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UNITED STATES SENTENCING COMMISSION

Public Hearing

Thursday, May 27, 2010

Thurgood Marshall Federal Judiciary Building

Mecham Conference Center, Ground Level

One Columbus Circle, N.E.

Washington, D.C. 20002-8002

COMMISSION MEMBERS:

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JONATHAN J. WROBLEWSKI, *Ex-Officio*

Commissioner

1 PANEL I: VIEW FROM THE EXECUTIVE BRANCH

2

3 SALLY QUILLIAN YATES

4 United States Attorney, Northern District of Georgia

5 United States Department of Justice

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8 PANEL II: VIEW FROM SENTENCING PRACTITIONERS

9

10 MICHAEL S. NACHMANOFF, Federal Public Defender

11 Office of the Federal Public Defender,

12 Eastern District of Virginia, Alexandria, VA

13 JEFFREY S. STEINBACK, Member

14 Practitioners Advisory Group to the United

15 States Sentencing Commission, Chicago, Illinois

16 JAMES E. FELMAN, American Bar Association

17 Tampa, Florida

18 CYNTHIA HUJAR ORR, President,

19 National Association of Criminal Defense Lawyers

20 San Antonio, Texas

21

22

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1 PANEL III: VIEW FROM LAW ENFORCEMENT

2

3 JILES H. SHIP, Second Vice President

4 National Organization of Black Law Enforcement

5 Executives, University City, Missouri

6 DAVID HILLER, National Vice President

7 Fraternal Order of Police,

8 Grosse Point Park, Michigan

9 MAXWELL JACKSON, Harrisville City Utah

10 Police Chief, National Center for Rural Law

11 Enforcement, Harrisville City, Utah

12

13

14 PANEL IV: VIEW FROM ACADEMIA

15

16 LAURIE L. LEVENSON, Professor of Law

17 Loyola Law School, Los Angeles, California

18 STEPHEN A. SALTZBURG, Professor of Law,

19 The George Washington University,

20 Washington, D.C.

21 STEPHEN J. SCHULHOFER, Professor of Law

22 New York University School of Law, NY, NY

23

1 PANEL V: VIEW FROM PUBLIC POLICY ANALYSTS

2

3 CORY ANDREWS, Senior Litigator

4 Washington Legal Foundation, Washington, D.C.

5 DAVID B. MUHLHAUSEN, Senior Policy Analyst

6 The Heritage Foundation, Washington, D.C.

7 ERIK LUNA, Adjunct Scholar

8 Cato Institute, Lexington, Virginia

9

10

11 PANEL VI: VIEW FROM ADVOCACY GROUPS

12

13 MARC MAUER, Executive Director,

14 The Sentencing Project, Washington, D.C.

15 JULIE STEWART, President

16 Families Against Mandatory Minimums, Washington, D.C.

17 JAY RORTY, Director of the Drug Law Reform Project,

18 American Civil Liberties Union, Santa Cruz, CA

19 THOMAS HILLIER II, Member of the

20 Sentencing Initiative's Blue-Ribbon Committee

21 The Constitution Project, Seattle, Washington

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P R O C E E D I N G S

(8:32 a.m.)

CHAIR SESSIONS: Good morning. I am William Sessions. I am the chief judge from Vermont and chair of the Sentencing Commission.

This is just an extraordinarily important hearing on statutory mandatory minimum penalties in the federal sentencing system.

We have a very full day ahead of us in which we will be hearing from the nation's leading experts, practitioners, and advocates on this very important topic. I will attempt therefore to be very brief.

The Commission, as part of its final priorities for the 2009-2010 amendment cycle identified statutory mandatory minimum penalties and their role in the post-*Booker* sentencing scheme as a priority, in fact really a top priority.

The Commission decided to undertake a study of and possible report to Congress on statutory mandatory minimum penalties, including a review of the operation of the "safety valve" provision at 18

1 U.S.C. [3553(f)].

2 The Commission's initial work in this area
3 resulted in a July 2009 submission for the record for
4 the House Judiciary Committee's hearing on mandatory
5 minimum penalties that provides a detailed overview
6 of the data associated with these provisions.

7 In October 2009, Congress directed the
8 Sentencing Commission to undertake a comprehensive
9 review of mandatory minimum sentencing penalties as
10 part of the Matthew Shepard and James Byrd Hate
11 Crimes Prevention Act, and report its findings and
12 recommendations to Congress.

13 Specifically, Congress directed the
14 Commission to examine a number of fundamental
15 sentencing issues that will be discussed during
16 today's proceedings, including first compilation of
17 all mandatory minimum sentencing provisions under
18 federal law.

19 Second, an assessment of the effect of
20 mandatory minimum sentencing provisions under federal
21 law, on the goal of eliminating unwarranted
22 sentencing disparity and other goals of sentencing.

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1 Third, an assessment of the impact of
2 mandatory minimum sentencing provisions on the
3 federal prison population.

4 Next, an assessment of the compatibility
5 of mandatory minimum sentencing provisions under
6 federal law and the sentencing guidelines system
7 which was established under the Sentencing Reform Act
8 of 1984, approximately 25, slightly more than 25
9 years ago; and also compatibility with the sentencing
10 guidelines system in place since *Booker v. United*
11 *States*, decided just a little bit over five years
12 ago.

13 Next, the bill provides for a description
14 of the interaction between mandatory minimum
15 sentencing provisions under federal law and plea
16 agreements entered into by practitioners.

17 Next, the piece of legislation calls for a
18 detailed empirical research study of the effect of
19 mandatory minimum penalties under federal law, and a
20 discussion of mechanisms other than mandatory minimum
21 sentencing laws by which Congress can take action
22 with respect to sentencing policy.

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1 The report may also include any other
2 information that the Commission determines would
3 contribute to a thorough assessment of mandatory
4 minimum provisions under federal law.

5 Today's hearing marks another step in the
6 Commission's information-gathering process. We have
7 just completed recently a whirlwind tour of the
8 United States in which we listened to practitioners,
9 judges, victims' groups, advocacy groups -- in fact,
10 all stakeholders in the criminal justice process --
11 about the viability of the guidelines system, how it
12 is in fact functioning in the real world, and to some
13 extent its relationship with mandatory minimum
14 sentencing.

15 The Commission has also conducted a survey
16 of all federal district court judges with active
17 sentencing dockets to gain further insight into the
18 federal sentencing process and the judges' views on
19 the current system. That survey was extraordinarily
20 extensive, and in fact close to 70 percent of all of
21 the judges of the United States actually complied and
22 filled out that lengthy survey. And in fact it

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1 represents well in excess of 80 percent of all of the
2 sentences that were imposed by judges across the
3 country.

4 A section of that survey was dedicated to
5 questions about federal statutory mandatory minimums
6 overall, as well as within certain offense types; and
7 the aggregate results of that survey will be used as
8 we move forward.

9 With that bit of background, I would like
10 to introduce the Commission and ask then if anyone
11 has any opening statements they would like to make
12 before we hear from other witnesses.

13 First let me introduce, to my right, Vice
14 Chair and Judge Ruben Castillo. Judge Castillo has
15 served on the Commission for 11 years, since
16 1999 -- well, actually, ten years and 11 months --

17 VICE CHAIR CASTILLO: Who's counting?

18 CHAIR SESSIONS: But who's counting.

19 (Laughter.)

20 CHAIR SESSIONS: -- as have I. He is a
21 judge in the Northern District of Illinois.

22 Next, to my left, is Will Carr who's

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1 served as vice chair of the Commission since December
2 of 2008. He was an assistant U.S. attorney in the
3 Eastern District of Pennsylvania from 1981 until his
4 premature retirement in 2004.

5 Next is Ketanji Brown Jackson, to my left.
6 She became vice chair of the Commission in February
7 of this year. Previously she was a litigator at
8 Morrison & Foerster, was an assistant federal
9 defender in the Appellate Division of the Office of
10 Federal Defender in the District of Columbia.

11 And next, to my far right -- not
12 politically, necessarily, but to my far right --

13 COMMISSIONER HINOJOSA: To your left.

14 (Laughter.)

15 CHAIR SESSIONS: I'm sorry, to my left,
16 I'm sorry, to my left.

17 COMMISSIONER HINOJOSA: Not politically,
18 either.

19 (Laughter.)

20 CHAIR SESSIONS: -- is Judge Ricardo
21 Hinojosa. Judge Hinojosa served as chair of this
22 Commission, and subsequently acting chair from 2004

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1 until 2009. He is the chief judge of the U.S.
2 District Court for the Southern District of Texas.

3 And now, to my right, is Commissioner
4 Beryl Howell. She's served on the Commission since
5 2004. She served as executive managing director and
6 general counsel of an international consulting and
7 technical services firm. She is former general
8 counsel of the Senate Committee on the Judiciary, and
9 was an assistant U.S. attorney in the Eastern
10 District of New York.

11 And next, to my right, is Dabney
12 Friedrich. She has served on the Commission since
13 December of 2006. She served as an associate counsel
14 at the White House, as counsel for the U.S. [Senate]
15 Judiciary Committee, as an assistant U.S. attorney in
16 the Southern District of California, and then as an
17 assistant U.S. attorney in the Eastern District of
18 Virginia.

19 And now, Jonathan Wroblewski is the ex-
20 *officio* member of the Commission representing the
21 Attorney General of the United States. Currently he
22 serves [as] the director of the Office of Policy and
23

1 Legislation in the Criminal Division of the
2 Department of Justice.

3 Now let me open it up for any comments
4 that any commissioner would like to make. Any
5 opening statements?

6 (No response.)

7 CHAIR SESSIONS: No? Okay. Well, let me
8 first then introduce our first witness, Sally Yates.
9 And let me get your background. Hold on just one
10 second. I actually know that, since you've been an
11 assistant U.S. attorney in the Northern District of
12 Georgia since 1989. You became just recently,
13 appointed by President Obama, the U.S. attorney for
14 the Northern District of Georgia.

