEZ: In Western Texas, Operation

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

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

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

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

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

1 sentence imposed, time served. Any comments?

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

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

10 CHAIR SESSIONS: The sentence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. HAWKINS: A great American.

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

8 MR. HAWKINS: Thank you.

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

16 MR. HAWKINS: Thank you.

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

22 MR. GIBBENS: McGoey.

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

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

6 MR. GIBBENS: Thank you.

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

10 MS. O'CONNELL: We have.

11 CHAIR SESSIONS: Oh, you have?

12 MS. O'CONNELL: We have.

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

15 MR. HAWKINS: I drew the black bean.

16 CHAIR SESSIONS: Great. All right.

17 Mr. Hawkins.

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

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

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

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

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

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

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

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

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

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

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

1 are putting the passion back into sentencing.

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

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

1 to prison that existed previously.

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

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

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

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

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

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

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

25 But that said, the district courts that

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

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

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

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

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

8 COMMISSIONER HINOJOSA: But were you under oath?

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

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

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

1 the mandatory minimum sentences.

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

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

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

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

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

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

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

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

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

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

25 The ranges recommended in these cases all

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

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

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

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

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

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

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

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

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

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

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

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

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

3 CHAIR SESSIONS: Thank you, Mr. Hawkins.

4 Who's next?

5 MR. GIBBENS: That's me.

6 CHAIR SESSIONS: Go ahead, Mr. Gibbens.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 CHAIR SESSIONS: Thank you, Mr. Gibbens.

13 MR. GIBBENS: Thank you.

14 CHAIR SESSIONS: Ms. O'Connell.

15 MS. O'CONNELL: Thank you.

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

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

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

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

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

1 including alternatives to incarceration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 We are all here because we want justice.

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

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

9 So, are we up for questions?

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

13 MS. O'CONNELL: Uh-huh.

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

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

3 MS. O'CONNELL: Yes.

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

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

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

12 MS. O'CONNELL: Uh-huh.

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

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

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

1 MS. O'CONNELL: Yes.

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

5 MS. O'CONNELL: Right.

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

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

16 COMMISSIONER FRIEDRICH: No. I mean -

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

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

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

7 MS. O'CONNELL: True.

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

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

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

25 MS. O'CONNELL: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 you mean.

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

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

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

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

15 COMMISSIONER HINOJOSA: They would be?

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

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

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

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

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

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

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

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

15 MS. O'CONNELL: Yes.

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

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

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

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

1 not otherwise identified?

2 COMMISSIONER HINOJOSA: Well -

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

4 telling me?

5 COMMISSIONER HINOJOSA: It talks, it was
6 five below the guideline range. None above the guideline,

7 [] 83 within the range. I'm just saying one doesn't

8 appear to be that much out of place when you look at the

9 total picture. And then for Mr. Hawkins.

10 MR. HAWKINS: Yes, sir.

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

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

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

17 MR. HAWKINS: Yes, and -

18 COMMISSIONER HINOJOSA: 71 cases, I guess.

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

22 COMMISSIONER HINOJOSA: Two to three what?

23 MR. HAWKINS: Two to three judges.

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

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

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

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

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

1 half down, in that doubling.

2 MR. HAWKINS: Yeah. I, I -

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

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

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

20 MR. HAWKINS: Absolutely.

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

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

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

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

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

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

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

1 to the -

2 CHAIR SESSIONS: Any other questions?

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

1 MS. O'CONNELL: Yes.

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

19 MS. O'CONNELL: Yes.

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

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

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

2 CHAIR SESSIONS: Do you agree with that?

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

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

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

12 CHAIR SESSIONS: Okay. Any other
13 questions?

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

20 MR. GIBBENS: Thank you for having me.

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

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

25 CHAIR SESSIONS: Coming up in the near

1 future. Okay. Thank you very much.

2

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

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I further certify that I am neither
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otherwise interested in the outcome of the action.

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Certified to by me this 4th day of
December, 2009.

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Jane E. Demars, Texas CSR No. 2789

Expiration Date: 12-31-09

Sunbelt Reporting & Litigation

Firm Registration No. 87

1016 La Posada Drive, Suite 294

Austin, Texas 78752

(512) 465-9100

Job # 81651

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

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

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

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

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

19 Here she is right now.

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

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

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

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

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

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

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

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

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

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

23 CHAIR SESSIONS: Good morning, Judge
24 Jones.

25 JUDGE JONES: Good morning. I have to

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

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

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

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

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

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

1 address.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 very, very unfortunate.

2 JUDGE BENAVIDES: I'm sorry.

3 CHAIR SESSIONS: Go ahead.

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

1 suggest that that might be so.

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

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

24 JUDGE JONES: Absolutely.

25 JUDGE BENAVIDES: I agree. I'm a

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

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

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

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

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

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

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

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

5 CHAIR SESSIONS: Absolutely, right.

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

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

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

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

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

25 JUDGE JONES: May I add that I do think

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

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

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

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

24 COMMISSIONER WROBLEWSKI: Even assuming
25 you have -

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

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

17 JUDGE JONES: Right.

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

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

23 CHAIR SESSIONS: Judge Jones.

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

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

21 JUDGE BENAVIDES: I support that.

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

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

4 JUDGE JONES: Don't forget the Southern.

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

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

9 JUDGE BENAVIDES: That is true.

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

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

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

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

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

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

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

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

8 JUDGE JONES: I agree with that. I think
9 that we are probably somewhat reluctant to use that
10 scale of reasonable articulation as a device to vacate
11 and remand, because in so many cases we know that the
12 sentence will be the same again, so I suppose that it's
13 just the sense of futility that if you – the judge will
14 be unhappy at having to go through the same routine
15 again, particularly if the judge has properly calculated
16 the guidelines, and it's just a question of our saying
17 you didn't explain why you went up so much. But a judge
18 might view – you are correct that we have not vacated
19 many sentences on that basis.

20 JUDGE BENAVIDES: It's like, kind of like
21 ordering a hamburger, but you don't get it because you
22 didn't say whether it had mayonnaise on it or not. Add
23 the mayonnaise and you're going to get the same
24 hamburger.

25 COMMISSIONER HINOJOSA: You're talking

1 about What-A-Burger.

2 CHAIR SESSIONS: Any other questions.

3 COMMISSIONER FRIEDRICH: Judge Jones, you
4 made a comment about the fraud guideline and the
5 emphasis on the amount of loss. I'm just wondering
6 would you recommend that we simplify the loss table,
7 emphasize other factors rather than loss? What sort of
8 suggestions do you have, if anything?

9 JUDGE JONES: Well, of course, as you
10 know I wrote the *Olis* case, and that was one where the
11 sort of lower-level fellow in one of the, in Dynegy,
12 which was a company that was involved in, you know, sort
13 of daisy chain inflation of its revenues. Lower-level
14 fellow got sentenced originally to 25 years, when the
15 higher up executives who actually called the shots plead
16 guilty and got one or two years. And in that case, that
17 was a securities fraud, and the government wanted to
18 predicate the sentence on proof of loss, where it would
19 be something in the stock market, or I forget exactly
20 what it was, but anyway, it was a hundred million
21 dollars or something. And I said that this loss had to
22 be tailored to the securities fraud standards for
23 damages. And he ended up, I forget what the sentence
24 ended up with, maybe eight years or something. But I
25 think that, you know, making the ranges broader would

1 help, but there also - it's really hard to say, because
2 each fraud crime has a different character of victims.
3 And when you steal people's credit cards and may or may
4 not take advantage of them, you may have a large
5 technical loss, but not a large physical loss to the
6 victims of crime, whereas in another one, I can remember
7 one where some people were trying to sell something to
8 elderly people, and just ruined them, ruined them, and
9 under, but under the proof of loss guidelines, the loss
10 might have been a few hundred thousand dollars, and the
11 sentence, according to guidelines, would have been, you
12 know, five, three or four, five years, but these people
13 had taken total advantage of a very vulnerable
14 population, and you know, so.

15 COMMISSIONER FRIEDRICH: Do you feel like
16 the district courts aren't using the departure that's
17 built into the guideline that enables the district
18 court, in its opinion, in which it overrepresents a
19 defense or underrepresents it departs, so you just don't
20 think we're using that enough.

21 JUDGE JONES: No, and the other situation
22 is I've seen some Medicare-type-fraud guideline loss
23 cases where you say, "Well, do you calculate for
24 defrauding the government for something. Well, what's
25 your basis for loss?" In other words, they were

1 exploiting the guideline, and is the guideline the
2 amount that they might legitimately have collected, or
3 is the guideline, or based on an increment from that, or
4 is it based on all of what they got? It's - I'm sorry,
5 I should have prepared better for this subject, but
6 sometimes the - you have to really invent the basis for
7 the loss, and I could find some cases for you like that,
8 and in those cases, it seems to me like the whole
9 enterprise is probably not worth the candle. So you
10 have a -

11 JUDGE BENAVIDES: Yeah. I agree, and I
12 think the question is interesting because it reflects
13 the other side of the coin, and that is that you don't
14 want sentences to be uniform, that you want judges, from
15 time to time, to make a departure, and so it's kind of
16 at odds with the idea of mandatory guidelines, uniform
17 type sentencing. Our concepts of justice vary, from
18 time to time, based upon unique circumstances or a kind
19 of a generalized feeling of the idea that all, that
20 everybody ought to be treated the same, and they're at
21 cross currents. So I think your question itself
22 reflects that kind of dilemma that exists.

23 CHAIR SESSIONS: Well, we feel honored,
24 by the way, to have both of you testifying today, and we
25 appreciate it very much, and I guess we'll call it a day

1 for this moment.

2 JUDGE BENAVIDES: Thank you.

3 JUDGE JONES: Thank you.

4 (Recess taken from 10:01 to 10:20.)

5 CHAIR SESSIONS: I'll call the meeting to
6 order. Good morning. Thank you very much for coming
7 today. This is the sixth out of seven regional
8 hearings. In each regional hearing, we've heard from
9 judges on the courts of appeals and judges from the
10 district courts of those particular regions, and I must
11 say, they have, the discussions that we've engaged in
12 with judges has been incredibly instructive and,
13 frankly, helpful. So I really appreciate your
14 willingness to participate today because I know of your
15 busy schedules.

16 So let me introduce you to the
17 Commission. First, J. Leon Holmes has served as a
18 district judge in the Eastern District of Arkansas, and
19 has served as chief judge of that district since 2005.
20 Prior to his judicial appointment, he practiced law in a
21 private firm in Little Rock. Judge Jones has also
22 served as an adjunct professor of law at the Arkansas
23 School of Law and a professor at Thomas Aquinas College.
24 Chief Judge Holmes has also, holds a bachelor's degree
25 from Arkansas State University, a master's from Northern

1 Illinois University, a doctorate from Duke, and a law
2 degree from the University of Arkansas. And I saw,
3 according to my notes, that I have changed you with the
4 chief judge of the Fifth Circuit of the United States,
5 and referred to you as Judge Jones on one occasion.

6 JUDGE HOLMES: I'm flattered. I hope
7 she's not insulted, but I'm flattered. Thank you.
8 That's all right.

9 CHAIR SESSIONS: Well, fortunately,
10 you're in different circuits, so. Welcome.

11 Next, the Honorable Micaela Alvarez has
12 been a district court judge in the Southern District of
13 Texas since 2004, having previously served as a
14 presiding judge at the Texas 139th Judicial District
15 Court. Before joining the bench, Judge Alvarez
16 practiced privately in McAllen, Texas. Judge Alvarez
17 received both her Bachelor of Science and her law
18 degree right here from the University of Texas. You
19 just flashed the Texas sign. That is the Texas sign.

20 JUDGE ALVAREZ: That's the Texas sign.

21 CHAIR SESSIONS: For those of us who are
22 not from Texas, we don't exactly know what that is, but
23 I imagine -

24 COMMISSIONER HINOJOSA: If they had it,
25 they could have the sign.

1 CHAIR SESSIONS: The Honorable Kathleen
2 Cardone has been a district court judge in the Western
3 District of Texas since 2003. She previously served in
4 the Texas Judiciary as a visiting judge, as a judge with
5 the 388th and 383rd judicial district courts, as an
6 associate judge of the Family Law Court of Texas, and as
7 a judge of the Municipal Court for the City of El Paso.
8 Judge Cardone has also served as a mediator, and in
9 private practice. She got her Bachelor of Arts degree
10 at the State University of New York at Binghamton,
11 getting closer to my home, and also her law degree at
12 Saint Mary's School of Law. Welcome to all, all three
13 of you.

14 Is there any preference as to who wishes
15 to go first, or should we go in order of introduction?

16 JUDGE ALVAREZ: Order of introduction,
17 for my money.

18 CHAIR SESSIONS: All right. It's just
19 that I can't order a judge around, so.

20 JUDGE HOLMES: Let me begin by saying
21 thank you for the opportunity to testify here today, and
22 thank you for the excellent work that you do with
23 reference to the guidelines.

24 I assumed the duties of a judge of the
25 United States District Court for the Eastern District of

1 Arkansas on July 19, 2004, less than a month after
2 *Blakely* was decided, and less than five months before
3 *Booker* was decided. My first sentencing was on January
4 12, 2005, the day *Booker* was decided, and since that day
5 I have imposed sentence on 341 offenders. I know that
6 some of the districts, over that number of five years,
7 would be much greater than that.

8 But I believe that the current system
9 strikes a reasonable balance between judicial
10 discretion, on the one hand, and uniformity and
11 certainty of sentencing on the other. It is helpful for
12 me to have the guidelines to inform me of the sentences
13 typically imposed for offenders committing the crime for
14 which the particular offender to be sentenced has been
15 convicted so that there can be uniformity in sentencing.
16 I am interested in knowing what has been the judgment of
17 my peers with respect to the application of the § 3553(a)
18 factors in similar cases. At the same time, however, I
19 believe it is important that judges have the discretion
20 to impose a sentence outside the guideline range because
21 in imposing sentence, we are not imposing sentence on
22 categories or types, we're imposing sentence on human
23 persons with their own individual characteristics and
24 history.

25 The current system has the advantage of

1 providing the judge with some indication of what other
2 judges have found to be a reasonable sentencing range in
3 similar cases, while at the same time allowing the judge
4 to tailor the sentence to the human person before the
5 court for sentencing.