15 She has been a U.S. attorney for the
16 Northern District of Georgia and was appointed by
17 President Obama and confirmed by the Senate on March
18 10, 2009. Prior to her appointment, she served as
19 first assistant U.S. attorney for approximately seven
20 years.

21 She served as chief of the Fraud and
22 Public Corruption Section of the office where she

23

1 supervised the prosecution of the office's white-
2 collar matters from 1994 until 2002.

3 Ms. Yates has been with the U.S.
4 attorney's office since 1989 and has handled a wide
5 variety of complex public corruption and fraud
6 matters. She was the lead prosecutor in the City of
7 Atlanta corruption prosecutions, and in the
8 prosecution of Olympic bomber Eric Rudolph.

9 She is a fellow of the American College of
10 Trial Lawyers. Ms. Yates practiced with King &
11 Spalding in the commercial litigation area prior to
12 joining the U.S. attorney's office in Atlanta. She
13 earned her J.D. from the University of Georgia School
14 of Law.

15 Welcome, and it is an honor for us to have
16 you here with us today.

17 MS. YATES: Well thank you, Mr. Chairman.
18 I am honored to be here. Good morning to everyone.

19 I want to thank you for the opportunity to
20 testify on behalf of the Obama administration, the
21 Department of Justice, and federal prosecutors across
22 the country on the issue of mandatory minimum
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1 sentencing.

2 Now I come before you today not as a
3 policy expert, but rather as a long-time prosecutor.
4 As Judge Sessions just mentioned, I have been a
5 prosecutor for over 20 years -- a line assistant, a
6 section chief, and first assistant. And during the
7 time I was first assistant, I also served a couple of
8 stints as acting U.S. attorney during that time, as
9 well.

10 I now find myself as a newly minted U.S.
11 attorney in a district facing a number of significant
12 law enforcement challenges in both the white collar
13 area, the violent crime area, and in the drug arena.

14 Just to hit a few of those highlights for
15 you to give you some idea of the diversity of
16 challenges that we face, in the Northern District of
17 Georgia we have had more bank failures than any other
18 district in the country.

19 In the Northern District of Georgia, we
20 are the number one district that exports illegal
21 firearms. In other words, more illegal firearms come
22 from the Northern District of Georgia than any other
23

1 district in the country.

2 We were, until just recently, the number
3 one district in mortgage fraud. We now, happily,
4 have dropped to number five, but it is still a
5 dubious distinction.

6 We have a growing gang problem in our
7 district. And we have now supplanted Miami as the
8 East Coast hub for the Mexican cartels. Miami now
9 gets its dope from us. And so we find ourselves with
10 a number of law enforcement challenges and have to
11 make decisions about how we are going to allocate
12 those resources.

13 I am grateful to have an opportunity to
14 talk with you today about the important issue of
15 mandatory minimum sentencing and its role in the law
16 enforcement community.

17 We applaud the Commission for its
18 leadership over the last 20 years on this critical
19 issue, and on so many others that impact federal
20 sentencing.

21 We look forward to working with you over
22 the months to come on a comprehensive assessment of

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1 mandatory minimum sentencing laws. We hope that this
2 assessment will look not only at the data surrounding
3 mandatory minimum sentencing but also their goal and
4 their place in the goals of achieving sentencing and
5 improving public safety, their evolving role in the
6 post-*Booker* world, and their severity levels, any
7 racial and ethnic disparities that result from these
8 laws, and the impact of mandatory minimum sentencing
9 statutes on the federal prison population.

10 Now my testimony here today is offered in
11 the context of an ongoing study at the Department of
12 Justice that began soon after Attorney General Holder
13 took office.

14 In the spring of law year, the Attorney
15 General created the Sentencing and Corrections Working
16 Group within the Department of Justice. The working
17 group is chaired by the acting deputy attorney
18 general and has involved over 100 different
19 prosecutors from within the Department, as well as
20 policy analysts, statisticians, researchers, prison
21 officials, and others across the Department.

22 The Attorney General's charge to the

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1 working group is to review federal sentencing and
2 corrections policy in light of the series of
3 constitutional rulings issued by the Supreme Court in
4 *Booker* and other cases, as well as the unsustainable
5 growth of the federal inmate population, and the
6 criticism of federal sentencing policy by many
7 judges, academics, members of Congress, and
8 practicing attorneys.

9 This criticism surrounds the structure of
10 federal sentencing, which includes mandatory minimum
11 sentencing statutes and advisory sentencing
12 guidelines, and the perceived racial and ethnic
13 disparities in sentencing and various other aspects
14 of sentencing and corrections practice and policy.

15 The Sentencing and Corrections Working Group
16 is conducting the most comprehensive review of
17 federal sentencing and corrections in the Executive
18 Branch at least since the passage of the Sentencing
19 Reform Act.

20 In studying the structure of federal
21 sentencing, this includes mandatory minimum
22 sentencing statutes, the federal cocaine sentencing
23

1 policy and other perceived racial and ethnic
2 disparities in sentencing, prisoner re-entry,
3 alternatives to incarceration, and the Department's
4 own charging and sentencing policy, and much more.

5 In its work, the working group is reaching
6 out beyond the Department of Justice. We are meeting
7 with law enforcement officials, federal judges,
8 defense attorneys, probation officers, victim
9 advocacy groups, civil rights organizations,
10 academics, outside researchers, and many others.

11 The working group is researching the
12 history of U.S. sentencings and corrections policy.
13 They are examining the available research on what
14 works in sentencing and corrections, and looking
15 closely at various state sentencing corrections law
16 and policies.

17 The Group visited several federal prisons.
18 They spoke with incarcerated men and women and
19 attended the Bureau of Prisons's residential drug
20 treatment program. They also attended a Federal
21 Prison Industries work site, and other prison
22 programming.

23

1 The results of the working group are
2 beginning to guide the Department's policies
3 regarding sentencing. To begin, the administration
4 has been working hard with members of Congress to see
5 the enactment this year of legislation to address the
6 current disparity in sentencing between crack and
7 powder cocaine offenses, including the existing
8 100-to-1 ratio.

9 In addition, last week the Attorney
10 General issued a new Department policy on charging
11 and sentencing in a memorandum to all federal
12 prosecutors. This new policy recognizes the reality
13 of the post-*Booker* sentencing world and the need for
14 the appropriate balance of consistency and
15 flexibility to maximize the crime-fighting impact of
16 federal law enforcement.

17 We are also working on new ways to examine
18 racial and ethnic disparities in sentencing beyond
19 the federal cocaine sentencing policy to determine if
20 the disparities are the result of a race-neutral
21 application of statutes and charging decisions and
22 are otherwise justified.

23

1 Finally, we are working on initiatives to
2 promote more effective prisoner re-entry. These and
3 other measures will be announced by the Department
4 shortly.

5 Our work on the structure of federal
6 sentencing began with a review of the historical
7 sentencing practices and policies of the United
8 States which reveals that judicial sentencing
9 discretion has never been absolute.

10 In the history of our country in the
11 federal criminal justice system, and in every state
12 criminal justice system, judicial discretion in
13 sentencing has always been limited as a matter of
14 law.

15 Sentencing discretion is constrained by
16 the Constitution, by maximum penalties set by
17 Congress and state legislatures, and in many
18 circumstances by minimum penalties set by
19 legislatures, and often by minimum and maximum
20 presumptive sentences set by a sentencing
21 commission.

22 As Justice Kennedy recently wrote,
23

1 "Few, perhaps no, judicial responsibilities
2 are more difficult than sentencing. The task is
3 usually undertaken by trial judges who seek with
4 diligence and professionalism to take account of the
5 human existence of the offender and the just demands
6 of a wronged society. The case-by-case approach to
7 sentencing must, however, be confined by some
8 boundaries."

9 It has been common practice in our
10 country's history in federal and state criminal
11 justice systems for the criminal law to mandate a
12 minimum sentence for murder, rape, drunk driving, and
13 a host of other serious crimes.

14 As you know, the current federal
15 sentencing structure includes both mandatory minimum
16 sentencing statutes and sentencing guidelines that
17 have been advisory for about the last five years.

18 Before the 1980s, the number of mandatory
19 minimum sentencing laws in the federal criminal
20 justice system was very small. Beginning as early as
21 the 1960s, though, a movement to establish more
22 mandatory minimum penalties began to sweep across the

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1 country as a result of an historic increase in crime
2 and illegal drug use in the United States.

3 In an attempt to slow the growing drug
4 trade, to combat an overall crime rate that had grown
5 five-fold, and a violent crime rate that had
6 quadrupled, and to address criticisms that courts
7 were being inappropriately lenient and imposing
8 disproportionately longer sentences in the cases of
9 minority defendants, many states by the 1970s adopted
10 statutory mandatory minimum sentences.

11 This was part of the larger sentencing
12 reform movement toward determinate sentencing and
13 away from indeterminate sentencing. After the 1984
14 passage of the Sentencing Reform Act, the federal
15 government committed to replacing its system of
16 indeterminate sentencing with a fairer, more
17 predictable, more uniform determinate sentencing
18 system, adopted a new sentencing system, the key
19 feature of which included the creation of the
20 Sentencing Commission.

21 The Act also called for the development
22 and implementation of sentencing guidelines that

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1 would carry the force of law. It also called for the
2 abolition of parole, the creation of truth-in-
3 sentencing practices, and the enactment of severe
4 mandatory minimum sentencing laws for certain serious
5 crimes -- primarily drug and firearms offenses, and for
6 recidivist offenders.

7 In 1986, through the 1990s and into the
8 21st century, Congress enacted mandatory minimum
9 sentencing statutes to work together with the federal
10 sentencing guidelines. As a result of these
11 sentencing reforms, many other criminal justice
12 reforms and larger cultural changes in society, crime
13 rates have been reduced dramatically across the
14 country in the last 20 years.

15 Researchers have found that a significant
16 part of the reduction in crime has been the result of
17 changes to sentencing and corrections policies.
18 Moreover, the experience of law enforcement
19 reinforces this research and shows that there are
20 tangible benefits to law enforcement and public
21 safety for mandatory sentencing laws.

22 Mandatory sentencing laws increase

1 deterrence and cooperation by those involved in
2 crime. It is not surprising then that every
3 administration and Congress since 1984 has supported,
4 in one way or another, determinate sentencing and
5 mandatory minimum sentencing statutes for serious
6 crimes.

7 Mandatory minimum sentencing statutes are
8 supported by most law enforcement organizations, and
9 most rank-and-file law enforcement officers across
10 the country.

11 Even our preliminary assessment of the
12 working group's efforts reveals, however, that
13 mandatory sentencing laws have come with a heavy
14 price. Mandatory minimum sentencing statutes in the
15 federal system now apply to a significant array of
16 crimes, and they also by and large mandate very
17 severe imprisonment terms.

18 The federal prison population, which was
19 about 25,000 at the time of the enactment of the
20 Sentencing Reform Act, is now over 210,000 and it
21 continues to grow. Much of that growth is the result
22 of long mandatory sentences for drug trafficking
23

1 offenders.

2 While these and other mandatory sentences
3 have been important factors in bringing down crime
4 rates, we also believe that there are real and
5 significant excesses in terms of the imprisonment
6 being meted out for some offenders under the existing
7 mandatory sentencing laws, especially for some
8 nonviolent offenders.

9 Moreover, the Federal Bureau of Prisons is
10 now significantly over capacity, which has real and
11 detrimental consequences for the safety of prisoners
12 and guards, for effective prisoner re-entry, and
13 ultimately for public safety.

14 At the same time, since the Supreme
15 Court's decision in *Booker*, Sentencing Commission
16 research and data, and the experience of our
17 prosecutors, have shown increasing disparities in
18 sentencing.

19 We are concerned by, and continue to
20 evaluate, research and data that indicate that
21 sentencing practices, particularly those in lengthier
22 incarcerations, are correlated with the demographics

23

1 of the offenders.

2 Further, with more and more sentences
3 becoming unhinged from the sentencing guidelines,
4 undue leniency has become common for certain
5 offenders convicted of certain types of crimes.

6 For example, some white collar offenses,
7 including high-loss white collar offenses, and some
8 child exploitation offenses, for both of these the
9 sentences have become increasingly inconsistent.

10 The federal sentencing guidelines, which
11 were intended to carry the force of law, no longer
12 do. Thus, for these offenses for which there are no
13 mandatory minimums, sentencing decisions have been
14 largely unconstrained as a matter of law, except for
15 any applicable statutory maximum penalty.

16 Predictably, this has led to greater
17 variation in sentencing. This in turn undermines the
18 goals of sentencing to treat offenders alike, to
19 eliminate unwarranted disparities in sentencing, and
20 to promote deterrence through predictability in
21 sentencing.

22 We support the limited and judicious use

23

1 of mandatory minimum sentencing statutes, and a re-
2 examination of existing mandatories and their
3 severity levels.

4 Our study has led us to the conclusion
5 that in an era of advisory guidelines, mandatory
6 minimum sentencing statutes remain important to
7 promote the goals of sentencing and public safety.
8 At the same time, we recognize that some reforms of
9 existing mandatory minimum sentencing statutes are
10 needed, and that consideration of some new modest
11 mandatory minimum sentencing statutes may be
12 appropriate.

13 Federal prosecutors do not support
14 mandatory minimum penalties for all crimes. That is
15 not our position.

16 Rather, acknowledging our current advisory
17 guideline system, and recognizing that mandatory
18 minimum penalties provide critical tools for
19 combatting serious crimes, we support mandatory
20 minimum sentencing statutes for certain serious
21 crimes.

22 As we have stated before, since *Booker* we
23

1 are seeing decreasing uniformity and increasing
2 disparity in the imposition of federal sentences.
3 Because predictability in sentencing has been
4 diminished, the deterrent value of federal sentencing
5 similarly is beginning to erode.

6 Moreover, we believe increasing
7 inconsistency in sentencing will chip away at public
8 confidence in the sentencing system, and that the
9 goals of sentencing will be short-changed.

10 In the past, the Sentencing Commission has
11 taken the position that mandatory minimum sentencing
12 statutes were not needed, in part because the
13 sentencing guidelines were themselves mandatory.
14 This position was also put forward for many years by
15 advocacy groups such as the American Bar Association,
16 and Families Against Mandatory Minimums, as well as
17 the Federal Public Defenders.

18 However, in our review of sentencing over
19 the last year we have found little support from
20 Congress or from the federal judiciary for
21 reinstating the presumptive nature of sentencing
22 guidelines.

23

1 In the absence of such a change to the
2 federal sentencing structure that might return
3 presumptive sentencing guidelines, an overhaul that
4 we are not now recommending, we believe that
5 mandatory minimum sentencing statutes must go hand-
6 in-hand with advisory sentencing guidelines.

7 In the post-*Booker* landscape of advisory
8 guidelines, a mandatory minimum penalty scheme is
9 reasonable and needed. It will retain an essential
10 law enforcement tool, increase public safety, ensure
11 that paths for achieving the goals of sentencing
12 continue to exist, and help promote public confidence
13 in the sentencing system by providing predictability,
14 certainty, and uniformity in sentencing for serious
15 crimes.

16 While we recognize that mandatory minimum
17 sentences are a critical tool in removing dangerous
18 offenders from society, and in gaining cooperation
19 from members of violent street gangs and drug
20 distribution networks, we simultaneously recognize
21 that mandatory minimum penalties should be used
22 judiciously and only for serious offenses, and should

23

1 be set at severity levels that are not excessive.

2 Many states are now re-examining their
3 mandatory minimum sentencing statutes. As I stated
4 earlier, there's been excess in the promulgation of
5 federal mandatory minimums. Thus, reforms of some of
6 the current mandatory minimums are needed to
7 eliminate excess severity in current sentencing laws,
8 and to help address the unsustainable growth in the
9 federal prison population.

10 We believe that the Commission should
11 undertake its review of mandatory minimums to
12 identify where mandatory minimum statutes are
13 unjustified, and thus can be eliminated; or, where
14 the applicable severity level of a mandatory minimum
15 might be reduced with no adverse consequences to
16 public safety.

17 We also believe that the Commission should
18 identify crimes where there are excessive sentencing
19 disparities, and where a new mandatory minimum
20 sentence would significantly address this disparity
21 and assist a law enforcement program and public
22 safety.

23

1 We believe that no new mandatory minimums
2 should be proposed unless there is substantial
3 evidence that such a minimum would rectify a genuine
4 problem with the imposition of sentences below the
5 advisory guidelines; that it would not have an
6 unwarranted adverse effect on any racial or ethnic
7 group; would not substantially exacerbate prison
8 crowding.

9 The current structure of federal
10 sentencing, with its advisory guidelines and
11 mandatory minimum sentencing statutes, was not
12 designed but rather evolved over time as a result of
13 actions of various Congresses and decisions by the
14 United States Supreme Court.

15 We believe the Commission should continue
16 to review the current sentencing structure that it
17 began with its regional hearings last year. We think
18 it should explore various options for sentencing
19 reform. At the same time, though, we see little
20 support in Congress or across the federal criminal
21 justice system for a structural change of federal
22 sentencing.

23

1 In light of this, we support the continued
2 but judicious use of mandatory minimum sentencing
3 statutes. We urge the Commission to engage in a
4 review of existing mandatory minimums to identify
5 those statutes that are unnecessarily severe, and
6 also to identify crimes for which the goals of
7 sentencing and public safety suggest a new statutory
8 minimum term may be appropriate.

9 We thank you for this opportunity to share
10 the views of the administration with the Commission,
11 and we are looking forward to continuing our work
12 together to improve federal sentencing and to bring
13 greater justice to all.

14 Thank you.

15 CHAIR SESSIONS: Thank you, Ms. Yates.
16 Let me open it up for questions.

17 Judge Castillo.

18 VICE CHAIR CASTILLO: As I understand your
19 testimony, the Department of Justice is willing to
20 agree that some change is necessary in terms of the
21 current use of mandatory minimums, but at this point
22 you are not willing to point out where that might be?

23

1 It really comes down to a definition of what is a
2 serious crime, or what is a judicious use of
3 mandatory minimums?

4 MS. YATES: It does, Judge. And I think
5 that by stating that we believe that mandatory
6 minimums should be limited to serious crimes, that is
7 really the starting point and not the ending point.

8 We recognize that that alone does not
9 provide sufficient guidance to this Commission in
10 determining which mandatory minimums should be
11 retained, and whether any new mandatory minimums
12 should be enacted.

13 VICE CHAIR CASTILLO: Do you think there's
14 ever going to be a time when the Department of
15 Justice is willing to come forward with the results
16 of its study and actually suggest to us what areas
17 should be modified?

18 MS. YATES: Well certainly I think it's
19 the position of the Department that this body, as the
20 expert on sentencing law, and with the opportunity
21 that you have of gathering data, is really the best
22 body to put forth the specific statutes that should

23

1 be revised.

2 That doesn't mean, though, that we're not
3 willing to voice our opinion on that. We think that
4 this is really the beginning of that process, though,
5 and that we would want to work with you as we go
6 through really a statute-by-statute examination of
7 the existing mandatory minimums, to take a look at
8 who are the offenders that are being impacted by
9 these mandatory minimums.

10 And, candidly, we don't have all of that
11 data right now to be able to do that. We think that
12 we need to go behind just the data that we have right
13 now and get a better feel of who are the offenders.

14 VICE CHAIR CASTILLO: As we go through
15 that -- and then I will stop my question -- but there's
16 one other topic I wanted to make sure we got to.
17 That is, the regional variations in the use of
18 mandatory minimums. It seems to me that they're used
19 nationally right around 30 percent of the time. But
20 when you start looking regionally, there are some
21 pretty wide differences.