6 While I believe that the current system
7 is generally a good one, I am concerned that it rests on
8 unsteady foundation. As we all know, the advisory
9 guideline system has never been adopted by Congress. It
10 was the result of a decision in *Booker* in which by a
11 vote of five to four the court held that the mandatory
12 guideline system was unconstitutional inasmuch as it
13 permitted judges to find facts that could result in
14 sentencing enhancements, and therefore violated the
15 defendant's right to trial by jury. We all know that
16 the four Justices from the opinion of the Court on that
17 issue then joined one of the Justices in the majority to
18 create a new majority in holding that the remedy for the
19 constitutional violation was to render the guidelines
20 advisory. One Justice who joined the opinion of the
21 Court on the constitutional issue joined four Justices
22 who dissented on that issue to form a majority voting to
23 excise § 3553(b)(1) and § 3742[e]. The result of excising
24 those subsections is that the guidelines are now advisory
25 in many cases in which either no enhancements would apply
26 or the facts that would give rise to enhancements

1 are not in dispute.

2 It has been nearly five years since
3 *Booker* was decided. We continue to operate under the
4 same statutory scheme, substantially the same rules of
5 criminal procedure, and substantially the same
6 guidelines manual, which is to say that even though the
7 guidelines have been advisory for five years, we still
8 operate under statutes, rules and guidelines designed
9 for a system of sentencing in which the guidelines were
10 mandatory. I hope that the Sentencing Commission will
11 recommend changes in the statutes and rules to make them
12 fit the advisory system under which we operate, and also
13 adopt changes to the guidelines to remove vestiges of
14 the mandatory guideline system.

15 I suggest that the Sentencing Commission
16 recommend that Congress repeal 28 U.S.C. § 3553(b)(1)
17 and 18 U.S.C. § 3742(e)(3), I think I just miscited that,
18 which were excised by the Supreme Court, but which remain
19 in the statutes.

20 I also call the attention of the
21 Sentencing Commission to the attention of § 3553(f).
22 That's the safety valve section, as you already know.
23 It allows the court to impose a sentence below the
24 otherwise applicable statutory minimum when

1 certain facts are present. This provision appears to
2 say that the mandatory minimum for a defendant who is
3 eligible for the safety valve is the low end of the
4 guideline realm. The Supreme Court did not hold that
5 § 3553(f) is unconstitutional, nor did the Court
6 excise any portion of that section in the remedy portion
7 of the *Booker* decision. The courts have consistently
8 held that the guidelines are advisory, even under
9 § 3553(f), but the reasoning that leads to that
10 conclusion is not particularly persuasive.

11 I also suggest that the Sentencing
12 Commission recommend to Congress that the second
13 sentence of 3553(e) be repealed. That sentence provides
14 that when the government moves for a departure below the
15 statutory minimum because of the defendant's substantial
16 assistance, the sentence shall be imposed in accordance
17 with the guidelines.

18 The notion of departures in the
19 sentencing guidelines and in the Federal Rules of
20 Criminal Procedure appears to me to be out of place in
21 the context of an advisory guideline system. In the
22 current system, the duty of the court is to impose a
23 sentence that is sufficient but not greater than
24 necessary to comply with the purposes in
25 § 3553(a)(2). In arriving at a sentence that is

1 sufficient but not greater than necessary to comply with
2 those purposes, the court will consider the sentencing
3 guidelines range as advisory. When the court imposes a
4 sentence outside the guidelines range, however, the
5 court is not departing from anything, but is simply
6 performing the function required by the statute of the
7 Supreme Court. The term departure suggests a
8 presumption that the appropriate sentence was within the
9 guidelines range and that a sentence outside the
10 guideline range therefore must be supported by some
11 important justification. It suggests that somehow the
12 parties are entitled to expect a sentence within the
13 guidelines range. The term variance has the same
14 infirmity. As we all know, the Supreme Court has
15 rejected the notion that district courts may impose a
16 presumption that a guidelines-range sentence is
17 reasonable. It may be important for statistical
18 purposes to make a record of the number of sentences
19 that are within the guidelines range and the number of
20 sentences outside the guidelines range, and it may be
21 important to distinguish between the sentences that are
22 outside the guidelines range that are based upon those
23 motions by the government for leniency because of the
24 defendant's substantial assistance and those that were
25 not, but otherwise the provisions in the sentencing

1 guidelines manual pertaining to departures appear to me
2 to be of no particular significance. It appears to me
3 that when the provisions, that the provision in the
4 manual relating to departures are vestiges of the
5 mandatory guidelines system, and my suggestion is that
6 the Sentencing Commission should consider deleting them.
7 If there are portions of the guidelines relating to
8 departures that need to be considered in determining the
9 sentencing guidelines range, those portions should be
10 moved to the section of the manual relating to
11 adjustments to the advisory sentence range.

12 Rule 32(h) of the Federal Rules of
13 Criminal Procedure requires the sentencing judge to give
14 notice of a possible departure from the sentencing
15 guidelines. The Supreme Court held in *Irizarry* that
16 Rule 32(h) does not apply to variances. Rule 32(h)
17 should be repealed. After the Supreme Court's decision
18 in *Irizarry*, Rule 32(h) has no practical effect. A
19 sentencing judge can impose a sentence outside the
20 guidelines range without notice by basing the sentence
21 on the § 3553(a) factors, which are the factors
22 that ultimately must justify the sentence.

23 Let me conclude by saying, again, that I
24 am in favor of the advisory guidelines system. The
25 theme of my suggestions to the Commission is that our

1 statutory scheme, procedural rules and guidelines
2 manual, which are designed for a mandatory guidelines
3 system, should be redesigned for an advisory guidelines
4 system.

5 CHAIR SESSIONS: Thank you, Judge Holmes.
6 Judge Alvarez.

7 JUDGE ALVAREZ: Thank you. Good morning.

8 CHAIR SESSIONS: Good morning.

9 JUDGE ALVAREZ: Thank you for inviting me
10 to present my view from a district court bench. I began
11 sentencing immediately after *Booker*. I can recall
12 calling Judge Hinojosa, in fact, to see if he could
13 provide me with any guidance about how I should proceed,
14 now that *Booker* had been, that the decision had rendered
15 the guidelines advisory.

16 During my short tenure on the bench, I
17 have sentenced, by my latest calculations, over 5,500
18 defendants, so although in numbers I may be one of the
19 newer judges on the bench, in number of years I may be
20 one of the newer judges on the bench, in numbers of
21 sentencings, I think I have sufficient experience to be
22 able to speak to the application of the guidelines.

23 Now, having listened yesterday afternoon
24 and this morning, one of the things that has come up, of
25 course, is that all the judges agree that it's very

1 difficult to sentence defendants. We have various
2 people involved in the sentencing, but when it comes
3 down to it, it is the district court judges that are, in
4 fact, applying the guidelines and determining what a
5 sentence will be.

6 In performing my duties, I hear often
7 from defense counsel and defendants that the guideline
8 that applies to that particular individual is too high.
9 I have yet to hear anybody say that it is too low, and
10 the complaint is always that it is too high. One of the
11 things I think that they forget is that we are looking
12 at a defendant, yes, as an individual before the court,
13 but also considering a sentence that should be imposed
14 in consideration of a lot of other factors, not just
15 what the defendant himself thinks is appropriate for him
16 and not just what I individually think is appropriate
17 for me. In that respect, I do believe that we should
18 consider a national standard for sentencing, because we
19 are federal courts, we're not state courts, and I have
20 sentenced at the state court, but as a federal court, I
21 believe that it is, in fact, necessary to consider what
22 is going on across the country.

23 The statute specifically provides that we
24 should impose a sentence that avoids unwarranted
25 disparities, and that is part of what we as judges have

1 to consider. In this respect, I do believe that the
2 guidelines are an essential tool for sentencing. There
3 are many who say that the guidelines, because they look
4 at a cold record, based on the offense, the particular
5 factors that apply to that offense, and the criminal
6 history, that they are, you know, in fact not promoting
7 uniformity and justice, but rather, in one way or
8 another, bringing about some sort of unfairness. I do
9 not necessarily agree that uniformity equates to
10 unfairness. In fact, it can, in some instances, promote
11 it. But I do believe that there is a distinction
12 between uniformity and fairness. Now, in our system of
13 justice, we believe in equality and fairness for all,
14 and what that means, in my opinion, is that we have to
15 consider what a similarly situated defendant with a
16 similar history would receive, not just in my particular
17 court, but again, because we're in federal court, across
18 the nation.

19 I don't believe, however, that, that
20 said, that any system of justice can be fair if it does
21 not take into account the individual, and so for that,
22 you know, factor I do believe that it is important that
23 we have discretion. I believe that the guidelines as
24 they are now provide the court with the discretion that
25 we need to impose the sentence that is fair and just to

1 all, not one that considers in isolation the particular
2 offense, the particular defendant, but that considers
3 all the factors that we have to consider.

4 Judge Benavides touched upon the fact
5 that, you know, that we should look at it on the
6 community level. I do believe we should look at it on
7 the community level, but I believe in our instance,
8 because we are federal judges, the communities that we
9 are looking at is the United States of America, not the
10 particular county in which we live, not the particular
11 district that we serve or the particular division where
12 we sit.

13 Having said that, as I said, I do believe
14 that discretion is necessary in order to serve justice,
15 and to bring about fairness. I have, on many occasions,
16 heard from a defendant about their particular case and
17 their particular situation. In conducting my
18 sentencing, as you have heard, you know, I review the
19 presentence investigation report. I do not come to a
20 conclusion about what sentence will be imposed based
21 upon a review of the report, but I obviously reach some
22 conclusions. But I listen to the defendant. I listen
23 to the attorney. I listen to the government. After I
24 have heard from all, then I consider, you know, the
25 sentence based upon all that I have to consider, which,

1 of course, includes the information in the presentence
2 investigation report, includes the 3553(a) factors, and
3 includes anything else that may be presented to me by
4 that particular defendant, his counsel and the
5 government, and anybody else that would speak to the
6 court, because I do, despite the numbers that I have, I
7 do provide each and every opportunity to a defendant to
8 present whatever he may wish, and that includes calling
9 witnesses. I often have a defense counsel calling
10 family members or other people who they believe need to
11 present something to the court, and I listen to all of
12 those. After I have heard all of that, then I determine
13 what the appropriate sentence will be for that
14 particular individual. However, I cannot just ignore,
15 in my opinion, at least, what the guidelines provide for
16 initially, because I believe that if we ignore the
17 guidelines altogether, then we are, you know, going back
18 to a system that comes down to my personal opinion about
19 this, you know, personal defendant.

20 As a state court judge I sentenced in a
21 system that did not have guidelines, and I have seen the
22 disparity that results from that system, and although
23 some may argue that that, in fact, reflects the
24 community opinion about what is appropriate for that
25 particular case, I'm not sure that that is always so,

1 because I have seen, within the same community,
2 different defendants who appear to be very similarly
3 situated who have received very, excuse me, committed
4 very similar offenses, receive very different sentences.
5 As a state court judge, although I consider it to be
6 inappropriate, I also believe that sometimes there are
7 influences on that state court judge that are reflected
8 in sentences that should not be considered for
9 sentencing purposes, and part of that, of course, has to
10 do with the fact that in Texas, at least, our judges are
11 elected judges.

12 I believe that *Booker, Gall* and *Kimbrough*
13 have provided us with the appropriate balance between
14 the abstract nature of the guidelines, because I do
15 believe they are to some degree abstract, with the very
16 human aspects of each particular case that comes before
17 the court, and I believe that consideration of the
18 guidelines provides for both uniformity and because they
19 are now advisory, with the discretion that is necessary
20 to ensure fairness.

21 Now, having said that and having praised
22 the guidelines, I do have some concerns about particular
23 guidelines. One area of particular concern to me is the
24 application of §2L1.2, which is one that I use
25 quite often that is a section that pertains to the

1 immigration cases, that is, you know, either the illegal
2 reentries or the reentries after deportation. And it
3 concerns me as to one particular, one particular type of
4 defendant. That is, I often have in front of me a young
5 defendant, generally a male, I cannot recall a single
6 female in this category, but generally a male who is
7 often in the range of say 18 to 22 who was brought here
8 as a child by his parents, who has been raised in the
9 United States, who has spent his entire life as what he
10 believes is a citizen of the United States, who
11 sometimes in that age range commits some offense or in
12 one way or another comes before an immigration court and
13 ends up being deported. Most of the times the ones that
14 I see have committed a felony. Otherwise I don't know
15 that they generally get deported. Most of the time they
16 have committed a felony. The felony can be a four level
17 enhancement felony or it can be a 16 level enhancement
18 felony. So we have a young person who has been, for all
19 practical purposes, a citizen of the United States, who
20 knows nothing but living in the United States, who quite
21 often does not speak any [Spanish], quite often does not
22 have any family in Mexico, who has, quite often, has not
23 even been to Mexico, who gets deported. They come
24 before the court, and again, depending on the particular
25 offense that resulted in their deportation, they may be

1 looking at the low end of the guideline range, maybe six
2 months in custody, at the high end of the guideline
3 range, depending on those variables, at three to four
4 years in custody. In that particular case, I believe
5 that the guidelines, when they, you know, are up in the
6 three to four year range, quite often are greater than
7 necessary, because this is an individual who, despite
8 whatever felony he has committed, is looking, for the
9 first time, at an immigration offense, having to come to
10 the realization that he cannot live in the United
11 States. And this age range, 18 to 22, I think as
12 anybody who has dealt with those people, anybody who as
13 a parents knows, they are most often not capable of
14 living on their own, especially in a foreign country.
15 Most often they are facing not just the consequences of
16 the felony, the consequences of the immigration offense,
17 but the emotional turmoil of coming to grips with the
18 fact that they will be having to make a living on their
19 own in a foreign country, removed from their family. I
20 do believe that in those cases that there should be some
21 mechanism in the guidelines for consideration of that
22 type of defendant. Cultural assimilation, of course, is
23 one of the considerations in that respect, but I don't
24 think that cultural assimilation always covers this
25 particular kind of defendant. And so I would urge the

1 Commission in that respect to consider whether this is
2 an area that perhaps some adjustment could be made in
3 the guidelines. Now, over time, when these young
4 defendants have gone through immigration court several
5 times, I don't know that it's necessary anymore because
6 as they get older and I see them, occasionally when they
7 continue to come back, as they get older, I feel that
8 well, you know, time should have given them the ability
9 to make the adjustment, but I believe that at least for
10 the first-time offender, in our court system, that there
11 ought to be some adjustment there.

12 Now, let me make a few other comments [that]
13 pertain to the guidelines that I didn't intend
14 originally, that are not part of my written statement,
15 because it's a result of some of what I've heard over
16 the last day and a half.

17 Let me speak to child pornography. I've
18 heard from members of the Commission and from some of
19 the people who have testified that there are many judges
20 and others who feel that the guidelines are too high. I
21 have not had a lot of cases dealing with child
22 pornography, but I have had a couple. One of those was
23 earlier on, when the guidelines had not yet been
24 adjusted. In my opinion, in that case, the guidelines
25 were not high enough. I sentenced the defendant to

1 something above the guidelines.

2 I think it is important to remember that
3 child pornography is not a victimless crime. There are
4 many who look at it as a victimless crime. You cannot
5 engage in even the simple possession of child
6 pornography without some child having been somewhere
7 abused by some adult, you know, individual, male or
8 female, and I say adult, I suppose it can happen with
9 somebody who is not an adult. But the bottom line is
10 that a child somewhere was abused. And you know, we use
11 some very nice terms sometimes. Abused speaks to a wide
12 variety of conduct. What we are talking about is we are
13 talking about children forced into performing some sort
14 of sexual act. Whether it is displaying their body in a
15 sexual manner or whether it is actually engaging in
16 sexual conduct, that is what we are dealing with when we
17 deal with child pornography. And I do not believe that
18 the viewing of child pornography is in any way a
19 victimless crime, because regardless of when that video
20 image was captured, that child has to live with that for
21 the rest of their life. And I will put it to you on a
22 personal level. If, under some circumstance, you have
23 been photographed naked, would you want that on the
24 internet for everybody to see? There's nothing wrong.
25 There's nothing illegal about being naked, and everybody

1 has done it at some point or another, but not a single
2 person in this room would want that out there. Well,
3 what we are talking about is children who have been
4 forced to perform sexual conduct, and those children
5 grow up, and they have to deal with that for the rest of
6 their life. They have families. They have children.
7 They are school teachers, policemen, they are people
8 that wait on us in the restaurants. And for those
9 children to know that there is somewhere out there this
10 image of them in that manner is something that affects
11 them.

12 And the one, the first case that I had,
13 one of the children was identified. I had from her
14 mother a letter addressing, you know, the effect that
15 this has had on her daughter. And the mother addressed
16 the letter because of the fact that she said that her
17 daughter could not, in fact, make herself sit down and
18 write about this because it was something that affected
19 her every single day, you know, in dealing with anybody
20 and everybody. You know, she wondered whether this was
21 a person who had seen her in that video.

22 So I believe that the guidelines reflect
23 some of that concern, and I would urge anybody who is
24 dealing with an issue of child pornography to go back
25 and read some of the reports that reflect these

1 concerns.

2 I am always terrible with names, but
3 there is, you know, the Supreme Court case that touches
4 on these issues in connection with a statute, not
5 necessarily with sentencing. But one of the things that
6 sticks to me from that case is the fact that one, were
7 there not a market for child pornography, we would not
8 have, you know, these images being produced. So I urge
9 the Commission to take that into account. And maybe
10 what we need is not necessarily a better understanding
11 of the guidelines, because I think one of the
12 indications is there may be something wrong with the
13 guidelines, but I think maybe we need a better
14 understanding of the crime itself. And I don't know
15 that that is necessarily a job for the Commission, but
16 perhaps in formulating the guidelines, the Commission
17 could better lay out the rationale for the guidelines and
18 what drove the guidelines in particular.

19 Very quickly, I will touch on one other
20 matter that was raised, as well, and that is pertaining
21 to the drug quantities and the statutory minimums in
22 some cases. You know, I do believe it is appropriate to
23 consider drug quantity, and I believe that the role
24 enhancement or the role adjustments provide for the
25 proper adjustments in consideration of what the quantity

1 is, because I do believe that part of this pertains to
2 culpability. A defendant who agrees to engage in the
3 offense of, you know, drug trafficking, this is, you
4 know, in addition to immigration, what I deal with on a
5 very, very regular basis. And it is appalling to me, as
6 a court, how people so easily agree to engage in drug
7 trafficking. I do believe it is appropriate to consider
8 quantity because of the fact that there is a vast
9 difference between somebody who may be, you know,
10 selling on a street level to somebody who is helping
11 these drug cartels get their product into mainstream
12 America. So I think that the tables as they are now
13 provide for that consideration.

14 With that, I will conclude my statements
15 by saying this: I am an individual with my own personal
16 values and beliefs. You know, the defendant in front of
17 me is an individual with his own particular concerns.
18 But I do believe that it is important for us to remember
19 that it is not me individually and it is not the, just
20 the defendant individually that is affected by
21 sentencing. But as a nation, we have to take into
22 account how this impacts the community that we serve. I
23 believe that the guidelines provide for the proper
24 balance between all of the factors, both those that are
25 already reflected in the guidelines, those set out by

1 3553(a), as well as the individual before the court and
2 and their particular characteristics and history. Thank
3 you very much.

4 CHAIR SESSIONS: Thank you very much,
5 Judge Alvarez.

6 Judge Cardone.

7 JUDGE CARDONE: First of all, let me
8 begin by thanking you for the opportunity to appear here
9 today to give testimony. I'm honored to be able to
10 share with you some of my thoughts regarding the
11 sentencing guidelines. And before - I prepared a
12 written statement and I'm going to go over that with
13 you, but before I do, I want to say two things, because
14 I was just listening to my colleague Judge Alvarez. On
15 page two of my written, prepared statement, I'm going to
16 talk about exactly the same things she just talked about
17 and I find it interesting that she was talking about it
18 because I haven't seen her in probably a year, but it
19 brings home to me how very real that situation is for
20 those of us who are dealing with it on a regular basis,
21 and I'm talking about the, the children that we find
22 here in the United States that are, that come back
23 illegally, and are facing the enhancements under [2L1.2(b)].
24 And I'll talk about that in just a minute.

25 But I wanted to emphasize to you, I

1 prepared this statement with no input from Judge
2 Alvarez, and we both have the same information. The
3 other thing is she mentioned about pornography. And I
4 want to reiterate what she said. I actually see quite a
5 few, not as many as other cases, but I see a lot of
6 pornography cases, and you know, we're not just talking
7 about depicting children by pictures. Some of the
8 graphic, some of the things they've done to children,
9 you know, tied up, hung upside down, I mean you know, if
10 you've ever dealt with some of those images, they are
11 not just nice little images of pretty little girls
12 painted up. Some of them are horrific, horrific images.
13 So I just wanted to say that, because I think some
14 people think we're just talking about pretty painted
15 little girls, and oftentimes we're not.

16 My tenure on the United States district
17 court began in July 2003. Before joining the El Paso
18 Division of the Western District of Texas, I spent over
19 25 years as a state judge. In my early career, I
20 practiced before the federal courts, but as the year
21 progressed, I became more involved in the state court
22 system. Thus, when I was elevated to the position of a
23 United States district court judge, I had only a very
24 passing knowledge of the sentencing guidelines.

25 As I began working with the guidelines, I

1 found them to be extremely useful in setting a framework
2 for sentencing. I appreciated their thoroughness in
3 addressing each separate offense and in incorporating
4 the surrounding circumstances of that offense. However,
5 by January of 2005, sentencing was thrown into a turmoil
6 with the U.S. Supreme Court decision in *Booker*, and it
7 seemed no sooner had I figured out what I was doing,
8 everything was, might be for naught, it was all changed.

9 What I believe to be the result of *Booker*
10 and its progeny is essentially a system of sentencing
11 where the U.S. Sentencing Commission offers its
12 expertise by compiling data which will provide ranges
13 within which a particular sentence should fall.
14 However, the ultimate decision of tailoring that
15 sentence to fit the individual rests in my hands, the
16 hands of the district court judge. Though I'm required
17 to follow the three-step process as set forth in *Gall* in
18 imposing a sentence, in the end I must give a sentence
19 which flows from the correct calculation of those
20 guidelines in keeping with the factors of 3553(a).

21 Though I find this process to be a much
22 improved system of determining a fair sentence for any
23 given defendant who might appear in my court, I've also
24 found that this method is not without its hurdles. Any
25 structure that's built to accommodate every situation is

1 inevitably going to find someone who just doesn't fit
2 that structure. It's some of those more problematic
3 structures that I want to address here today.

4 First, I want to review with you some
5 statistics, so that you get a sense of the breadth of my
6 experience in working with these guidelines. For your
7 information, I've brought with me, and I think each of
8 you have a copy of the 2009 fiscal year statistics for
9 the Western District of Texas. In there you will see
10 that the total criminal case filings for 2009, in my
11 division alone, in El Paso, was 3,424 cases. That's
12 approximately 38 percent of all of the criminal cases
13 filed in our district. There are only four district
14 judges in El Paso. In 2003, when I took the bench, the
15 total number of criminal cases filed in El Paso was
16 2,140. So the number has actually increased by 1,284
17 over the past six years, just in my division. And for
18 fiscal year 2009, in my court alone, there were 898
19 criminal defendant cases that were filed and 963
20 criminal defendant cases closed. Thus I meted out
21 approximately 1,000 criminal sentences in the past
22 fiscal year.

23 The majority of the cases that I see in
24 my court are immigration cases and drug cases. The drug
25 cases involve large quantity of drugs, including

1 marijuana, cocaine, heroin, ecstasy and
2 methamphetamines. The recent publicity that the City of
3 Juarez, Mexico has received, and the indictments by
4 Attorney General Holder of the Mexican drug cartels,
5 indicates that the El Paso-Juarez corridor is one of
6 three major drug smuggling corridors into the United
7 States. In fact, in the indictment filed by Attorney
8 General Holder in August of 2009 against Vicente
9 Carrillo Fuentes, Attorney General Holder stated that
10 approximately 70 percent of the cocaine which entered
11 the United States annually was transported through the
12 Juarez El Paso corridor.

13 So today I'd like to address my remarks
14 to the two areas of the sentencing guidelines that I
15 deal with the most and that I know the best, immigration
16 and drug cases.

17 First, and this is the part that pertains
18 to Judge Alvarez, I'd like to address the issue of the
19 enhancement under [USSG] §2L1.2(b)(1), and that's the
20 enhancement which applies when an alien unlawfully
21 enters the United States and has a prior conviction
22 or convictions. In many of the cases that I see,
23 this enhancement applied, I have before me a
24 young person in his twenties, and it's almost
25 tracking what she said, who was brought into this

1 country as an infant by undocumented parents seeking a
2 better life. This child grew up going to school in the
3 United States, speaking only English, working, and most
4 of the time never questioning where he was born or his
5 nationality. He believes himself to be an American.
6 Then, at some point in his twenties, the person has a
7 run-in with the law. He's convicted of a felony
8 offense, and as a result of that conviction, he's
9 deported from the only country he knows. Though he's
10 deported back to Mexico, he speaks no Spanish, is
11 unfamiliar with that culture, has no family members
12 there to assist him. All of his family is back here in
13 the United States. This person oftentimes will panic,
14 return back into the United States, not realizing that
15 if he's caught he faces sentences of 37 to 46 months for
16 a plus 16 enhancement, 24 to 30 months for a plus 12
17 enhancement, and or 12 to 18 months for a plus eight
18 enhancement.

19 Now, contrast that with somebody who has
20 come into the United States repeatedly for the past 20
21 years. That person has been voluntarily removed to
22 Mexico 11 times, has been returned to Mexico two times.
23 This person is found at the El Paso County Detention
24 Facility because he's been arrested and convicted of a
25 DWI. He has numerous prior run-ins with the law for

1 public intoxication, misdemeanor theft, assault, all
2 with the labels or disposition of the case unknown.
3 This person would probably be a total offense level of
4 six, criminal history category two, and his sentencing
5 guideline range would be one to seven months.

6 I'd like to propose to you the following:

7 I believe that the sentencing guidelines should
8 recognize circumstances where a defendant has been in
9 this country for many years, only to find that now the
10 only country he knows is no longer an option for him.
11 These individuals are often in this country through no
12 fault of their own. Shouldn't there be some recognition
13 of that in mitigation of their guideline range? Perhaps
14 there could be an adjustment provision, much like a
15 minus three adjustment for acceptance. It could allow
16 for a downward adjustment by factoring in that there are
17 numerous, factoring in their numerous prior years of law
18 abiding residence in this country.

19 Currently, to address this issue, counsel
20 for the defendant often files what we call a motion for
21 downward departure, citing cultural assimilation.
22 Though recognized in the Fifth Circuit, it is a highly
23 discouraged and infrequently granted departure. It
24 essentially requires the sentencing court to make a
25 finding that the defendant's circumstance are so

1 atypical or extraordinary that it warrants a downward
2 departure on the basis of cultural assimilation, and as
3 I've indicated, these are cases that I see quite often,
4 as evidenced by Judge Alvarez referring to the same
5 thing, thus making a finding by me that they are
6 extraordinary or atypical is just not warranted. That's
7 why I would propose to you that these defendants should
8 be entitled to some sort of formulaic downward
9 adjustment. I believe that this would avoid many of the
10 variances that the judges must resort to in order to
11 recognize those special circumstances.

12 A second issue in immigration that I'd
13 like to touch upon is the criminal history
14 documentation. Though over the years I have seen many
15 different types of immigration cases, the vast majority
16 of those cases that pass through my court are illegal
17 reentry, 18 U.S.C. § 1326 cases. Many of these
18 defendants are charged with enhanced felonies understand
19 1326(b)(1) or 1326(b)(2), and it is these enhanced illegal
20 reentry cases which cause the most consternation. It is
21 the rare enhanced 1326 case that doesn't require an
22 extensive check into the defendant's criminal history.
23 Most of these criminal histories expand over decades,
24 entail searching into court documents from New York to
25 California to Denver to Florida, in any one given case.

1 Often cases must be postponed to allow the United States
2 probation offices, officers to obtain copies of
3 documents from small counties which keep very poor
4 records. And with the advent of computer filing and
5 docketing, many courts have destroyed paper copies
6 altogether and can only provide the court with some sort
7 of computer generated entries. This, in most cases,
8 doesn't satisfy the needs or the requirements of
9 documenting a defendant's criminal history for purposes
10 of accurately determining that correct enhancement
11 calculation and their criminal history category.

12 Though I am unsure of the exact solution
13 to this problem, I would like to point out that it is
14 truly a problem that I see on almost a daily basis. One
15 solution might be to limit the criminal history in those
16 cases to a certain number of years, perhaps ten. I
17 don't know the exact fix to this dilemma, but I would
18 point out to you that it is a very time consuming and
19 difficult task to comply with the requirement of this
20 section of the guidelines.