22 For example, in the D.C. Circuit they're
23

1 used about 45 percent of the time. In the Fourth
2 Circuit, right around 45 percent of the time. But
3 then when you go to some of our larger circuits, the
4 Fifth, and the Fourth, it goes all the way down to
5 more, lesser use, or I should say the Fourth and the
6 D.C. Circuit it's up there like 45 percent; but when
7 you look at the Fifth and the Ninth, it's right
8 around 20 percent.

9 And then if you were to overlay that with
10 the African American population, I mean the higher
11 use of mandatory minimums would seem to be, at first
12 blush, in the areas where there is a higher African
13 American population.

14 Should we be concerned about that?

15 MS. YATES: I think we certainly should be
16 concerned about that. And I can tell you that the
17 Department is concerned about that.

18 First, with respect to the issue that you
19 raised of racial disparities, the Attorney General
20 actually designated a separate working group to look
21 at racial disparities in sentencing -- not limited
22 exclusively just to the impact on minimum
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1 mandatories, but a sentencing across the board -- and
2 found in fact, as you just pointed out, that there
3 are disparities; that minimum mandatories have had a
4 disproportionate impact on the African American
5 community.

6 What we don't know yet, though, and what
7 the Department is endeavoring to determine, is
8 whether or not that disparity is the result of the
9 race-neutral application of statutes and prosecuted
10 policies.

11 That is a second study that the Department
12 is undertaking now. In other words, we have to go
13 behind just the statistics. You know, when you look
14 at -- and to your earlier point, that hopefully I can
15 connect the two up here -- to your earlier point of
16 looking at regional disparities, you know there are
17 lots of factors that go into a charging decision that
18 oftentimes is not readily apparent just from looking
19 at the cold numbers on the page.

20 I know, as I was mentioning earlier in my
21 testimony, in our district we are overrun with law
22 enforcement challenges. We have about 75 prosecutors

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1 to handle a district of about 6.5 million people.

2 We can't possibly prosecute every federal
3 crime. Candidly, we can't even prosecute most
4 federal crimes in our district. And so what I am
5 charged with doing, as the United States attorney in
6 that district, is trying to determine how can we best
7 allocate our resources to have the greatest impact on
8 the district?

9 When you mentioned the difference between
10 large districts and small districts, I would
11 imagine -- and I am speculating here -- but I would
12 imagine that one of the reasons for that difference
13 would be that in larger districts we have more that
14 we have to deal with, and larger and more significant
15 crimes.

16 For example, in our district because we
17 are now the East Coast hub for the Mexican cartels,
18 we are not doing those small drug cases anymore.
19 We're not doing really five-kilo, ten-kilo cases. The
20 majority of our drug cases in our district, certainly
21 with some exceptions, but the majority are in the
22 hundreds of kilos. They are major organizations.

23

1 And so when you're making decisions
2 about -- when you're making charging decisions, it may
3 be that you don't pursue a mandatory minimum because
4 if you do that that's going to be a trial, and you
5 ultimately then end up taking a plea for example to a
6 case to something other than a mandatory minimum
7 because you simply don't have the resources to go
8 forward on the mandatory minimums.

9 That is not an ideal situation, certainly,
10 from a consistency standpoint but it's the reality of
11 the situation that we're in. And so when you look at
12 disparities, also another thing that is oftentimes
13 absent from the cold numbers would be the
14 demographics of the district and the crime problem in
15 the district.

16 For example, if you look in the Northern
17 District of Georgia, the majority of our drug
18 defendants are Hispanic. That is because, again, we
19 are at the hub for the Mexican cartels.

20 Now if you were to compare the percentage
21 of drug defendants compared to the overall population
22 in our district for Hispanics, you would see a gross

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1 disparity in those numbers. But the reason for our
2 numbers of Hispanic defendants is because those are
3 our major offenders in our district. Those are the
4 cases that are our highest priority.

5 And so I guess I would just caution that
6 oftentimes the numbers don't tell the full story,
7 which is one reason why the Department is committed
8 to going behind the numbers as it relates to the
9 racial disparities and trying to get to the bottom of
10 it. And we would urge the Commission to do the same
11 thing.

12 VICE CHAIR CASTILLO: Thank you.

13 CHAIR SESSIONS: Commissioner Carr.

14 VICE CHAIR CARR: Ms. Yates, I was an
15 assistant U.S. attorney in a district which, while it
16 had a conspicuously high 5K rate, was very faithful
17 to the Thornburgh and Ashcroft Memos in terms of
18 charging the most readily provable offenses that had
19 the most serious consequences both in terms of
20 guidelines and statutory mandatories.

21 Yesterday we received a copy of the
22 Attorney General's new charging and sentencing

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1 memorandum, and one question I have is -- because
2 clearly it is giving more flexibility to assistant
3 U.S. attorneys' offices and what their policies are,
4 although also setting forth the fact that through
5 supervisory review the policies will be consistent
6 within the district -- but do you know whether that new
7 policy came in part from the fact that a lot of U.S.
8 attorneys' offices were not in fact doing what ours
9 did, and that they were not always following the
10 memos that had been set out before?

11 MS. YATES: Well I don't want to speak for
12 the Attorney General, but I guess that's actually
13 what I'm here to do, but I can tell you what my
14 understanding is of the genesis of the memo. And I
15 think it was really for a couple of purposes.

16 One, you know we are now in a post-Booker
17 world. Sentencing is different. And for the last
18 five years, where we were operating under a policy
19 that one could say required us to advocate for a
20 guidelines' sentence in all but the most exceptional
21 circumstances, we were essentially the only ones in
22 the courtroom who were still acting like the

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1 guidelines were mandatory.

2 That had a real negative impact I think on
3 the Department's ability to have a voice in
4 sentencing. We essentially in some cases ended up
5 being out of the conversation in sentencing because
6 we would come in and some would say, somewhat
7 robotically say, the government recommends a
8 guidelines sentence. And then the conversation would
9 proceed between the judge and the defense attorney as
10 they went through the 3553 factors and considered
11 various factors that might warrant a variance.

12 And so I think part of the genesis of this
13 was a recognition of the world that we live in now;
14 that while in most cases we will still be advocating
15 for a guidelines' sentence because in the majority of
16 cases we believe that is the fair and appropriate
17 sentence, that we are in an advisory guideline world
18 now, and that we need to adapt. And we need to
19 recognize that courts are going to be considering
20 factors outside of the guidelines for variances, and
21 we need to be part of that conversation.

22 VICE CHAIR CARR: But it also seems like

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1 there would be more flexibility in the determination
2 not to bring a mandatory minimum.

3 MS. YATES: I think that that's right.

4 Now in the past -- and there was something
5 of a conflict in the past between the Ashcroft Memo
6 and the Principles of Federal Prosecution, which
7 never did change. Still, even in the charging arena
8 the Holder Memo counsels that ordinarily we should
9 charge the most serious readily provable offense; and
10 ordinarily that would include sentencing
11 enhancements, whether it's 924(c)s or 851 charges.

12 But it does give some additional
13 flexibility to take into account the specific
14 circumstances of the case. Now that is not based on
15 the whim of the individual prosecutor. As you just
16 mentioned, it is with supervisory approval. And it
17 also comes with a requirement that each charging
18 decision be accompanied by a pros memo that lays out
19 what the various sentencing options are, and why the
20 prosecutor is recommending the specific charge.

21 So, yes, there is some increased
22 flexibility here. You know, I might say though that

23

1 even in the past with the Ashcroft Memo, the
2 definition of what is an extraordinary circumstance
3 that would warrant a deviation from the Ashcroft Memo
4 was by itself open to somewhat widely varying
5 interpretation. So it's not as though we had perfect
6 consistency under the Ashcroft Memo as well.

7 VICE CHAIR CARR: I have one last question
8 about your district. Almost exactly a third of your
9 cases last fiscal year were drug cases -- unlike the
10 rest of the country, overwhelmingly powder cocaine
11 cases --

12 MS. YATES: That's right.

13 VICE CHAIR CARR: -- 54 percent. And just
14 about two percent crack cocaine. Does that reflect the
15 drugs that you find in your district, or a policy as
16 to what you're going to concentrate on? And do the
17 crack cases go locally, or something?

18 MS. YATES: It's a little bit of both. As
19 I mentioned, it reflects what we find in our
20 district. Certainly powder cocaine is huge in our
21 district. We have other drugs. There's heroin and
22 certainly marijuana, and some meth, but again we're

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1 the hub for powder cocaine. It comes up from Mexico
2 through Texas, and then comes to Atlanta and is kept
3 there for distribution along the East Coast.

4 And so that is our most significant crime
5 threat. And partly because of that, and a resource
6 issue, we have, not just recently but in the past,
7 sent most of the crack cases to the locals. Because
8 we're not really prosecuting again for the most part
9 street-level dealers.

10 CHAIR SESSIONS: Commissioner Howell.

11 COMMISSIONER HOWELL: Yes, I want to
12 actually follow up on some of Commissioner Carr's
13 questions about the new flexibility in the charging
14 decisions, since I was also interested in the
15 Department's perspective on how this one differs from
16 the Ashcroft and Comey Memos that it supercedes.

17 And one of the criticisms of course of
18 mandatory minimum penalties raised widely is that it
19 puts too much power in the hands of prosecutors, and
20 the use of that power by prosecutors is inconsistent
21 around the country.

22 Some of the Commission's own preliminary
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1 data analysis, for example, of use of the 851
2 enhancement, something that we're going to hear about
3 a little bit from our probation -- our Practitioners
4 Advisory Group, and other people testifying today -- is
5 that, based on our preliminary analysis of two data
6 sets from '06 and '08, the eligibility of defendants
7 for an 851 notice or sentencing enhancement is fairly
8 consistent across the country. And yet the use of
9 that enhancement is just startling.