21 Now, turning to drug cases. The
22 situation under the guidelines that I'd like to address
23 is a common one along the U.S. Mexican border, a
24 multi-defendant drug smuggling conspiracy case. This
25 issue involves my giving what I consider to be disparate

1 sentences to co-defendants in the same case.

2 I'll use as my example a case involving
3 seven defendants charged in a seven count indictment for
4 conspiracy drug offenses including possession with
5 intent to distribute large quantities of
6 methamphetamine, marijuana and MDMA, which is ecstasy.
7 Obviously, since it's a conspiracy case, each of these
8 defendants have different roles to play. The main
9 defendants are the ones who directed the transporting
10 and loading of the controlled substances between Mexico
11 and the United States to stash houses in El Paso, and
12 then subsequently directed those transfer of those drugs
13 to far away states such as Georgia and Tennessee. Then,
14 as co-defendants, there are the truck drivers who
15 transported illegal narcotics from El Paso, Texas, into
16 the interior of the United States, often using what we
17 call a cover load. In this case, one of the leaders of
18 the drug conspiracy received a sentence as low as 90
19 months, while the truck driver received a 120-month
20 sentence, which is the mandatory minimum.

21 What I would like to address regarding
22 the way these cases are handled under the guidelines
23 calculations pertains to the availability of safety
24 valve, which would allow for a guideline range below the
25 mandatory minimum of 120 months for the leader

1 organizer. Compare this to the inability of the
2 co-conspirator with a prior criminal record to be
3 sentenced below that mandatory minimum. This low level
4 co-conspirator is now eligible - is not eligible for
5 safety valve because of a prior conviction. Even if he
6 fully cooperates with the government by providing a
7 safety valve statement, and even if he played only a
8 minimal role, a minor role or even a minimal role in
9 that offense, if this low-level co-conspirator is a
10 truck driver with a prior misdemeanor record that
11 somehow amounts to more than one criminal history point,
12 any possibility of getting below that mandatory minimum
13 is foreclosed. Meanwhile, safety valve for the leader
14 organizer is automatic. Certainly, the low-level
15 co-conspirator can seek some sort of 5K.1 motion for
16 downward departure from the government, but it is not
17 automatic, and frankly, because the government's
18 obtained everything they wanted from the conspiracy
19 leader, who obviously would have much more knowledge
20 about what was going on, the minor co-conspirator is
21 facing a mandatory minimum. And I, as the judge, seeing
22 the potential injustice of this, am powerless due to the
23 mandatory minimum.

24 Now, I recognize, and I brought it with
25 me, that in your March, 2009 publication, *Impact of*

1 *Prior Minor Offenses on Eligibility for Safety Valve,*
2 you discuss my concern in part with regards to that,
3 those prior minor offenses. In the conclusion of that
4 publication, you state that only 260 defendants, 1.1
5 percent of all drug trafficking offenders, were
6 disqualified from eligibility for safety valve due to
7 minor offenses in their criminal history. Thus you
8 conclude prior convictions for minor offenses have a
9 minimal impact on safety valve eligibility. First, in
10 my court, this is not such a rare occurrence, and as a
11 judge, I strive to give fair and reasonable sentences to
12 100 percent of the defendants appearing before me, not
13 some calculated subset, and I believe that fairness and
14 reasonableness demands consistency. This is what I
15 believe justice requires. To mete out an injustice to a
16 defendant should not be disregarded because it is a
17 statistical minority. Furthermore, I would argue to you
18 the opposite statistic, and that is if this provision is
19 allowing 99 percent of leader organizers to get that
20 less significant sentence than a minor player, where is
21 the justice or fairness in that?

22 I have attempted to limit my comments
23 today to the few areas where I believe the guidelines
24 and statutes have resulted in disparate sentences.
25 These comments, however, should not belie the fact that

1 I believe the sentencing guidelines generally work very
2 well.

3 Thank you for the opportunity to speak,
4 and I'd be glad to answer any questions.

5 CHAIR SESSIONS: Thank you, Judge
6 Cardone.

7 So we open it up for questions. Mr.
8 Wroblewski.

9 COMMISSIONER WROBLEWSKI: Yeah. I'd like
10 to just ask you, Judge Cardone, just something about the last
11 sentence you spoke about.

12 JUDGE CARDONE: Sure.

13 COMMISSIONER WROBLEWSKI: The guidelines
14 and the safety valve provision in the guidelines, in the
15 statute, are supposed to preclude organizers and leaders
16 from getting reductions under the safety valve. So I'm
17 a little curious about that. And one of the things you
18 talked about in one of the other panels is that if a
19 leader or organizer involved in these truck loads, their
20 offense levels should be in the high thirties, if not
21 the forties, and they may be getting reductions because
22 of substantial assistance because they're cooperating.

23 JUDGE CARDONE: Right.

24 COMMISSIONER WROBLEWSKI: But isn't part of
25 that that those reductions are taking them down to as low

1 as a 90-month sentence?

2 JUDGE CARDONE: No, no question, and
3 again I will say to you that this is a conspiracy case.
4 So in a conspiracy case, the amount, if you've got a
5 bunch of people working in conspiracy, the amounts are
6 attributable to everybody in that conspiracy. So even
7 the one truck driver who's taking only a part of that
8 huge amount of drugs is going to be in the conspiracy
9 and is going to be sentenced with everybody else, and so
10 they're in the high 40 range too. And yet they're not
11 going to get the benefits that that leader organizer can
12 get. And let me, let me qualify. When I say leader or
13 organizer, I use that term to differentiate from - I
14 know under the guidelines it's a very specific term, but
15 I meant even if it's not the actual top of the line
16 leader organizer, to be so much more culpable and be
17 eligible for those reduced sentences because, because
18 you're - some of these people are Mexican nationals, so
19 they don't have a record in the United States. God
20 knows what they have in Mexico, but they don't have a
21 record in the United States, so they're not going to
22 have to worry about that, that minus one that won't
23 allow them to get a safety valve, whereas you've got
24 some truck driver who picked up a DWI, you know,
25 sometime in Tennessee, and he's not going to be eligible

1 for that because he, he scores higher. So that's really
2 what I'm trying to refer to more.

3 COMMISSIONER WROBLEWSKI: And I take it
4 that the steps that the Commission has taken over the
5 years, for example, if you're a minor player, you don't
6 have the leading role, you have levels - more levels off of
7 the leading role, you have two to three levels taken off
8 for accepting responsibility, and the person who's more
9 culpable is supposed to be going up because of being an
10 organizer or leader or manager or something, I take it
11 you don't think any of that is sufficient, that those
12 things are not sufficient to take into account.

13 JUDGE CARDONE: I think it helps, but if
14 you're looking at a mandatory minimum, there's nothing
15 that I can do.

16 CHAIR SESSIONS: Commissioner Howell.

17 COMMISSIONER HOWELL: I just want to
18 start off with one comment about the child pornography
19 case that both of you judges made, and that is that
20 across the country, both at our hearings and it's
21 revealed in other areas, so many judges think that our
22 child pornography guidelines are producing too severe
23 sentences for some of the offenders that they see in
24 front of them. I think because across the country
25 consistently in each circuit, the highest variance rate

1 among all the different offense types is in the child
2 pornography area, this is something that is a priority
3 for the Commission, and that we're looking at.

4 We're in the process, I think Judge
5 Alvarez, you said having the Commission, you know,
6 having the Commission do some sort of, you wonder
7 whether we would be able to do a report or study of this
8 type of offense and the type of offenses that are coming
9 out to help explain some of the variances, and we are
10 undertaking such, such a study right now, looking at the
11 literature regarding recidivism, how many child
12 pornography possessors actually have contact with,
13 contact of a sexual nature with children, and so we are,
14 we are undertaking that study now, and re-examining that
15 child pornography guideline to see if there are
16 refinements that can be made that make it more useful to
17 judges around the country, because the variance rate is
18 such that this is something that many of us feel we just
19 can't ignore.

20 JUDGE ALVAREZ: May I make one comment?

21 COMMISSIONER HOWELL: Yes.

22 JUDGE ALVAREZ: You said one of the
23 things that you're looking at is to see how many of
24 those offenders have actual contact with children -

25 COMMISSIONER HOWELL: Yes.

1 JUDGE ALVAREZ: And I see that in very
2 different settings, and I would urge the Commission to
3 consider that that is not necessarily the most important
4 criteria. And I'll give, by way of example, you know,
5 there was an incident, I don't remember it was six
6 months ago, a year ago, where a news reporter was
7 videotaped in her room by some stalker, and that was put
8 out to the public. I don't know that it was, you know,
9 more or less embarrassing to that news reporter, the
10 fact that that stalker had not personally touched her.
11 Okay? So it is not just a question of is there physical
12 contact. I go back to, you know, the statement that I
13 made, it's a matter of is there a market for this,
14 because there are those who will view it?

15 COMMISSIONER HOWELL: I didn't mean to
16 say that that was the only harm we were looking at. I
17 think there are a variety of harms, and that one is the
18 embarrassment, continuing, almost permanent
19 embarrassment.

20 JUDGE ALVAREZ: More than embarrassment.

21 COMMISSIONER HOWELL: But one of the, you
22 know, significant harms that, that we are looking at
23 gauging or trying to evaluate is people who possess
24 child pornography and whether they do have actual
25 contact with children. So I agree with you that there

1 are a number of other harms that Congress decided to get
2 it again, the Supreme Court decided, and these are
3 overriding things that we're looking at in this report.

4 I started with comment. I actually
5 wanted to turn to, for this question, to a comment Judge
6 Holmes made.

7 JUDGE CARDONE: Can I?

8 COMMISSIONER HOWELL: Yes.

9 JUDGE CARDONE: Because I just wanted to
10 say something about your job on the child pornography,
11 and I didn't mean to cut you off, but my concern is this
12 sort of leaves the topic, and that is I would only say,
13 on your looking at it, and some of the comments that you
14 get that it's either too harsh or too easy, I know as a
15 judge that when I get these child pornography cases,
16 what happens is that we get these presentence
17 investigation reports, and they cite numerically, and
18 when somebody downloads this stuff, it can be volumes of
19 stuff or it can be just a few things, normally it's
20 volumes, because once you get it on, it just keeps
21 coming.

22 But we get sort of this very sort of
23 analytical analysis of like what is on the computer and
24 how many images and all of those kinds of things. And
25 I, I see it quite often, not, I can't say, you know, but

1 I see it quite often, and when you see it and you read
2 it like that, it's not the same thing.

3 And I will give you only an example that
4 I had. And that was that I was reading this report, and
5 it was making reference to the fact that he had, this
6 person had clicked on some website. It had a very sort
7 of innocuous name, as some of them do, and then all of a
8 sudden found himself in all of this child porn. And the
9 attorney tried to use that as a way to say, Judge, you
10 know, this is not a bad guy, he has no prior record, et
11 cetera.

12 At the sentencing hearing, I actually
13 got, got testimony, and they brought the website in, and
14 you know, if you have to see those images, if the judges
15 or the people that are commenting about this saw what
16 they're talking about, not just looked at it sort of
17 analytically, it is a lot different. And I would only,
18 I'm only saying that to you because it's one thing to
19 read about it, but it's another thing to see some of
20 those images, and when you see those images, when we're
21 talking about child pornography, it is not something
22 that - it's like Judge Alvarez says, and again, it's
23 not something that you can go, "Oh, this is just
24 harmless." These are oftentimes very young children, in
25 all kinds of acts and circumstances, and I, I don't know

1 if the guidelines can somehow - I mean, you know, you
2 hate to force anybody to look at these pictures, but
3 I'll tell you what, when you look at these pictures, you
4 have a very different opinion than if you're just doing
5 some sort of analytical, well, it's 1,550 images versus
6 two images. I would only point that out.

7 COMMISSIONER HOWELL: This question is
8 for Judge Holmes. One of the things that you
9 recommended to us is to update the manual to make it,
10 you know, to make it more workable, this advisory, and
11 one of the things that you've suggested with regard to
12 the departures, Chapter Five, is perhaps they should be
13 deleted, and you're not the first person to appear in
14 front of us to make that suggestion. And I have to say
15 one of the things that I puzzle over with respect to
16 that suggestion is our statutory mandate, which tells us
17 that we, as a Commission, shall, and it says shall,
18 consider how much relevance certain factors should play
19 in sentencing, and those factors include age, family
20 ties, community ties, education, and I think that the
21 first Commission looking at that statutory mandate, what
22 their job was, created Chapter Five in part to address
23 those factors and make a number of them discouraged
24 factors. So if we are looking to update the manual, and
25 looking at the ones, the suggestion on one side to just

1 delete all references to those discouraged factors, and
2 from the other side, our statutory mandate to give
3 guidance to judges about how they should consider those
4 factors, what relevance they should play in sentencing,
5 I puzzle whether the elimination option is really an
6 option that which comports with what we're supposed to
7 be doing. I just wanted to know if you could help me or
8 give me your thoughts on that.

9 JUDGE HOLMES: It may not be the best
10 suggestion for how to go about it. My real thought is
11 that we are five years into an advisory guideline system
12 and we're still dealing with a manual, rules and
13 statutes designed for a mandatory system. That's
14 really, in thinking about that, and in thinking about
15 what I do as a judge, what is helpful to me, and it is
16 helpful, it is helpful to have the sentencing guideline
17 range, to calculate that and look at it and think about
18 it in light of the 3553(a) factors. And, and but once,
19 once I have the sentencing guideline range and I have
20 the defendant in front of me, and I have the 3553(a)
21 factor to the consider, by in large, the departure
22 provisions in the manual don't play much effect on -
23 don't really affect what I do.

24 COMMISSIONER HOWELL: So if those
25 departure provisions were revised to actually explain

1 more fully what, how those offender characteristics
2 should be considered as part of sentencing, would, would
3 that be more helpful, a rewrite of that chapter?