10 You know, it's used in some districts and
11 not in others. And even within states it's sometimes
12 used inconsistently. I mean, we have one example
13 where the Northern District of Florida, over 75
14 percent of eligible defendants received the 851
15 enhancement, whereas in Southern and Middle Districts
16 of Florida, less than 25 percent.

17 I mean, I looked at Georgia specifically
18 and, while every Georgia district has defendants
19 eligible for the 851 enhancement, none were filed in
20 the Middle District of Georgia. Some were filed in
21 your districts. Some were filed in the other
22 districts, but none in the Middle District of

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1 Georgia. Which raises, you know, in terms of our
2 preliminary data analysis, just on the 851
3 enhancement, that there is totally inconsistent
4 application of that particular sentencing enhancement
5 that can double sentences in certain cases.

6 And, you know, based on some of this
7 inconsistent application, there are certainly groups
8 that say this is one of the reasons that mandatory
9 minimums should be repealed. And, I mean, one, do
10 you think the Commission should be concerned, and the
11 Department should be concerned about the inconsistent
12 application that may in fact be aggravated by the new
13 Attorney General's memo giving additional
14 flexibility?

15 And, two, should we -- where we find that
16 there is significant discrepancy in application as
17 we're finding with the 851 enhancement, that that is
18 the kind of empirical analysis that should prompt
19 recommendation to Congress that that kind of
20 enhancement solely in the hands of prosecutors should
21 be modified?

22 That's one area of questions. And then I

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1 have another area of questions about the severity of
2 mandatory minimums, but I'll leave you to answer
3 that, first.

4 MS. YATES: First with respect to whether
5 or not the Holder Memo -- and I guess I've just dubbed
6 it the Holder Memo; I'm not sure it was called that
7 before -- but under your question as to whether or not
8 there will be even greater disparity under the Holder
9 Memo, I don't think so.

10 Again, I can't tell you with precision
11 what the basis is for the variations in the practice
12 of filing 851s. I can tell you, though, that now
13 when the Holder Memo specifically counsels and places
14 a responsibility on federal prosecutors to consider
15 the specific circumstances of the case in making the
16 determination as to the appropriate charge, I think
17 that is a factor that had been considered in the past
18 by some offices in determining whether to file the
19 851.

20 You know one of the problems with the
21 enhancement under 851, and one of the things that we
22 think that the Commission should study, is the fact

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1 that a wide variety of offenses and conduct will
2 qualify as a prior offense for the 851 enhancement.
3 And so you may have a street-level drug dealer
4 involved in a hand-to-hand, in a hand-to-hand
5 transaction that has a prior offense, and you may
6 have a drug kingpin that has a prior offense, and
7 they both count.

8 In the past I know in our district we have
9 tried at times to look beneath the actual conviction
10 and to see what the circumstances of that conviction
11 were. And I think what the Holder Memo is counseling
12 now is that you can look at specific circumstances.

13 I think that this is an area again that
14 the Commission should study, as well. When we say we
15 think there are excesses, certainly one of the areas
16 where there has been criticism that would be a
17 fruitful area for the Commission to examine would be
18 the 851 enhancements, and the doubling of penalties
19 for one prior, or then for two priors.

20 COMMISSIONER HOWELL: But is this an area
21 that the Department is also looking at to give more
22 specific guidance to U.S. attorneys, that if you have

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1 a less serious drug prior that that should not prompt
2 filing of an 851 notice?

3 I mean, some of this, you know, every
4 player in the criminal justice system has a role and
5 responsibility to try and ensure consistency. And
6 given the stark inconsistencies in application of the
7 851 based on our preliminary data analysis, I mean
8 this is also something that the Department should be
9 aware of. And it may prompt guidance on the part of
10 the Department rather than running to Congress to
11 have a statutory change when it could be much more
12 easily dealt with in terms of consistency of
13 application by another Attorney General memo.

14 MS. YATES: Well I think that the Attorney
15 General memo is the starting point, again, not
16 necessarily the ending point on this as well. And
17 while right now the memo does not provide more
18 specific guidance for the filing of 851s or any other
19 sentencing enhancement beyond the general guidance
20 it's given, which is you should ordinarily charge and
21 pursue the most significant offense, which would
22 include the enhancements, I think certainly as we go

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1 forward and see how this practice plays out that it
2 may very well be that additional guidance is
3 appropriate.

4 COMMISSIONER HOWELL: Let me just turn to
5 the severity of mandatory minimums and specifically
6 talk a little bit about the safety valve.

7 I mean, it is something that the
8 Commission has been looking at in terms -- in sort of
9 informally discussing whether there should be an
10 expansion of the safety valve. We have a number of
11 different groups who are going to be testifying today
12 who also make -- you know, urge the Commission to
13 recommend to Congress that the safety valve be
14 expanded.

15 Based on our preliminary data analysis,
16 should we expand the safety valve to cover -- to make
17 eligible not just defendants in Criminal History
18 Category I, but expand that to Criminal History
19 Category II and III? We would, based on our 2009
20 data set, cover about an additional 2500 defendants
21 who might meet the other criteria for the safety
22 valve as well.

23

1 Of those defendants, the vast majority
2 have criminal history categories in II and III based
3 on prior convictions that did not warrant a three-
4 point increase, meaning their prior convictions were
5 not ones that had imprisonment of more than a year
6 and a month. Meaning that their prior convictions
7 weren't probably all that serious.

8 So would that kind of evidence garner the
9 support of the Department for expansion of the safety
10 valve to encompass, if not all of category II and III
11 eligible defendants, but certain perhaps category II
12 and III defendants that didn't have a three-point
13 increase in their -- whose prior convictions hadn't
14 triggered the three-point increase?

15 MS. YATES: Well we have found the safety
16 valve to be a very effective mechanism for helping to
17 provide some relief for nonviolent drug offenders who
18 have no, or no significant criminal history.

19 The Department is currently examining what
20 you're talking about right now, at least through
21 Criminal History Category II. And I think, while
22 they have not completed the study on this, it would
23

1 be important that we really get a handle on precisely
2 who is in this category of offenders that we would be
3 extending safety valve for. But it is certainly
4 something that the Department is open to and think
5 that the Commission should consider and continue to
6 look at, as well, as to whether safety valves should
7 be expanded to Criminal History Category II. We
8 haven't talked about III, but that doesn't mean we
9 won't.

10 CHAIR SESSIONS: Okay. Commissioner
11 Friedrich?

12 COMMISSIONER FRIEDRICH: Yes. Ms. Yates,
13 I would like to follow up on a question Judge
14 Castillo asked you regarding mandatory minimum
15 penalties and appropriate offenses which those should
16 apply to.

17 As I understand DOJ's position is that you
18 don't support mandatory minimum sentences -- any new
19 mandatory minimum sentences unless there is
20 substantial evidence that mandatory minimum would
21 rectify a problem with sentences being imposed
22 substantially below the guidelines.

23

1 And in your testimony you highlighted two
2 areas in particular. One being high-loss white
3 collar offenses; another being some child
4 exploitation offenses, which you described as
5 increasingly inconsistent and unhinged from the
6 guidelines.

7 MS. YATES: Right.

8 COMMISSIONER FRIEDRICH: Is it fair for
9 the Commission to infer from your testimony that
10 these are two areas in which the Department of
11 Justice believes that low-level mandatory minimums
12 may be appropriate?

13 MS. YATES: Certainly I think the
14 Department believes that they may be appropriate. We
15 think that we need to study with the Commission
16 further before saying that they definitely are
17 appropriate. But you know that is something, again
18 as a practitioner in the field, that I've seen and
19 the prosecutors in my office have seen: that white
20 collar offenses are now almost -- the sentencing is
21 almost indeterminate.

22 And, you know, those are very significant

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1 cases that have a significant impact on the district.
2 And I worry that we are devolving into sort of a two
3 systems of justice: one for one category or
4 socioeconomic group of offenders; and another for
5 another socioeconomic group.

6 And so we believe that that is an area
7 where some modest mandatory minimum -- we're not
8 suggesting that there needs to be a 25-year minimum
9 mandatory, but it's something that the Commission
10 should look at.

11 We have also seen in the child
12 exploitation area -- particularly in the area of
13 possession of child porn that does not carry, as you
14 know, a mandatory minimum -- wildly divergent
15 sentences. From judges who want to impose the top of
16 the guidelines, if not beyond that, to other judges
17 who impose probation on the theory that they're just
18 sitting in front of their computer looking at some
19 bad pictures, what's the big deal about that?

20 Well, that's an area where, for deterrence
21 purposes and for also recognizing the importance and
22 severity of that crime, we believe that it may be

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1 important for there to be a modest mandatory minimum.

2 So we are up to the point of saying we
3 believe the Commission should consider these two. I
4 don't think the Department is quite ready yet to
5 commit that those are two that definitely should have
6 mandatory minimums, but they deserve close scrutiny.

7 CHAIR SESSIONS: Okay. Judge Hinojosa.

8 COMMISSIONER HINOJOSA: As a follow up to
9 the questions about the statements that you support
10 mandatory minimums for serious offenses, I guess I'm
11 a little confused --

12 MS. YATES: It's a murky word, isn't it?

13 COMMISSIONER HINOJOSA: -- from the
14 standpoint that you keep talking about the
15 Commission, but it is Congress that passes the
16 mandatory minimums. And so my question to you is, is
17 the Department going to express a view to Congress as
18 to which you consider serious and which you do not,
19 from the standpoint of which mandatory minimums you
20 would support and which, if any, you would consider a
21 change in?

22 As you know, there's about 170 mandatory
23

1 minimums. Most of them don't get used. Ninety
2 percent of the mandatory minimums used in the
3 courtroom are drug trafficking and firearms offenses.
4 And then there's a group of the others that make
5 about the ten percent.