4 JUDGE HOLMES: You know, a rewrite of the
5 35, you know, some commentary on the 3553(a) factors
6 probably would be helpful, and how you apply them.
7 Certainly we all struggle with that. We know there is
8 no magic formula, and we all know that, on how to apply
9 those factors. It's a difficult process, and it
10 involves judgment. But once you, under the sentencing
11 guidelines manual, you calculate the guidelines range
12 and then you look at determining whether there are any
13 departures that apply, if there are departures that
14 apply, and you don't change the guideline range, then
15 you're outside the guideline range. But once you're
16 outside the guideline range, you're already into the
17 3553(a) factors, and they're going to control in every
18 instance. That's what you have to justify your ultimate
19 sentence on anyway. And because of the, the other
20 things that I mentioned, and everybody is aware of it,
21 the *Irizarry* case, when you get in, when you go into
22 sentencing and you hear the arguments and you, you hear
23 the presentations, and you make a decision, and some of
24 the judges, I think Judge Jones mentioned in the earlier
25 panel, you don't necessarily know where you're going to

1 come out. If you did, there would be no point in having
2 the arguments and the allocution and all those things.
3 You're going to listen to all that, and then make a
4 judgment. And if you're going to impose a sentence that
5 is either above or below the guideline range, and you
6 hadn't anticipated doing that in time to give notice,
7 then, then you're going to base it on the 3553(a)
8 factors and not on the, and not on the manual.

9 I will say, unless you try a case - I
10 don't know how the other judges do this, but if we have
11 a, if you you know the statistics of the percentage of
12 them that plead guilty, we have to see them at the
13 change of plea hearing and at the sentencing. And I
14 will read the presentence report either the day before
15 or the day of sentencing, and then go over it with the
16 probation officer before the hearing. But I don't read
17 it two weeks in advance. You know, I wouldn't remember
18 it if I did.

19 If we have a trial, and then we have
20 sentencing, I can give notice, and I've done that. I'm
21 thinking about departing upward. I have done that where
22 I've heard a trial, and I know the case, and I can give
23 them advance notice. But if all we have is a change of
24 plea, I may not know I'm going to consider a departure
25 until I read the presentence report, because I don't

1 have enough information about the case.

2 So the departure provision, in terms of
3 what I do with *Booker* and with *Gall* and *Rita* and all
4 those cases, is not, it's just not a significant part
5 of, of what - we may look at it in terms of how we fill
6 out the sheet that goes to the Sentencing Commission,
7 but in terms of the actual decision making, it's not a
8 significant part.

9 CHAIR SESSIONS: Judge Hinojosa.

10 COMMISSIONER HINOJOSA: This is just, I
11 guess a follow-up. *Booker* and the cases since then have
12 said the procedure is termination of the guideline range,
13 consideration of departures, and then going to
14 variances. The one thing, when you talk about 3553(a)
15 factors, when you look at those factors, two of them,
16 two of the seven of the guidelines, one is the
17 guideline, the other one is the policy statement, which
18 is the departures, and I, as a judge -

19 JUDGE HOLMES: And it's all written for a
20 mandatory guideline system. And I do look at those
21 things, and I say it, and again, to the extent that
22 someone argues for a departure under the guidelines, I
23 will look at those guidelines and I will make a
24 determination is it applicable. It's part of my duty.
25 And if one side or the other argues for a departure

1 under one of the provisions of the guidelines manual, I
2 will make a decision, either it fits or it doesn't fit,
3 because it's part of what I'm required to do, and it
4 makes a complete record for appeal. But at the end, the
5 decision on the sentencing is going to be based on the
6 3553(a) factors, and that does include considering the
7 guidelines, but there are a lot of things in the
8 departures that - I mean I, in my, in my experience,
9 it's just not a very practical aspect of the manual
10 that's helpful to us at this point.

11 COMMISSIONER HINOJOSA: You are required to
12 look at it, and you know, really, one of the things that I
13 don't think the Commission has done a good enough job is
14 to really explain [§]5K2.0 with regards to the
15 possibilities for the cases that have been brought up by
16 the two federal border judges, and the opportunity not
17 just to look at 5H1, but point six, but then also go to
18 5K2.0 with all the possibilities there.

19 But it appears to me that the statute
20 does require the steps that you just described, and then
21 to say well, it was written when the guidelines, that
22 statute was written when the guidelines were mandatory.
23 Nevertheless, the Supreme Court has left it there. They
24 decided which parts of the statutes would be written
25 off, but the statute is still there.

1 JUDGE HOLMES: And that's true. And I
2 do, in every instance, I tell them we're going to go
3 through the steps, including the departure steps under
4 the guidelines. If someone argues for a departure or
5 asks for a departure under the guidelines, we consider
6 it, listen to the arguments, reads the cases if they're
7 applicable cases, and make a determination.

8 But you know, and my point was not that
9 we should not be doing that as judges today. I mean
10 that is our duty to do that today. But at the end, we
11 have to make the decision based upon – we have to
12 impose a sentence that is sufficient but not greater
13 than necessary to comply with the purposes of [18 U.S.C. §
14 3553(a)(2)], and that's, in the final analysis, what we're
15 supposed to do. Consideration of the guidelines is one
16 of those, one of those points. When we do that, when we
17 do that, we have done our duty under the law as it
18 stands today, and if it's not a sentence within the
19 guideline range, I don't think that we're departing from
20 anything or varying from anything. We're simply doing
21 our duty under the statutes. And I would like to see us
22 move toward a, a system that is actually designed for an
23 advisory guideline system.

24 And I don't disagree with you about what
25 I'm supposed to be doing today. It may be that, in my

1 experience, the, the 35 - the departures don't play a
2 big part in our sentencing, other than substantial
3 assistance. Substantial assistance still plays a really
4 big part in sentencing. The others don't play a big
5 part. I very rarely get arguments based on the
6 guidelines. We do occasionally. But we don't, we don't
7 very often get arguments based on departures under the
8 guidelines.

9 But I do think we should be rethinking if
10 this is a good system, and I think it is. I think the
11 advisory guideline system is a good system. I think
12 it's superior to the mandatory guidelines system. I
13 think it's superior to having sentencing without any
14 guidelines at all. If we're going to do that, I think
15 we ought to rethink the whole scheme, including the
16 statutes, about what we're required to do and how we're
17 required to do it.

18 And it's very helpful to me to know here
19 is a sentencing range that, over time, has been the, a
20 common range for sentences like this. That's helpful to
21 me. But a lot of the rest, some of the other things are
22 not. That's the meat of the guidelines, and I think
23 that is helpful. The rest of it I think is probably not
24 so helpful.

25 CHAIR SESSIONS: Commissioner Friedrich,

1 do you have anything?

2 COMMISSIONER FRIEDRICH: Yes. Judge
3 Cardone, thank you for providing the statistics. This
4 is published material to be used by the court?

5 JUDGE CARDONE: It's, I don't know who
6 it's published to. It's certainly published to us, and
7 it is prepared by our district clerk, and provided to
8 all of us, and so we receive it. I received it just
9 last week, and so I was able to bring it with me.

10 COMMISSIONER FRIEDRICH: Well, it's
11 interesting, it's very interesting to me how it's broken
12 down, different reports by judge in terms of your case
13 load, criminal and civil, and bench hours and how long
14 it takes to resolve a case and all these factors. It's
15 very interesting to me.

16 I'm wondering, and I pose this question
17 to all of you, what your reaction would be to having
18 information published about the sentences you impose.
19 You know, in the advisory system, the litigants are much
20 more - much less certain about what sentence they might
21 expect before a certain judge. It seems to me it would
22 be especially helpful for them, appearing before certain
23 judges, to have a better sense of what judges have done
24 in particular types of cases. And I'm just interested
25 in what your reaction would be to having more

1 information providing, provided about individual judges'
2 sentencings.

3 JUDGE CARDONE: Well, I would say to you
4 that I think that's probably not the case, because the
5 attorneys that appear in front of us on a regular basis
6 know us very well, and know the, know sort of what gets
7 us going and what doesn't. I mean I, I don't know how
8 else to put it. But I would say to you that each of
9 these, these defendants are represented by counsel who
10 are in our court every single day, who know us, who know
11 sort of the things that we look at and, and you know, I
12 can tell because the attorneys argue them to me, and
13 sort of know, and have said to me, and I've told my
14 client, judge, that, you know, you don't like blah,
15 blah, blah blah. And I don't mean to say that it's our
16 personal opinions, but it's sort of the way we look at
17 different issues, the factors, some of the factors, et
18 cetera, et cetera. So I don't know that statistically
19 that would make a big difference, because I think
20 nationally maybe, but in our communities, the lawyers
21 that practice in front of us, I think, and I'm a big
22 believer in consistency, I think because of your
23 reputation and the way you consistently hand out
24 sentences, that those lawyers then counsel their clients
25 of that. So I think oftentimes they already have that

1 information.

2 COMMISSIONER FRIEDRICH: Judge Alvarez.

3 JUDGE ALVAREZ: I would agree with that.

4 I don't have any problem with, you know, my statistics
5 being published. They are quite open records so that is
6 not an issue. But I believe that the attorneys that
7 practice regularly are familiar with what we tend to do
8 in similar cases, and I don't know that it would make
9 any difference to the particular defendant, because
10 obviously he's already before us. So that as a
11 defender -

12 COMMISSIONER FRIEDRICH: In terms of
13 deciding whether to plead, that sort of thing.

14 JUDGE ALVAREZ: I suppose in that respect
15 it might help to a certain degree, but I think that for
16 the most part they'd get that information from their
17 counsel, because they do know our work already.

18 COMMISSIONER FRIEDRICH: Judge Holmes.

19 JUDGE HOLMES: I have no objection to
20 that information being compiled and published. I agree
21 with what the other judges said, that most of the
22 lawyers are going to be aware, and so for that purpose,
23 it's, it has some value, but not great. But the public
24 has an interest, a legitimate interest in knowing what
25 we do, and, and being able to form their own opinions on

1 whether we're doing our job properly, and I don't have a
2 problem with that information being published.

3 CHAIR SESSIONS: Well, thank you all very
4 much for coming here today. This is a very interesting
5 discussion. We'll take your thoughts, and clearly, I
6 think the expression is under advisement. Thank you.

7 (Recess taken from 11:30 to 11:47.)

8 CHAIR SESSIONS: Well, welcome. This is
9 exciting for us.

10 Mr. Lappin, we've been together at
11 meetings all across the country, in the Criminal Law
12 Committee for, in your case, for ten years, and to have
13 you testify before the Commission is an honor for all of
14 us. And Ms. Vance, I really sincerely appreciate your
15 coming here today. So this is our last panel
16 discussion, and we're really looking forward to it.

17 So let me introduce each of you to the
18 Commission.

19 Harley Lappin was sworn in as director of
20 the Federal Bureau of Prisons in April of 2003. He has
21 a long and distinguished career as a public
22 administrator with the Bureau of Prisons. He began his
23 career in November of 1985 as a case manager at FCI in
24 Texarkana, Texas. He was promoted throughout the ranks
25 through the Bureau. Mr. Lappin received a Bachelor of

1 Arts degree in Forensic Studies from Indiana University
2 in Bloomington, Indiana, in 1978, and a Master of Arts
3 degree in Criminal Justice and Correctional
4 Administration from Kent State University in Kent, Ohio
5 in 1985.

6 Today is special for me. One of my
7 favorite experiences of my professional life, really my
8 first experience, was as a teacher and warden, which, of
9 course, was not under your jurisdiction at that point.
10 And then I worked my way through law school in the
11 General Counsel's Office, Office of the Bureau of
12 Prisons in Washington, D.C. So that's sort of a, I
13 don't know, is that a circle of history or something
14 that I'm, many years later, I'm -

15 DIRECTOR LAPPIN: We were lucky to have
16 you.

17 CHAIR SESSIONS: I'm not so sure about
18 that.

19 And Joyce Vance was confirmed as United
20 States Attorney for the Northern District of Alabama in
21 August of 2009. Prior to serving that post, she was
22 chief of the Appellate Division in the U.S. Attorney's
23 Office in the Northern District of Alabama, where she
24 has worked since 1981. Before entering government
25 service, she was an associate at the Birmingham law firm

1 of Bradley, Arant, Rose and White from 1988 to 1991.
2 She earned her Bachelor of Arts degree from Bates
3 College in 1982, and her law degree from the University
4 of Virginia Law School in 1985.

5 For those of you who don't know, Bates
6 College is in Lewiston, Maine, which happens to be the
7 school where my eldest daughter went.

8 With those personal introductions,
9 Mr. Lappin.

10 DIRECTOR LAPPIN: Thank you, Judge. It's
11 really a pleasure for me to be back before you for the
12 hearing. I certainly appreciate the opportunity to
13 appear before you today and discuss the Bureau of
14 Prisons inmate reentry programs, as well as the
15 challenges we are facing, including continued increases
16 in the size of the inmate population, unfortunately
17 without corresponding increases in capacity or staffing
18 for the agency.

19 Over the past 20 years, the federal
20 inmate population has increased by more than 200 percent
21 to more than 209,000 inmates. Over the past few years,
22 we haven't been able to build enough facilities to keep
23 up with the increase in the federal inmate population,
24 and we have not been able to increase staffing, as well.
25 Today our inmate to staff ratio is 50 percent higher

1 than that reported by the five largest state departments
2 of corrections. We are forced to double bunk nearly all
3 of our high security institutions, many of whom are
4 aggressive and violent offenders, and have various
5 antisocial tendencies, and we are triple bunking nearly
6 half of the remaining inmate population housed in our
7 lows and mediums. Over the past 25 years, the number of
8 inmates in federal prisons who have a history of
9 violence has increased more than six-fold, and that is
10 affiliated with gangs have increased by four-fold.

11 Rigorous research demonstrates that
12 increases in crowding and reductions in staffing lead to
13 increased serious assaults by inmates, both on staff and
14 inmates. Additionally, crowding and reduced staffing
15 levels affects inmates' access to important services,
16 and limits our ability to prepare inmates for reentry
17 into the community. Inmates are being released,
18 unfortunately, without the benefit of some programs that
19 enable them to gain the skills and training necessary to
20 reintegrate successfully. In fiscal year 2007-2008, for
21 the first time, the Bureau of Prisons was not able to
22 meet the statutory mandate for treating 100 percent of
23 eligible offenders in need of residential substance
24 abuse treatment. The waiting list for such treatment
25 currently exceeds 7,000 inmates, and waiting lists for

1 education programs currently exceed 15,000 inmates.

2 Our most important reentry program, or
3 one of them, Federal Prison Industries, is dwindling,
4 rather than expanding. We operate factories, primarily
5 at medium security and high security institutions, where
6 we confine the most violent and criminally sophisticated
7 offenders. More than three-quarters of the inmates who
8 work in Federal Prison Industries have been convicted of
9 serious offenses, including drug trafficking, weapons,
10 robbery or other violent offenses. Work in Federal
11 Prison Industries keeps inmates productively occupied,
12 thereby reducing the opportunity for violent and other
13 disruptive behavior. Work in Federal Prison Industries
14 also teaches inmates job skills and work ethics, and it
15 does so without the use of appropriated funds. Rigorous
16 research has confirmed that inmates who participate in
17 the program gain valuable skills and training, resulting
18 in substantial reductions in the rate of recidivism.
19 Federal Prison Industries participants are 24 percent
20 less likely to recidivate, when compared to similar
21 nonparticipating inmates, and inmates who participate in
22 vocational or occupational training programs are 33
23 percent less likely to recidivate than similar inmates.
24 Additionally, Federal Prison Industries participants
25 were 14 percent more likely to be employed one year

1 after release from prison than their nonparticipating
2 peers. Finally, inmates in Federal Prison Industries
3 are less likely to be involved in misconduct while
4 incarcerated, as compared to other inmates.

5 Last year Federal Prison Industries
6 closed or downsized 20 factories, resulting in the loss
7 of approximately 1,700 inmate jobs. That's nearly ten
8 percent of the federal prison inmate workforce in Prison
9 Industries. These actions, while necessary, can be
10 expected to result in more idleness, higher recidivism,
11 and increased staffing required on the part of the
12 Bureau of Prisons to supervise more idle inmates.

13 There are many factors that significantly
14 affect recidivism, including prison programs. Research
15 by the Washington State Institute of Public Policy
16 confirms that programs such as those operated by the
17 Federal Bureau of Prisons, which include residential
18 drug treatment, Federal Prison Industries, education and
19 vocational training, yield savings as high as \$6.23 for
20 every dollar spent, as a result of lowering costs for
21 arrests, conviction, incarceration, supervision and
22 avoiding further crime victimization.

23 The longstanding philosophy of the Bureau
24 is that preparation for reentry begins on the first day
25 of imprisonment. The broad array of programs available

1 at every federal prison is designed to facilitate
2 prisoner reentry. All medically-able sentenced inmates
3 are required to work. Most inmates are assigned to do
4 institution jobs such as food service worker, orderly,
5 plumber, painter, warehouse worker, groundskeeper. They
6 earn between 12 and 40 cents per hour in these
7 institution jobs. Inmates who participate in Federal
8 Prison Industries earn up to \$1.15 per hour.

9 The Bureau of Prisons' educational
10 programs are effective in reducing recidivism. Inmates
11 who participate in these programs are 16 percent less
12 likely to recidivate, as compared to their
13 nonparticipating peers. Inmates who do not have a high
14 school diploma or a General Educational Development
15 certificate must participate in the literacy program for
16 a minimum of 240 hours or until they obtain a GED.
17 Non-English-speaking inmates are required to participate
18 in an English as a second language program until they
19 are proficient in oral and written English. Post-
20 secondary occupational-oriented programs are available
21 in many institutions, and inmates with their own
22 resources are permitted to enroll in post-secondary
23 education programs.

24 The Bureau operates 62 residential
25 substance abuse treatment programs for the 35 percent of

1 the inmate population who have moderate to serious
2 substance abuse problems. Inmates in these programs are
3 housed together in a separate unit of the prison that's
4 reserved for drug treatment, which consists of intensive
5 half-day programming five days a week. The remainder of
6 the day is spent in education, work skills training or
7 other inmate programming. Upon completion of this
8 portion of the treatment, aftercare services are
9 provided to the inmate while he or she is in the general
10 population, and also later at the residential treatment
11 center. A rigorous evaluation of the residential drug
12 abuse treatment program demonstrated convincingly that
13 offenders who participated in residential drug abuse
14 treatment were less – and were released to the
15 community for at least three years, were 16 percent less
16 likely to be re-arrested and to have their supervision
17 revoked and returned to prison than inmates who did not
18 receive such treatment. This reduction in recidivism is
19 coupled with a 15 percent reduction in drug use for
20 treatment subjects.

21 The agency is often challenged on its use
22 of residential reentry centers, an important part of the
23 reentry program. Most inmates who are released to
24 United States communities are transferred to a
25 residential reentry center to serve the last few months

1 of their sentence in a structured setting in the
2 community prior to completing their federal sentence.
3 Some inmates are transferred to home detention during
4 the last portion of their residential reentry center
5 stay, while others are sent directly to home confinement
6 for the last few months of their sentence. Inmates who
7 are released through RRCs are more likely to be
8 gainfully employed, and therefore less likely to
9 recidivate, as compared to inmates who are released from
10 prison directly to the community. We have recently
11 begun to place inmates at low risk for recidivism, based
12 on their age, criminal history and other criminogenic
13 factors, and with few reentry needs, such as a need for
14 housing or employment or family ties, directly into home
15 confinement whenever possible, allowing us to allocate
16 the residential reentry center beds to those with the
17 need for the services and the structure provided in that
18 environment. The Second Chance Act expands the Bureau's
19 authority to place inmates in RRCs for an extended
20 period of time from which to - I'm sorry, for an
21 extended, extending the time limit from the ten percent
22 not to exceed six months, to 12 months, and authorizing
23 the agency to place inmates with shorter sentences, 12
24 months or less, directly into RRCs for service of their
25 entire term of imprisonment. Based on the mission of

1 the agency to confine offenders in institutions that are
2 secure and most cost efficient and provide opportunities
3 to prepare for reentry, the Bureau of Prisons is rarely
4 using the RRCs for direct court commitments, and rarely
5 uses transfers, or rarely transfers inmates to RRCs for
6 prerelease services for more than six months. Most
7 inmates with short sentences are appropriately placed in
8 prison camps, which are minimum security, much less
9 costly than RRCs and offer a wide variety of inmate
10 programs, and most releasing offenders receive the
11 necessary transitional assistance in the three or four
12 months at an RRC. While it is certainly desirable for
13 offenders to remain with their families and in the
14 community for extended periods of time, such placements
15 cannot be justified with the agency mission as cost
16 efficient and necessary to address reentry needs.

17 Again, I appreciate joining you today. I
18 look forward to answering questions that you may have.

19 CHAIR SESSIONS: Thank you, Mr. Lappin.

20 Ms. Vance.

21 MS. VANCE: Mr. Chairman and members of
22 the committee, it's an honor to speak to you this
23 morning about criminal sentencing in the federal system,
24 and especially the impact of *United States v. Booker*
25 on all of us. I have the unusual position of having

1 been a career federal prosecutor, and now being a
2 relatively new United States attorney, and I know you've
3 heard from a number of my colleagues. I'm here to offer
4 you a view from the Deep South. It's a little bit
5 strange being an appellate lawyer in recovery to be in a
6 room with this many federal judges, and to have gotten
7 that far without drawing a question. I'm not sure if I
8 can make the shift, but I'll try my best.

9 I'm a U.S. attorney in the Northern
10 District of Alabama. I have about three-fifths of the
11 state's population, the northern 31 counties in Alabama.
12 My main office is in Birmingham. My office has
13 prosecuted, for an office so situated, a rather
14 extraordinary amount of both public corruption and of
15 white collar crime. Most recently, a couple of weeks
16 ago, we convicted our mayor on an indictment involving
17 in excess of 60 counts of fraud and other related
18 crimes. Ex-Mayor Langford's conviction makes him the
19 fifth member of the Jefferson County Commission to go to
20 federal prison in the State of Alabama, he having
21 previously been a county commissioner. My office also
22 prosecuted a systemic accounting fraud at HealthSouth
23 Corporation, once one of Alabama's largest corporate
24 entities. Virtually every high ranking corporate
25 officer was convicted, with the exception of the CEO and

1 Chairman of the Board Richard Scrushy, who was
2 acquitted, but subsequently convicted in the Middle
3 District of Alabama on unrelated charges.

4 So because we do a large number of both
5 significant and smaller prosecutions in this area, this
6 community context gives us plenty of reason to consider
7 the impact of *Booker* on sentencing, and particularly in
8 the area of white collar crime. My belief is that
9 *Booker* has made sentencing less uniform, and thus
10 less predictable for prosecutors and defendants alike,
11 particularly in the white collar context. Whatever
12 deficiencies some of its detractors believe the
13 guidelines have, the guidelines have promoted
14 consistency by treating like cases alike, without regard
15 to the particular jurisdiction or the randomly selected
16 sentencing judge. The individual consideration that
17 judicial discretion promotes I think appeals to all of
18 our innate senses of fairness in the sentencing process
19 of individuals.

20 Consistency, on the other hand, provides
21 a systemic sense of certainty in sentences handed down
22 to defendants convicted of similar conduct. And I
23 believe that that comes with the additional benefit of
24 promoting and contributing to the public's trust and
25 belief that the system has integrity, a very important

1 factor from where I sit.

2 My sense is that the challenge that the
3 system and certainly the Commission faces going forward
4 is to balance, in the post-*Booker* era, those competing
5 concerns of judicial discretion and the individuality
6 benefits it brings, with concerns about consistency, so
7 that the system as a whole imposes fair, certain and
8 consistent punishment.

9 The guidelines were obviously predicated
10 on the belief that it was important for defendants who
11 committed similar crimes and had similar characteristics
12 to receive similar sentences. By in large, the
13 experience in my district, the guidelines were very
14 successful in achieving that goal of consistency.

15 Appellate review is important to us in
16 making these guidelines effective, because a court of
17 appeals could provide a single interpretation of the
18 guidelines for cases brought in multiple district
19 courts, and thus promote consistency within a circuit.

20 After *Booker* and *Gall*, the role of the
21 courts of appeal has been significantly diminished so
22 that sentencing is once again a matter almost
23 exclusively for the district court. Like other courts
24 of appeals, in my circuit, the Eleventh has applied a
25 highly differential standard of review in evaluating

1 sentences since *Booker* was handed down. The court
2 reviews the sentence for procedural and or substantive
3 reasonableness, applying an abuse of discretion standard
4 of review. Since very few cases at this stage involve
5 any significant procedural question about the
6 calculation of the guidelines, the focus is generally on
7 substantive reasonableness. And the Eleventh Circuit
8 has held it will not vacate a sentence for substantive
9 unreasonableness unless it is left with the definite and
10 firm conviction that the district court committed a
11 clear error of judgment in weighing the § 3553(a)
12 factors by arriving at a sentence that lies outside the
13 reasonable range dictated by the facts in that case.

14 The Eleventh Circuit has not completely
15 forsaken reasonableness review, and I worry sometimes
16 that I'm the poster child for anger by the district
17 court in my district, because we have appealed a number
18 of cases and had reversals, but quite frankly, even
19 though the Eleventh Circuit has noted that the district
20 courts' choice of sentence is not unfettered, it is very
21 rare to have appellate review of a sentence that
22 reverses a case.

23 Recently we have had that happen. This
24 past week the Eleventh Circuit issued a published
25 opinion in *United States v. Livesay*. That is one of

1 the HealthSouth related cases, a 2.7 billion dollar
2 accounting fraud that essentially eviscerated one of the
3 largest health service providers in the company, and the
4 district court has sentenced this particular gentleman,
5 the company chief financial officer, and he held other
6 positions, to a sentence of probation. The court of
7 appeals held, on appeal, that that sentence was not
8 reasonable for a key player in the massive 2.7 billion
9 dollar fraud, and took the unusual step in our circuit
10 of instructing the district judge to impose a custodial
11 sentence. But a case like *Livesay* is by far the rarity.
12 The bottom line is that a procedurally sound sentence
13 will almost certainly be affirmed on appeal.

14 So given the limited role of appellate
15 review after *Booker*, a district court has significant
16 authority to impose a sentence outside the guideline
17 range.

18 The data suggests that district courts
19 nationwide still impose guideline sentences more often
20 than not, although they have imposed more non-guideline
21 sentences since *Booker*, and those statistics hold up
22 pretty well in my district. I think we actually have
23 higher than the national average of guidelines-based
24 sentences.

25 In fiscal 2008, the judges in our

1 district imposed above-guideline sentences in 2.7
2 percent of cases, below-guideline sentences in 10.9
3 percent of cases, and then we had another 19.9 percent
4 of our cases that involved §5K.1.1 departures.
5 So primarily we had a heartland of guideline sentences.

6 As a practical matter, in my district,
7 federal prosecutors continue to treat the advisory
8 guideline range as the appropriate benchmark for
9 beginning the sentencing conversation. Defense lawyers
10 treat the guidelines as a ceiling for sentencing,
11 without regard to the existence of statutory maximums,
12 and quite frankly, each judge has his or her own view of
13 the wisdom of the applicable guideline range. So while
14 it's difficult to generalize about the reasons for the
15 variances we see, it's clear to us that a downward
16 variance is far more likely than an unward variance at
17 this point in the progression.

18 Although we generally believe that the
19 judges in our district carefully exercise their
20 sentencing discretion, and I have to say, you know, we
21 are the Deep South, we both like and respect our bench
22 and enjoy excellent relationships, but we have noticed
23 an increasing number of below-guideline sentences in
24 white collar cases. We take very few affirmative
25 sentencing appeals in our office, and of those taken

1 since *Booker*, the majority have been appealed from below-
2 guideline sentences in either white collar or public
3 corruption settings.

4 So I want to be very clear that in the
5 overwhelming majority of our cases, we believe that our
6 judges sentence reasonably. Even when they don't select
7 the sentence that we advocate for, we believe that they
8 are well within the reasonable range.

9 Having said that, though, I do want to
10 touch briefly on our concerns in white collar
11 sentencings, and I'd like to do that by offering to you
12 an example of a case. This is a post-*Booker* case.

13 We prosecuted a man named Michael Crisp.
14 Crisp was the comptroller for a small construction
15 company based in Birmingham. He prepared false
16 financial statements, overstating the company's accounts
17 receivable, and provided them to a bank which
18 predictably extended a line of credit. The bank relied
19 on the false reports and continued to extend credit well
20 beyond the company's means, and when the company was
21 ultimately unable to repay the line of credit, the bank
22 lost over \$480,000. Crisp's victim was a small family-
23 owned bank. He plead guilty. His guideline range was
24 24 to 30 months. He cooperated against the owner of the
25 company. We filed a, perhaps an overly generous 5K1.1

1 motion offering him a 50 percent downward departure, the
2 low end of a range of 12 to 15 months, and the district
3 court sentenced Crisp to five hours of custody in the
4 United States Marshals' custody to be served at Crisp's
5 convenience. We appealed, it was my case, and the
6 Eleventh Circuit vacated the sentence. The Eleventh
7 Circuit held that the below-guidelines sentence was
8 substantively unreasonable, in light of the § 3553(a)
9 factors, and noted that the court gave Crisp,
10 and I'm quoting, "five hours for a crime that caused
11 \$484,137.38 in harm." That equates to \$96,827.48 per
12 hour, or \$1,613.79 per minute served in custody. I
13 think that that was Judge Carnes's opinion.