6 So my question is: If the prosecutors
7 with all the years of experience, and the Department
8 of Justice don't express a view to Congress as to
9 which ones you consider serious, where does that get
10 us? I mean, the point of, well, the Commission
11 should do such-and-such, the question is what is the
12 Department of Justice's view? Because you're the
13 ones in the field doing the prosecuting.

14 You have the discretion under the
15 statutes, under 851, whether to use them or not. So
16 the question is: Are you going to express a view as
17 to which of these you consider serious enough to have
18 mandatory minimums and which you do not?

19 It sounds nice to say, well, we support
20 them. We support them under serious cases, and we
21 don't necessarily approve of large mandatory minimums
22 as far as the years. But without an expression from
23

1 the Department, what does Congress do?

2 I mean, they're the ones that have to pass
3 the legislation. And so I'm sure they would want to
4 know something from the Department of Justice and
5 these working groups as to what is the view here,
6 just like we would. But unlike us, Congress can
7 actually do something legislatively.

8 MS. YATES: Well --

9 COMMISSIONER HINOJOSA: And I have a
10 follow-up question about a different subject.

11 MS. YATES: Certainly. And that's a fair
12 point. I think that we view this as the beginning of
13 our discussion, both with the Commission and then
14 later with Congress, on what the appropriate
15 mandatory minimums should be.

16 We believe that this Commission should
17 really engage in a statute-by-statute examination of
18 mandatory minimums. We want to be part of that
19 examination. We want to participate with you. We're
20 ready to roll up our sleeves and look at these
21 statutes with you.

22 COMMISSIONER HINOJOSA: But isn't that
23

1 what the working group should be doing, also, so that
2 you could make a recommendation to Congress, the
3 working groups within the Department? With your
4 experience -- and, you know, I empathize with your
5 district, just like our district on the border, with
6 the kind of cases that we have.

7 You know, you certainly have some
8 viewpoint as to which -- if you make the statement in
9 front of us that you think some of them are not
10 serious enough to have these mandatory minimums, I'm
11 sure you have a viewpoint, and the prosecutors across
12 the country I would think, unless they support them
13 all, would have some views that could be expressed.

14 MS. YATES: Well I guess I could go out on
15 a limb here and tell you that I think that forging a
16 notary seal really doesn't require a one-year minimum
17 mandatory, which remarkably enough is one of them.

18 COMMISSIONER HINOJOSA: And how many times
19 do you think that gets used?

20 MS. YATES: Absolutely none. And that is
21 what -- I mean, I was stunned to find out there were
22 170 minimum mandatories. You know, I recognize

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1 that -- and the Commission certainly recognizes that
2 the vast majority are in the area of drugs and guns.

3 The Department is certainly willing to
4 express its views. I think the Department has not
5 yet completely formulated its views as to precisely
6 which statutes. And we think that really the best
7 decision with respect to this comes not out of us
8 over there squirrelled away in the Department without
9 the input of others that would be involved in your
10 study, but in working together with you.

11 I don't think we're going to be short of
12 an opinion on it. I think our view is that that
13 opinion as to the specific statutes really best comes
14 as a result of the Commission's study in which we
15 would like to work with you.

16 Now I will tell you that I'll highlight
17 some of the statutes that I think deserve some
18 particular examination. This does not say of course
19 that it is the Department's view that this particular
20 mandatory minimum should be changed, but certainly it
21 is well known that there are criticisms and concerns
22 about the stacking of 924(c)s, particularly in a

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1 scenario where you have an individual who is charged
2 with multiple 924(c) counts in the same indictment.

3 And so consequently, while the purpose of
4 924(c) may have originally been as a recidivist
5 statute, where you have an individual who goes out on
6 a spree and robs three banks and is now looking at
7 life as a result of that, that that might not
8 necessarily be the most appropriate use of the
9 sentencing structure.

10 So I would think that the stacking of
11 924(c)s would be an area that we should examine,
12 along with the Commission.

13 Certainly as we were talking about with
14 respect to 851s and the offenses that qualify there
15 as a prior conviction for an 851. We believe that
16 that is an area, based on the criticisms that we've
17 heard, that deserves further examination.

18 Likewise in the area of armed career
19 criminals. In our district we have a situation
20 where, because of the overcrowding in the state court
21 system there, it is not unusual at all for a
22 defendant to be charged and convicted and plead
23

1 guilty of drug trafficking and never serve a day in
2 prison.

3 This can happen a couple of times in our
4 state system. It can happen more than a couple of
5 times in our state system. And then we may arrest
6 that offender, and they have a gun, and now they're
7 looking automatically at 15 years. Even though
8 they've never really done any time.

9 That is an area where we think it would be
10 appropriate for the Commission to examine to see if
11 that really is the sentencing structure that makes
12 the most sense.

13 And so I don't know if that provides much
14 help to you, but I'm doing the best I can.

15 COMMISSIONER HINOJOSA: I think you were
16 probably given a difficult position to come and say
17 something without really saying --

18 (Laughter.)

19 COMMISSIONER HINOJOSA: -- what it is it's
20 going to be.

21 MS. YATES: The term "short straw" comes
22 to mind right now.

23

1 (Laughter.)

2 COMMISSIONER HINOJOSA: The other point
3 that has been a discussion for a long time about
4 lengthy sentences and what can be done once they've
5 been imposed has been 3582(c)(1) with regards to the
6 motions by the Bureau of Prisons made to the court
7 after someone's served the length of their sentence
8 under exceptional circumstances for consideration of
9 a reduction of a sentence.

10 The statute requires that the motion be by
11 the Bureau of Prisons, the director of the Bureau of
12 Prisons. The policy has been, by the director of the
13 Bureau of Prisons, a long-standing policy, that it is
14 only limited to cases where somebody has a terminal
15 illness.

16 And so my question is: Is this Department
17 looking at this through your working groups as to
18 whether you will continue to follow the policy, or
19 start looking at other possibilities?

20 MS. YATES: I don't know the answer to
21 that, I'm sorry. I'll be glad to get an answer for
22 you.

23

1 COMMISSIONER HINOJOSA: Thank you.

2 CHAIR SESSIONS: Commissioner Jackson.

3 VICE CHAIR JACKSON: I just have two quick
4 questions. A number of us have touched upon the
5 extent to which the current disparities in sentencing
6 may be a function of prosecutorial discretion, as
7 opposed to judicial discretion.

8 I am just wondering whether DOJ keeps its
9 own statistics with regard to various charging
10 determinations, the types and frequencies of charging
11 of statutes that contain mandatory minimums so that
12 you -- you, in your internal working group -- can see
13 what's going on nationally?

14 MS. YATES: I'm not aware of the
15 Department having a central database for example that
16 would provide that information. I know that going
17 forward, for example, under the Holder Memo there
18 will be some mechanism within each U.S. attorney's
19 office to be able to review that data based on the
20 pros memos that will require now a discussion of not
21 just the charges that are proposed, but what the
22 charging options are.

23

1 So for example if a prosecutor were
2 recommending that an 851 not be charged, that would
3 be memorialized now in a pros memo. In the past,
4 though, various offices had different practices as to
5 how they memorialized those decisions, and what level
6 of supervisory review, if any, was required for
7 those.

8 Under the new Holder Memo, it is not left
9 to the individual discretion of the individual
10 prosecutor. It does require supervisory review. And
11 it does require that it be memorialized in terms of
12 the charging decision.

13 And so we were at something of a bit of a
14 disadvantage now to be able to go back and look,
15 going back, as to what would underlie those charging
16 decisions. And that's also another thing we're
17 looking at, the cold paper oftentimes doesn't tell
18 the full story, either.

19 You know, oftentimes you can read a
20 presentence report and you may have information in a
21 presentence report for example that indicates that a
22 gun was used, and consequently you may wonder, well,

23

1 why wasn't that 924(c) charged, then, in this
2 instance?

3 Well we not only have to make a decision
4 about what the fair and appropriate charges are, but
5 we also have to make a decision about what can we
6 prove beyond a reasonable doubt? And oftentimes the
7 lapses in proof, or the difficulties that we have
8 with witnesses, or other proof issues, are not things
9 that are going to be evident from the mere
10 statistics. And perhaps not even evident from, if
11 you go back and look at a presentence report, because
12 the evidence that's required to show something by a
13 preponderance, or that lays out in a PSR is very
14 different than proving it beyond a reasonable doubt
15 at trial.

16 And so that's why, even with statistics,
17 it's still not going to tell the full story.

18 VICE CHAIR JACKSON: Well I agree, but I
19 mean I guess I would just encourage the Department to
20 try to get a handle on what's happening. Because it
21 seems to me that you do have an advantage over, you
22 know, sort of in the debate between prosecutorial

23

1 discretion and judicial discretion, you have the
2 advantage of having sort of a more centralized system
3 to be able to, you know, at least monitor what's
4 going on nationally.

5 My other question was: In the 1991 report
6 the Commission said that mandatory minimums were in a
7 very fundamental sense incompatible with the
8 operation of the guidelines. And yet the government,
9 or the DOJ in this case, endorses the sort of current
10 hybrid system where we have advisory guidelines and
11 mandatory minimums.

12 And I'm just wondering whether that
13 represents the Department's determination that the
14 Commission was wrong about the fact that mandatory
15 minimums skew the guidelines, or are inconsistent
16 with the guidelines. Or whether it's DOJ's
17 determination that the constraint of judicial
18 discretion is more important than the proper
19 functioning of the guidelines the way that they were
20 intended.

21 MS. YATES: Well I don't think that the
22 Department's current position is any kind of a

23

1 statement about past positions of the Sentencing
2 Commission. We're just looking now at the world that
3 we live in now. And that's really the basis of the
4 Department's position now, is that we're in an
5 advisory guidelines world now. And in that advisory
6 guidelines world, that mandatory minimum sentences
7 really are an important tool for us, not only in
8 ensuring consistency for some offenses, but also for
9 promoting deterrence, and encouraging cooperation,
10 and other legitimate law enforcement functions.