14 On resentencing, the district court
15 resentenced Crisp to 100 days in custody, still
16 significantly below the guidelines range, and quite
17 frankly, the *Crisp* case, which was not unique in our
18 district, gave us great pause.

19 Below-guideline sentences are extremely
20 troubling to us in the white collar context, because we
21 think deterrence there is important, and is a more
22 reachable goal, perhaps, than it is in some more
23 opportunistic crimes.

24 In vacating another below-guideline
25 sentence in a white collar case in our district, I think

1 the Eleventh Circuit really got it dead on. They said
2 because economic and fraud based crimes are more
3 rational, cruel and calculated than sudden crimes of
4 passion or opportunity, these crimes are prime
5 candidates for general deterrence. The defendants in
6 white collar crimes often calculate the financial gain
7 and risk of loss, and white collar crime, therefore, can
8 be affected and reduced with serious punishment.
9 Sentences like Crisp's could reasonably lead a potential
10 white collar thief to conclude that fraudulent conduct
11 in the Northern District of Alabama is worth the risk.
12 And I think some of our crime statistics bear that out.
13 You might be willing to go to jail for seven days to
14 make \$7,000,000,000. We've seen little deterrent effect
15 from this type of sentence.

16 Although the Eleventh Circuit did correct
17 the sentence in Crisp, and has corrected sentences in
18 other egregious cases, there remains a real risk that
19 below-guidelines sentences in white collar cases will
20 undermine the effectiveness of white collar sentencing
21 and statutes.

22 Post-Booker, I think the result will
23 likely be less consistency, as we get further into it,
24 and it may actually migrate from white collar into other
25 areas with similarly detrimental effect.

1 One of the things I like to think that
2 I've learned in my years as a prosecutor is that we do
3 have more in common in the system than we have that
4 separates us, and I mean prosecutors, defenders, judges
5 and the probation department. My experience, in talking
6 with colleagues, is that we all seek the same thing in
7 sentencing. We all seek fair, certain sentences that
8 impose appropriate punishment for a particular
9 defendant, while providing meaningful deterrence for
10 would-be criminals.

11 It is sometimes very difficult, and I
12 don't think we acknowledge enough that as stakeholders
13 in the system, it can be very difficult for us to engage
14 in honest conversation because, quite frankly, if my job
15 is to be a defender, it's difficult for me to come into
16 a hearing and explore a position that's against my
17 client's interest. Similarly, you don't hear
18 prosecutors willing to give ground very often. But this
19 issue is so serious and so systemic that I think it
20 requires us, in an exercise of responsibility, to be
21 willing to step away from our advocacy positions and to
22 explore meaningfully and very openly what works best for
23 us as a system.

24 My instinct is that the best results that
25 we achieve happen when we come and work together. We

1 did that in my district under the leadership of our
2 chief judge when we explored resentencing after the
3 crack guidelines were amended, and it was very effective
4 and interesting experience, because we found that we all
5 walked away from our initially held opinions and worked
6 together to get those cases through the system quickly.
7 So that's my belief. And my experience leads me to
8 believe that the best way in the system that we can
9 balance the often competing goals of individualized
10 sentencing, on the one hand, and consistency on the
11 other, is for the Commission to encourage communication
12 by all of the stakeholders in the justice system, much
13 as we did with the nationwide conferences that followed
14 regarding the crack guidelines.

15 I think prosecutors want to ensure that
16 the guidelines continue to have a valid advisory role.
17 I do believe that we are willing to be open and to
18 consider other points of view, although they may need to
19 be brought to us aggressively, but we are open and we do
20 like to consider propositions that promote the fairness
21 of the system. My belief is that it will work best if
22 we do all work explicitly and deliberately together.

23 So on that note, I'd like to thank you
24 you all for the work you've done. You've certainly
25 provided appellate lawyers like myself with a full

1 employment plan over the years, and we're grateful, but
2 we are more grateful for the guidance and the
3 leadership, and for the Commission's willingness, I
4 think, to re-examine and to update the guidelines to
5 work in the legal framework that we now find ourselves
6 in. And I look forward to answering any questions
7 you all have.

8 CHAIR SESSIONS: Thank you, Ms. Vance.

9 VICE CHAIR CARR: Director Lappin, you
10 mentioned in your written submission that the Federal
11 Prison Industries program has diminished significantly,
12 in part because of the authorization and appropriations
13 bills, but also administrative changes by the Federal
14 Prison Industries Board of Directors. What were they?

15 DIRECTOR LAPPIN: Excuse me. There are,
16 the Federal Prison Industries organization is overseen
17 by a board appointed by the President, and there has
18 been pressure over the years, similar to that which
19 we're seeing in litigation, to have less impact on law
20 abiding citizens' businesses in this country, a notion
21 we agree with, and as a consequence of that, they have
22 put caps on certain types of products and services not
23 to exceed a certain level of production, in an effort to
24 protect the businesses in, that are operating in the
25 United States. Given that, we're kind of going in a

1 different direction. We are looking for more products
2 and services to perform offshore, and seeking
3 authorities to be able to pursue that on a larger scale
4 so that at the end of the day, we'll have even less of
5 an impact on people's businesses in this country, but
6 they put some established caps to protect certain
7 products and services areas.

8 CHAIR SESSIONS: Commissioner Friedrich.

9 COMMISSIONER FRIEDRICH: Director Lappin,
10 I have two questions. You mentioned in your testimony
11 that the Second Chance Act gave the Bureau of Prisons
12 the ability to sentence inmates to halfway houses for
13 the last 12 months of their sentence, and you mentioned
14 that it's the rare case that you send an inmate to a
15 halfway house for more than six months, and your typical
16 average is three to four months. And I would ask you if
17 you could elaborate on why you typically don't send an
18 inmate to a halfway house for more than six months. Is
19 that solely for cost? And secondly, the Second Chance
20 Act also gives the Bureau of Prisons the ability to
21 sentence inmates to home confinement at the end of their
22 prison term. Is that also for twelve-month periods, and
23 if so, are you sending some low-level offenders who
24 typically you might send to halfway houses, that are low
25 security, are you sentencing them to home confinement or

1 are you sending them to home confinement for 12 months,
2 the full - are you exercising your authority to the
3 full extent.

4 DIRECTOR LAPPIN: Yeah. First of all, on
5 the second question, it allows up to ten percent of the
6 sentence to be served on home confinement, so it's how
7 much time, and home confinement is driven by the length
8 of sentence, and again, up to ten percent.

9 We are currently evaluating every inmate
10 for up to 12 months. We have found in the past that
11 oftentimes, for many inmates, beyond six months can
12 actually result in less success because many of the
13 inmates have family ties, and as a consequence, have
14 opportunities for employment and a place to live long
15 before the six-month period occurs. Our sense is they
16 tend to get a little frustrated, and sometimes act out
17 because of their desire to move on after they've
18 established themselves back in the community.

19 So secondly, there's a limited number of
20 halfway house beds available, and it varies
21 geographically. We have some communities that are, bend
22 over backwards to offer halfway house opportunities in
23 their communities. The other extreme is that some
24 completely resist, and as if their citizens are not
25 going to return home. And as a consequence, there's not

1 an abundance of beds. So our objective, always, is to
2 send every offender, if we could, in the United States
3 to a halfway house for at least some period of time, and
4 we do it on the basis of how long have they been
5 incarcerated, what are their community ties, do they
6 have some, do they have skills that might lead for them
7 to be employable moreso than others, do they have a
8 place to live or is that something that they're going to
9 have to accomplish during that period of incarceration,
10 and based on that, we are currently averaging about 120
11 days in a halfway house, when you, when you average all
12 of the inmates.

13 Eighty-five percent. So last year, for
14 example, the Bureau of Prisons released just slightly more
15 than 60,000 inmates. About 18, 19,000 were deported.
16 Slightly more than 40,000 were released into the United
17 States. Eighty-five percent of those transitioned out
18 through a halfway house, on average for 120, some more
19 than six, but not a lot, and, and the majority of those
20 transitioning out through a halfway house today are
21 getting home confinement towards the end of that
22 sentence.

23 The most difficult inmates to place are
24 three groups: sex offenders, inmates with mental
25 illnesses, and those that have very violent records and

1 continue to be, act out during a period of
2 incarceration. Those are the more troublesome ones to
3 place. So that's kind of an overview of the halfway
4 house situation. We are now, for lower risk inmates who
5 have family ties and job opportunities, we're moving
6 more of them typically coming out of camps, minimums and
7 lows, directly into home confinement, in lieu of halfway
8 houses, so that we can reserve those halfway house beds
9 for those inmates that have the greatest needs, and
10 typically those are the inmates that fall into the
11 medium and high security institutions, who have been
12 incarcerated for longer periods of time, may not have as
13 very good family ties, are going to be more troublesome
14 to find jobs given their records, some with lack of
15 skills, and so what we're trying to reserve those beds
16 that we do have for those inmates that have the greatest
17 need, in anticipation that towards the end of the
18 sentence, if the stay goes well, we'll also put them out
19 on home confinement for a portion of that sentence.

20 The other issue is funding. When the
21 Second Chance Act passed, even though we may have other
22 cases that we would like to put in for a longer period
23 of time, it costs us more money. And so when we went
24 from about a 92-bed average, a year and a half ago, to
25 120-bed average, it cost us an additional \$30 to

1 \$40,000,000 a year to do that. We were able to do that
2 without reducing staff in the Bureau of Prisons. But
3 today, for us to be able to put more money into
4 community corrections, I'd have to, we would have to
5 lower staffing in our institutions, reprogram that money
6 from institution operations to community corrections,
7 and we're unwilling to do that, given the low level of
8 staffing that currently exists. So it's a combination
9 of things that are driving that.

10 COMMISSIONER FRIEDRICH: But those low
11 risk offenders who you're sending directly to home
12 confinement, are you maximizing the ten percent -

13 DIRECTOR LAPPIN: Yes.

14 COMMISSIONER FRIEDRICH: - relatively
15 speaking?

16 DIRECTOR LAPPIN: Yes. We're trying to
17 put them up for as long as we can. Now, there's a cost
18 to that. It's not as expensive, nearly as expensive to
19 be in a halfway house, but we still have to pay for
20 people to supervise and to monitor. So most places we
21 have halfway houses who, as part of their contract,
22 provide that supervision. Do they show up for work?
23 Phone calls, home visits, things of that nature, while
24 they're on home confinement.

25 And I'll say, you know, the cost of

1 halfway houses has increased, and it's, it was, we
2 expected that, because we want more services in those
3 halfway houses. We want drug transition services. We
4 want more mental health services. We want more medical
5 services. We want more job placement services. And
6 when you build those into the contracts, obviously, it
7 has a greater expense. We think it's worth it. It's
8 worth the investment, given the critically important
9 period of time it is transitioning from prison to the
10 community. So we're all in favor of it, but it does
11 cost \$72, \$73 per day per inmate, which is slightly
12 higher than what it costs us to keep them incarcerated
13 in a minimum or low security institution.

14 COMMISSIONER FRIEDRICH: In halfway house
15 or home detention?

16 DIRECTOR LAPPIN: Halfway house.

17 VICE CHAIR CARR: When you talk about the
18 counterproductive results of more than six months, is
19 that home confinement, halfway house or both?

20 DIRECTOR LAPPIN: Both.

21 VICE CHAIR CARR: And is that annual
22 or -

23 DIRECTOR LAPPIN: It is. We're currently
24 doing some research on this very issue. Typically, I
25 don't, I don't think the problem is the home

1 confinement. I think the problem is more so a person who
2 has really done well in that halfway house, established
3 themselves, has a job, and gets anxious over the
4 continued increased supervision, even though, you know,
5 they're well established, they're doing, they're ready
6 to move on, and there's indication not to do that.

7 CHAIR SESSIONS: Mr. Wroblewski.

8 COMMISSIONER WROBLEWSKI: Thank you, Judge.

9 First, I 'd like to say thank both of you
10 so much for coming. I know how much time you've taken
11 out of your schedules to be here. It's very important
12 to us. A couple of questions.

13 Joyce, you mentioned, in your case list,
14 the white collar defendant had a 50 percent reduction
15 for substantial assistance. Is that typical of
16 reductions for 5K in your district?

17 MS. VANCE: You know, being new to the
18 process, I've taken a look at our 5Ks, and we do have, I
19 think, a pattern of 5Ks that approach the 50 percent
20 mark. There are even some that exceed that, and
21 obviously, that's something that we look at fresh at
22 this point, but yes, I'd say that's pretty typical.

23 COMMISSIONER WROBLEWSKI: All right. Mr.
24 Lappin, the programs that you talked about, you mentioned
25 some statistics about reductions in recidivism. How often

1 does your staff evaluate or re-evaluate those programs
2 that you have? Is that done every decade? Every two
3 years? Is there some role that you think that this
4 Commission could play in either part of those
5 evaluations, promoting Prison Industries or other
6 programs like that?

7 DIRECTOR LAPPIN: We update those. We,
8 there's an ongoing research assessment for drug
9 treatment and all of the other programs. I don't recall
10 exactly how often it's done. It's not as difficult to
11 do today, given the automated nature of the information
12 that we have. But I can follow up and find out how
13 often we're doing that. I don't know exactly.

14 COMMISSIONER WROBLEWSKI: Can you do a case
15 study on the statistics? It doesn't go back up to you, but -

16 DIRECTOR LAPPIN: Yeah. And that's the
17 thing. The trigger is rearrests. It's not
18 reincarcerations. We oftentimes - It's too difficult
19 to determine that. So in some cases, even though our
20 recidivism rate, our return rate is about 40 percent in
21 the Federal Bureau of Prisons, which is slightly lower
22 than the average of the states, which is, you know, I
23 think 65 percent range, so - and the trigger is
24 rearrests, and there may be some that we're counting as
25 recidivating who get arrested but don't get convicted

1 and sent to prison, so the number could be actually a
2 little lower than that.

3 COMMISSIONER WROBLEWSKI: Do you have that
4 data now, for example? Because we've been struggling on the
5 Commission with getting recidivism data on people in the
6 system.