11 I'm not sure if I'm answering your
12 Question.

13 VICE CHAIR JACKSON: I think so.

14 MS. YATES: Okay.

15 VICE CHAIR JACKSON: Thank you.

16 CHAIR SESSIONS: Well I have, like the
17 other commissioners, a couple of questions.
18 Literally they address what you're asking the
19 Commission to do in light of the legislation that
20 brought us here today.

21 The first is in regard to essentially
22 severity of mandatory minimums. You have expressed

23

1 in your pleadings -- or your papers, not your
2 pleadings, your papers --

3 (Laughter.)

4 MS. YATES: It felt like a pleading --

5 (Laughter.)

6 CHAIR SESSIONS: -- you've expressed this
7 view that some of those mandatory minimums might be
8 too high, roughly three-quarters, well over 70
9 percent of all mandatory minimums are in drug-related
10 offenses. And is it true that you're asking us, with
11 your help, which is what I think you've offered, as a
12 part of the response to Congress's directive to us,
13 that we go through every mandatory minimum penalty
14 and decide not only should it be there -- and make a
15 recommendation to Congress as to whether it should be
16 there or not be there -- but also we should make an
17 independent assessment about whether we think the
18 penalties in the mandatory minimums are too high and
19 should be reduced?

20 I mean is that, first of all, what you are
21 asking us to do in response to the congressional
22 directive?

23

1 MS. YATES: Well it sounds like a daunting
2 task when you put it that way, but, yes, that is what
3 we're asking you to do. And we think that that's
4 what's really critically important to do in this
5 situation.

6 Now there are 170. We think you could get
7 through about 150 of them pretty quickly.

8 CHAIR SESSIONS: All right, but
9 essentially what you're suggesting is that as a part
10 of our task we need to look at every five-, and ten-,
11 and 20-year mandatory minimum with 851s and explore
12 whether those are too high. And you want to work
13 with us in that regard, is that right?

14 MS. YATES: That's right.

15 CHAIR SESSIONS: And the second thing -- and
16 this may be going a little bit beyond what you
17 literally said, but you kept talking in your, not
18 your pleadings but your statement, about presumptive
19 guideline levels. And you in a sense couched your
20 view on mandatory minimums in light of today's
21 advisory world.

22 And you suggested perhaps that the

23

1 Commission should address this question of
2 presumptive guideline system. And I think the
3 implication perhaps was -- and tell me if I am
4 absolutely wrong -- but the implication is that if
5 there was a presumptive guideline system with perhaps
6 fewer ranges and wider disparity within ranges, that
7 your view of the necessity of mandatory minimums may
8 be altered or changed in some way.

9 Is that right?

10 MS. YATES: Well the Department doesn't
11 have an opinion at this point about whether mandatory
12 minimums would be necessary under a presumptive
13 guideline -- in a presumptive guideline world, in large
14 part because that's not the world that we're in now.
15 And as far as I know, there really hasn't been an
16 assessment by the Attorney General as to what the
17 Department's position would be in that regard.

18 We certainly are open to considering that
19 and discussing that with the Commission. We would
20 encourage the Commission to look at all of the
21 options. But we're also practical in the sense that
22 we're not sensing a lot of support out there for such

23

1 a presumptive system.

2 CHAIR SESSIONS: But did I read you wrong
3 when I came to the assessment that you think we, in
4 response to the congressional directive, should be
5 looking into alternative guideline systems that may
6 address the concerns that you have expressed?

7 MS. YATES: Well I think that certainly
8 would be the most thorough and comprehensive
9 evaluation that the Commission could engage in. And
10 so, yes, we think that that would be a worthwhile
11 endeavor by the Commission.

12 We're just not in a position at this point
13 to necessarily endorse such a system. And while we
14 think it's worth looking at and exploring it, we,
15 again, at the risk of beating the dead horse here, we
16 don't see much chance of that happening.

17 CHAIR SESSIONS: Any other questions?

18 Yes, Ricardo.

19 COMMISSIONER HINOJOSA: Just, since you've
20 given us a lot of advice about what we should be
21 doing --

22 (Laughter.)

23

1 COMMISSIONER HINOJOSA: Just one final --

2 MS. YATES: I'm about to receive some,
3 aren't I?

4 (Laughter.)

5 COMMISSIONER HINOJOSA: One final comment.
6 You identified the ones that you personally feel are
7 issues that are very serious with severe punishment,
8 the stacking of 924(c) and sometimes 851.

9 Under present law you would have total
10 control over that. You don't have to charge it. And
11 you can proceed without more than one of those
12 charges, and you can proceed without filing it. And
13 so I take it that you all will be looking at that as
14 to how you proceed. Even under the prior memos you
15 didn't have to charge them all.

16 MS. YATES: Right.

17 COMMISSIONER HINOJOSA: And so that really
18 requires no congressional fix.

19 MS. YATES: That's right. And I think
20 that going forward I am hopeful that, even without
21 necessarily changes in the minimum mandatories, that
22 the examples that I have no doubt that you'll hear

23

1 about later on today and which undeniably exist of
2 situations where the result of the application of
3 mandatory minimums certainly appears unjust, that
4 hopefully going forward under the new Department
5 policy those occasions will be fewer and farther
6 between, if that's the right term. That there won't
7 be as many of those.

8 COMMISSIONER HINOJOSA: It appears to me
9 that it was possible even under the old policy.

10 MS. YATES: You know, it was possible but
11 I think it was sort of dependent on how you
12 interpreted the Ashcroft Memo and what was an
13 exceptional circumstance. And different offices I
14 know interpreted that different ways. Our office was
15 a bit of a strict constructionist on that term. And
16 the U.S. attorneys that were in our office viewed it
17 as truly exceptional.

18 Other offices did not. And so I think
19 there was that variation. Although certainly it has
20 never been an absolute system that you must always
21 charge under any circumstances the most serious
22 offense, or file all sentencing enhancements. And I

23

1 don't think any of us would advocate for such a
2 system.

3 While I understand the Commission may have
4 some curiosity or discomfort in the idea of
5 sentencing discretion, I see it as a good thing. I
6 mean, it seems to me that citizens and the public
7 would want their prosecutors to be factoring in and
8 considering the specific circumstances of the case,
9 and what is going to be a just and fair charge.

10 And I think by specifically articulating
11 that as something that we are affirmatively obligated
12 to consider, that really says what we are all about,
13 which is seeking justice.

14 CHAIR SESSIONS: Well, Ms. Yates, you
15 wondered whether you could make it for an hour. You
16 made it for an hour-and-a-quarter.

17 MS. YATES: Oh, God. Time flies.

18 CHAIR SESSIONS: Thank you very much for
19 coming.

20 MS. YATES: Thank you.

21 CHAIR SESSIONS: We enjoyed very much your
22 presentation.

23

1 MS. YATES: Thank you, very much.

2 CHAIR SESSIONS: Let's call the next
3 panel: View From Sentencing Practitioners.

4 (Pause.)

5 Good morning. Welcome. Let me introduce
6 the panel: the "View from Sentencing Practitioners."
7 First, Michael Nachmanoff is the federal public
8 defender from the Eastern District of Virginia. He
9 has been with the office since it was established in
10 2001, including serving as the first assistant for
11 three years, the acting federal public defender for
12 two years, and then the federal public defender since
13 the year 2007.

14 Mr. Nachmanoff previously practiced law in
15 Arlington, Virginia, with Cohen, Gettings & Dunham.
16 He also earned his J.D. from the University of
17 Virginia School of Law where he served on the
18 *Virginia Law Review*; a graduate of Wesleyan
19 University; clerked with the Honorable Leonie
20 Brinkema, and at the U.S. District Court for the
21 Eastern District of Virginia; and you look about the
22 same age as my daughter who graduated from Wesleyan,
23

1 so I'll have to ask about that in the future.

2 (Laughter.)

3 CHAIR SESSIONS: Next, Jeffrey Steinback
4 is a private practitioner in Chicago at his firm, the
5 Law Offices of Jeffrey B. Steinback. Previously, for
6 approximately 20 years, he was a partner in the law
7 firm of, is it Ginsen? Or Gensoen? Genson,
8 Steinback & Gillespie, a Chicago-based law firm. Mr.
9 Steinback is a member of the Commission's
10 Practitioners Advisory Group. He is also a past co-
11 chair of the Criminal Law Committee of the Chicago
12 Chapter of the American Bar Association, and a past
13 president of the Criminal Law Committee of the
14 Federal Bar Committee in Chicago. Mr. Steinback
15 earned his B.A. in psychology and a J.D. from the
16 University of Iowa, where he was on the law review as
17 well. Welcome.

18 Next, a person known to all of us, James
19 Felman. He is a partner in the firm of Kynes,
20 Markman & Felman in Tampa, Florida. He serves as co-
21 chair of the American Bar Association's Committee on
22 Sentencing, and as a member of the ABA's Governing

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1 Council. He also previously co-chaired the
2 Commission's Practitioners Advisory Group for many
3 years. He received his M.A. in philosophy and a J.D.
4 from Duke, a B.A. from Wake Forest; and clerked for
5 Judge Theodore McMillian of the U.S. Court of Appeals
6 for the Eighth Circuit; and got his J.D. from Duke
7 University. Welcome.

8 MR. FELMAN: Thank you.

9 CHAIR SESSIONS: And next, Cynthia Orr is
10 President of the National Association of Criminal
11 Defense Lawyers, and practices in San Antonio with
12 the law firm of Goldstein, Goldstein & Hilley. She
13 is also co-chair of the ABA's Defense Functions
14 Committee. Ms. Orr earned her J.D. degree from St.
15 Mary's School of Law, and an undergraduate degree
16 from the University of Texas at Austin. She clerked
17 for the Fifth Circuit Judge Emilio Garza when he was
18 a district court judge in San Antonio, Texas.
19 Welcome, from Texas.