7 DIRECTOR LAPPIN: I will check and follow
8 up for you with our research folks.

9 COMMISSIONER WROBLEWSKI: Thank you.

10 DIRECTOR LAPPIN: I think just your
11 interest in reentry is noteworthy. In my opinion, it's,
12 there's a resistant public to the ex-offender who, not
13 unlike other social issues, out of sight out of mind,
14 and even in those supportive communities, they still
15 bear the brunt of discrimination in employment and in
16 finding a place to live. Some communities go so far as
17 to passing restrictions on them returning to their home
18 districts. It's a shame. I believe it makes the
19 communities less safe because, and this is especially
20 true of sex offenders, when we're forced to release them
21 and we actually have to release them into districts and
22 into locations that they have absolutely no ties. And
23 so again, I think the more this is discussed, the more
24 sympathetic – and I understand the social, society's
25 concerns over folks coming back from, after spending a

1 period of time incarcerated, and what they've done in
2 the past, but at the end of the day, the vast, vast
3 majority of these people coming home, very few stay for
4 the rest of their life, and I think the more we talk
5 about it, the more involved – you know, a few years
6 ago, to be honest with you, not to get political on
7 this, but when President Bush mentioned reentry in the
8 State of the Union address, that was a real turning
9 point for a more open discussion on these things, and I
10 encourage us to continue that dialogue, because these
11 are still our citizens, many of whom can be productive,
12 and I think we've got to figure out ways to bring people
13 along.

14 We just, we just finished four years of
15 litigation to get a halfway house in one community, and
16 until this halfway house, their inmates were basically
17 released directly into the street, again, which I think
18 is far less safe than having structured supervision in
19 that transition.

20 CHAIR SESSIONS: Let me just follow up
21 with the reentry programs, because obviously, we have an
22 interest in the reentry programs, as well, and in
23 particular, incentivizing inmates to participate in
24 treatment options and ultimately a reentry. You know
25 the 500-hour drug and alcohol rehabilitation program is

1 incredibly positive. The responses, in terms of
2 recidivism rates, have been terrific. You obviously
3 have so many people wanting to go in it that you can't,
4 you can't service everyone, and violating your statutory
5 obligation in that respect. Of course, the reason that
6 many people are participating, you know, let's be
7 realistic, is because they're going to get a reduction
8 in sentence. Despite that fact, you have a program with
9 that level of subtle coercion, which is extraordinarily
10 positive. And then you describe the other programs that
11 you've had, vocational training, educational training,
12 the requirement of getting GEDs, all can be reflected in
13 the risks of recidivism. So my question is have you
14 thought or what's your - I'm not too sure I'm allowed
15 to ask you what your personal view is, but perhaps I can
16 ask on behalf of the Bureau, what the Bureau's
17 perspective is on creating incentives to participate in
18 reentry programs before they actually are released into
19 the community, and then, once they go through a reentry
20 program, perhaps provide the incentive of a slight
21 reduction in sentence to get them into the program, and
22 then move them through halfway house or alternatives,
23 you know, like home confinement, ultimately into the
24 community in coordination with the probation officers
25 who are receiving them at the other end, I mean that

1 seems to me like a no-brainer. So that's the first area
2 of incentivizing.

3 And the second is, you know, essentially
4 good time, where 85 percent, and this is a good point,
5 your good time has essentially been taken away as an
6 incentive for managing behavior within facilities. I
7 mean based upon my very limited and ancient experience.
8 I don't mean to suggest that I have any expertise in
9 this regard. But it would seem if people have to earn
10 good time, or can have it realistically taken away for
11 bad behavior, that you are improving people's behavior.
12 And so I guess my question is: Are there any
13 discussions about perhaps going to Congress and
14 suggesting an increase in good time at the end, maybe
15 minimal, but increase the good time at the end, and then
16 ultimately, is there anything the Commission can do to
17 help you in this endeavor?

18 DIRECTOR LAPPIN: Both very good
19 questions, and I'd be more than happy to answer them and
20 provide my opinion. Given the fact that I'm now
21 retirement eligible, if it does go sour, I can kind of
22 move on.

23 But anyway, one, we like, and I'm, I'm
24 really encouraged by the recent sentencing, and working
25 group, sentencing and corrections working group that the

1 Attorney General has established, and Jonathan is very
2 much a part of that, and our staff are participating in
3 that, to consider these options. Quite honestly, I
4 think it's long overdue, especially considering the fact
5 that we are struggling acquiring the funding we need to
6 run the Bureau of Prisons in the manner in which we
7 think it needs to be run, and if that's going to
8 continue, I think it's long overdue to look at other
9 options to lower the burden of additional inmates.

10 And in doing that, you have to look at
11 two options. Two things: how many and how long?
12 Adjust either of those, and you can see a trend going
13 one way or the other. And so as you mentioned, I think
14 the residential drug abuse program is a perfect example
15 of the benefit of incentivizing those opportunities.
16 They need to earn it. We need to teach responsibility.
17 They need to be able to make choices. And 35 percent of
18 our inmates we have are addicted to drugs or, to drugs
19 or alcohol, such that we think they need, should have
20 treatment. Ninety-two percent of those inmates are volunteering
21 for treatment. What's interesting is that 40 percent of
22 those inmates get no time off their sentence. So about
23 60 percent of those volunteering can get some time off.
24 Certainly they're there in part for that reason. And 40
25 percent get no time off. They're there because they've

1 come to the realization they need help, and they want
2 treatment, and I think that's noteworthy.

3 A real brief example, I, not long after
4 becoming Director, I was visiting an institution in
5 Alderson, West Virginia and I happened to be there on
6 the day that the drug treatment program was having
7 graduation. And I walked into this class, and they're
8 crying. I said, "Geez, I didn't mean to have that kind
9 of an impact on you." I said, "Well, tell me of your
10 experience. You know, how has this impacted you?" And
11 of course, there was a lot of brown nosing going on and
12 all that kind of stuff, but this one lady says, "I did
13 this program for one reason and one reason only, I
14 wanted time off my sentence. And when I began this
15 program, I didn't think I needed help to begin with,
16 but," she says, "soon into this program, I realized the
17 burden I had carried my entire life, the trauma I'd
18 experienced coupled with drugs addiction. It has had
19 such an impact on my life that I stayed in prison longer
20 than I have to," not beyond her sentence, but she could
21 have gone to a halfway house earlier, and she decided to
22 stay and finish the entire treatment program before
23 going to a halfway house, she says. That's noteworthy.
24 because this, she says, "I'm a whole different person
25 than I was when I came to prison." And so I think that's

1 critically important.

2 We would like to see more of that. We've
3 had some candid discussions going on about that, the
4 first step being let's look at the other group of
5 nonviolent offenders, the least risky group of inmates,
6 less risky than the nonviolent drug or alcohol addicted,
7 given the fact that they don't have that burden, and
8 looking at programs or strategies in which we might be
9 able to offer some time off their sentence if they
10 complete certain programs, as well.

11 Today we're doing much better than we did
12 years ago. Inmate comes into prison, we do a skills
13 assessment, and we know, we've identified the nine
14 skills that most inmates lack. The inmate does an
15 assessment, and we identify which of those skills they
16 have the greatest need for improvement in, and all of
17 our institutions eventually will have programs to
18 address each of those skill categories, and so we can
19 quickly lay out a program plan that will identify here's
20 what you need to do, here's what we expect you to do,
21 and then if they are successful in completing those
22 things, a strategy could be considered to offer some
23 additional time off their sentence.

24 So I think the discussions on additional
25 good time incentives - again, it has to be earned. You

1 just can't show up and get it. I think you'd have a
2 huge, huge impact.

3 On the other hand, we need more leverage.
4 You're right, leverage encourages people to behave
5 better. On the other hand, it gives us more leverage
6 for those inmates who misbehave. That's the other
7 problem is that today, unlike in the '80s and before,
8 when you had more flexibility for good time, when
9 inmates misbehaved, you could take large amounts of good
10 time away, and for some it had huge, huge impact on
11 them. Today our most severe sanction for misbehavior is
12 isolation, segregation. I don't think that's wise
13 long-term. It is for some, but for some, break my
14 heart, throw me in a cell where I don't have to work and
15 feed me three meals a day. They could care less. Time
16 out. But take six months of good time away from them.
17 Tell them you're going to serve more time in prison
18 because of your misbehavior, may have a much greater
19 impact than us throwing them into a segregation cell for
20 60, 90, 120 days. So we think that's an important part
21 of the discussion, as well. It's tragic, but we've got
22 this group of inmates, a small group, a small group, who
23 are misbehaving very severely. Again, we're pursuing
24 prosecutions on a number of them, but that's, it's
25 unrealistic to prosecute them all. But I think that

1 type of leverage is critically important to really step
2 up and meet the demand.

3 CHAIR SESSIONS: So it's a two-pronged
4 approach, that is to increase good time, obviously with
5 a congressional act.

6 DIRECTOR LIPPAN: Uh-huh.

7 CHAIR SESSIONS: But then you also
8 increase the ability to use the imposing of time or the
9 removal of good time, so that you can enforce behavior.

10 DIRECTOR LAPPIN: Soon after the passage
11 in '88, when it went to 54 days a year, until a few
12 years ago, that was, it was vested yearly. So the most
13 good time you could take from an inmate, until a few
14 years ago, was 54 days. That's the most you could take
15 from an inmate. 54 days, an additional 54 days, they
16 could do that standing on their head, no big deal. But
17 then they did away with that, so you can take more now.
18 Still, it's just not a lot to take over the course of a
19 sentence.

20 VICE CHAIR CASTILLO: Thank you both for
21 your testimony. My question is for Director Lappin. It
22 seems to me, going to the two questions of how many and
23 how long, which I'm very sensitive to, your big growth
24 is with defendants who are not citizens, and at the same
25 time, all of them, who by definition probably have

1 immigration detainees, are not eligible for a lot of
2 your good programs that reduce recidivism or could
3 reduce their sentence. So by definition, they're
4 serving effectively longer, possibly an abusive, more
5 onerous sentences.

6 Now, some judges throughout the country
7 are taking this into consideration at the front end and
8 reducing their sentences, some others are not. So
9 there's a certain amount of inconsistency. How would
10 you feel if we encouraged some type of consistency by
11 making this one way to reduce sentences at the front
12 end, taking into consideration that somebody is not
13 going to be qualifying for some of these great programs
14 that the Bureau of Prisons has?

15 DIRECTOR LAPPIN: Just so you know, we
16 offer most of these programs to all the inmates.

17 VICE CHAIR CASTILLO: Okay.

18 DIRECTOR LAPPIN: Many of them do
19 participate.

20 VICE CHAIR CASTILLO: Okay.

21 DIRECTOR LAPPIN: There are some
22 restrictions that result in fewer of them participating.
23 There are some restrictions if you have a detainer, you
24 can't earn over a certain pay grade in the Prison
25 Industries, and as a consequence, they don't have as

1 much of an interest. But we encourage them to
2 participate in the literacy programs and the work
3 programs. There are a few limitations, not many, and I
4 could get those for you and provide them for the record.

5 Just so you know, the average sentence
6 for an immigration inmate, it is actually one of our
7 shorter sentences. The average immigration offender is
8 serving like 27, 28 months, comparatively speaking, to
9 the average drug offender, it's in the seventies. In
10 fact, I was sharing with some of you that sex offenders
11 have just exceeded some of our highest average sentences
12 slightly.

13 So we do encourage them. I think that,
14 I'm not sure how to respond to should we consider it at
15 the front end. But you're right. I mean 54,000 of our
16 inmates are non-U.S. citizens, the vast majority of them
17 serving immigration violations. Many of them have
18 detainers. As I mentioned, we transitioned 18,000 to
19 ICE last year, and they deported the vast majority of
20 those folks.

21 VICE CHAIR CASTILLO: Like you say, this
22 is at the top of page eight of your testimony, and I
23 think this is what you're referring to, you're talking
24 about a recent March 19th, 2009 Bureau of Prisons
25 regulations adds treatment in community correctional

1 facility as a mandatory component of the program. One
2 consequence of this change is the exclusion from the
3 residential drug abuse program participation of inmates
4 with detainers. I take it you're talking about
5 immigration detainers.

6 DIRECTOR LAPPIN: You're correct. Those
7 inmates, and that's, I think it's unwise, to be honest
8 with you. I think they should be in treatment, to be
9 honest with you, because they're going to return to
10 their communities and continue to have drug and alcohol
11 addictions. And so we, we've limited it some, because
12 we've been struggling to get the U.S. citizens through,
13 who are returning to our communities, so they've taken a
14 higher priority.

15 VICE CHAIR CASTILLO: I take it the
16 thinking behind whoever implemented that policy is since
17 they're going to be deported, the taxpayer is not
18 getting the bang for the buck -

19 DIRECTOR LAPPIN: That's right.

20 VICE CHAIR CASTILLO: - in having them
21 go through the drug treatment program.

22 DIRECTOR LAPPIN: Yes. And I really
23 believe that we should be providing that treatment, if
24 we have the resources available to do that.

25 Just so you know, in 2009, we were able

1 to treat all the inmates who volunteered. So unlike in
2 '07 and '08, we've added enough resources that we were
3 able, we were able to do that. Also, the crack powder
4 adjustment released some of those inmates from our
5 waiting list, so our waiting list wasn't quite as long
6 as it had been.

7 VICE CHAIR [CASTILLO]: Thank you.

8 CHAIR SESSIONS: Any other questions?
9 Well, thank you very much for coming. This is a
10 fascinating discussion, and we know you've put a large
11 amount of effort into coming, and we really appreciate
12 it.

13 DIRECTOR LAPPIN: It was a pleasure.

14 CHAIR SESSIONS: Thank you.

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1 I, Jane Demars, Certified Shorthand Reporter for
2 the State of Texas, certify that the foregoing is a
3 correct transcription of the proceedings in the
4 above-entitled matter.

5 I further certify that I am neither
6 counsel for, related to, nor employed by any of the
7 parties to the action in which this transcript was
8 prepared, and further, that I am not financially or
9 otherwise interested in the outcome of the action.

10 Certified to by me this 4th day of
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13
14 -----
15 Jane E. Demars, Texas CSR No. 2789
16 Expiration Date: 12-31-09
17 Sunbelt Reporting & Litigation
18 Firm Registration No. 87
19 1016 La Posada Drive, Suite 294
20 Austin, Texas 78752
21 (512) 465-9100
22 Job # 81651
23
24
25
26
27
28
29
30
31