20 All right, first Mr. Nachmanoff.

21 MR. NACHMANOFF: Thank you very much, Mr.
22 Chairman, members of the Commission.

23

1 I want to thank you for holding this
2 hearing and for providing me the opportunity to speak
3 to you this morning on behalf of Federal Public and
4 Community Defenders from across the country.

5 First I want to begin by thanking the
6 Commission for being the leading voice for almost 20
7 years against mandatory minimum sentencing. I am
8 sure you will hear throughout the day the fact that
9 the Commission's 1991 report has served as a
10 foundation for those who have felt and advocated that
11 mandatory minimum sentences conflict fundamentally
12 with the purposes of sentencing and fairness and
13 justice in the sentencing process.

14 The Commission is in good company, and has
15 been for a long time. The Judicial Conference of
16 course has opposed mandatory minimums for almost 60
17 years, and reiterated their opposition to mandatory
18 minimums many times over the years. They are joined
19 by academics from across the political spectrum, of
20 course from the defense bar, and even from many
21 former prosecutors.

22 It was a pleasure to hear the Department
23

1 of Justice speak this morning, and I am delighted
2 that at least there is a clear consensus on the
3 elimination of the mandatory minimum for forging a
4 notary seal.

5 (Laughter.)

6 MR. NACHMANOFF: I hope that more will
7 come out of this process, but at least that's a
8 starting point.

9 In all seriousness, the problems that were
10 identified in the 1991 report continue to exist
11 today. And in many ways we have had almost 20 years
12 to see just how correct the 1991 report was, and how
13 many of those problems have increased at times
14 dramatically.

15 I'll give a few examples. Our materials,
16 which I'm sure you've had the opportunity to peruse,
17 all 32 single-spaced pages, have a lot of statistics
18 in them.

19 CHAIR SESSIONS: May I say that's shorter
20 than the average submission from the Federal
21 Defenders --

22 (Laughter.)

23

1 MR. NACHMANOFF: Well the Commission may
2 remember that last time I testified I suggested that
3 perhaps I should read my remarks into the record, and
4 did not get any smiles, including from Judge Hinojosa
5 who I see remains stone-faced now when I say it
6 again.

7 (Laughter.)

8 COMMISSIONER HINOJOSA: Although at least
9 you did have some specific suggestions.

10 (Laughter.)

11 MR. NACHMANOFF: Indeed. No shortage of
12 specific suggestions, although I will cut to the
13 chase and say that I think there is a simple way, and
14 in all seriousness the Commission should address this
15 issue, which is to urge Congress to repeal all
16 mandatory minimums. And that avoids the problem that
17 was discussed just a moment ago about going through
18 an effort to examine all 170 of them to determine
19 which ones are appropriate, which ones are not, and
20 what level they are appropriate.

21 For all of the reasons that we have set
22 forth, and of the many other panelists that you'll

23

1 hear from today, I think the correct and only answer
2 is to urge the repeal of all mandatory minimums.

3 A statistic that I think bears out what
4 I'm talking about in terms of the problems that have
5 existed for all these years is one that we mentioned
6 in our papers.

7 In 1991, 5.8 percent of cases that
8 involved a mandatory minimum required judges to
9 impose a sentence that was completely above the
10 guideline range. So in other words, the guideline range
11 was trumped altogether in 5.8 [percent] of cases because
12 the mandatory minimum was higher than that guideline
13 range that had been determined by the Commission.

14 In 2008, that number had jumped to 41.3
15 percent. So in 41.3 percent of cases in 2008, judges
16 were precluded from imposing a sentence within the
17 guideline range because the mandatory minimum was
18 higher than even the high end of that range. That is
19 a stunning number, and these numbers are significant.

20 In 2009 there were over 24,000 drug cases.
21 Two-thirds of those cases involved mandatory
22 minimums: 16,000 cases. Of those cases, 83 percent

23

1 of the defendants had no weapon; 94 percent had no
2 role adjustment; and more than 60 percent had only one,
3 two, or three criminal history points.

4 I think what that does is it underscores
5 exactly what the Department of Justice was talking
6 about a few minutes ago. These mandatory minimum
7 penalties do not target the defendants that Congress
8 wanted to target: serious and major drug
9 traffickers. They simply don't. They target very
10 low-level, often nonviolent, oftentimes people who
11 have had very little interaction with the criminal
12 justice system.

13 And so the very fundamental purpose that
14 Congress stated when passing these mandatory minimums
15 is not being borne out in the courts today, and it is
16 resulting in massive injustice. And that is why the
17 Judicial Conference has opposed mandatory minimums.
18 That is why so many academics have. And that is why
19 I am pleased to see that the Department of Justice is
20 recognizing that there is a problem and that there is
21 a place for the repeal of at least some mandatory
22 minimums.

23

1 In addition to all of those actors in the
2 criminal justice system, though, I think it is
3 important that the Commission consider and advise
4 Congress that the general public is also concerned
5 about this issue. And in our materials there are
6 some statistics that reflect surveys that have been
7 conducted, including one in which it showed that a
8 sample of people polled, 78 percent, found that the
9 courts and not Congress is best able to determine
10 sentences.

11 In addition to that, there have been some
12 federal judges who have done some very interesting
13 surveys of jurors -- and you may be familiar with some
14 of those surveys. Judge Cassell did it in relation
15 to the *Angelos* case. Judge Gwin, and some others.

16 And in polling jurors who were exposed to
17 information, detailed information, about defendants
18 and cases, and being asked what they thought an
19 appropriate sentence was, overwhelmingly those jurors
20 came back with sentences that, if they played a role
21 in determining that sentence, would have been
22 substantially lower than the mandatory minimums that

23

1 the judge was ultimately required to impose.

2 In many cases, the sentences were
3 substantially lower than the advisory guideline range
4 that was determined. But what I think this tells us
5 is that this process of mandatory minimums and this
6 process of Congress passing them, which is supposed
7 to reflect the will of the people who they have been
8 elected to represent, does not in fact reflect the
9 will of the people; that when their constituents go
10 into courtrooms and learn what happens in a case,
11 their determination of what just punishment is is
12 totally at odds with the mandatory minimum scheme
13 that Congress passes.

14 And so I think it is appropriate for this
15 body, as an expert body on sentencing, to be able to
16 tell Congress that this is not a political problem.
17 This is a problem in which Congress has passed laws
18 that they now find are difficult to undo, despite the
19 fact that they are unjust and their very own
20 constituents, when asked the question directly, with
21 sufficient information, agree that they are unjust.

22 We would ask the Commission to reiterate

23

1 its findings regarding the injustice of mandatory
2 minimums. And part of those findings, going back to
3 1991, and that have been borne out over time, involve
4 the negative racial impact of mandatory minimums.

5 This Commission did a great service to the
6 country and to the criminal justice system with
7 regard to its reports on crack cocaine. And as I
8 have had the opportunity before to testify on this
9 issue before Congress and before this Commission, it
10 is the hard work and research and education that this
11 Commission did that has led to the modest but
12 important gains with crack retroactivity and the
13 changes in the guidelines that we have. Hopefully it
14 will result in Congress acting to finally move
15 forward with regard to the pending legislation,
16 moving the 100-to-1 ratio to 18-to-1.

17 But that information about the racial
18 impact of the crack cocaine mandatory minimums is a
19 critical part of what the Commission should be
20 telling Congress in this report that comes out.

21 It is not limited to crack cocaine. The
22 disproportionate, unjustified impact on minorities,

23

1 particularly African Americans, can be seen in other
2 areas, too. And the Commission has also spoken on
3 that in the 15-year report. We see it in the
4 imposition of 924(c)s, and we see it in the
5 imposition of 851 enhancements.

6 There is one other statistic that I am
7 going to mention that's in our materials that I think
8 is important for the Commission to be aware of and to
9 think about.

10 With regard to 924(c)s, of those
11 defendants eligible for 924(c)s who receive them, 7.2
12 percent were African American; 2.2 percent were
13 White. With regard to those who could have received
14 either a 924(c) or the gun bump, which is
15 significantly less serious, for some reason the
16 statistics show that 35 percent of African Americans
17 received the 924(c), but only 26 percent of Whites.

18 What this goes to is the issue of the
19 transfer of discretion from courts to charging
20 decisions. And we know that mandatory minimums
21 transfer and distort the sentencing process by taking
22 discretion away from judges who are neutral arbiters

23

1 and giving it to advocates.

2 This is true regardless of whether the
3 Ashcroft Memorandum is in play, or whether the new
4 Holder Memorandum is in play. And we of course
5 welcome a change which gives more flexibility and
6 suggests that prosecutors may be able to take into
7 consideration the individualized circumstances in a
8 case.

9 In fact, in the memo there is a wonderful
10 quote that Attorney General Holder writes, and he
11 says that "equal justice depends on individualized
12 justice." And we believe that to be true. And that
13 really is exactly why this Commission should make an
14 unequivocal statement reaffirming its stance from the
15 1991 report that mandatory minimums should be
16 abolished and repealed.

17 The arguments in favor of mandatory
18 minimums don't hold up. There is no empirical
19 evidence to show that they have a deterrent effect.
20 First, they cannot have a deterrent effect because of
21 the notion of certainty or predictability because, as
22 was discussed in the last panel, even under the
23

1 Ashcroft Memorandum there's always the possibility,
2 depending on the district and depending on the
3 prosecutor, that a mandatory minimum which could
4 apply may not apply.

5 And so for a defendant to be deterred, or
6 to know that there will be the specific severe
7 punishment is not necessarily borne out. That will
8 be true under the Holder Memo, as well.

9 As a practical matter, there is no
10 promotion of uniformity for mandatory minimums. We
11 have been talking about prison overcrowding and the
12 explosion of the federal prison population. Federal
13 prosecutors know, the Department of Justice knows,
14 every part of the criminal justice system knows that
15 mandatory minimums can't be enforced across the board
16 in every case.

17 We certainly don't advocate that. That
18 would be a gross injustice. But it literally would
19 cause the system to collapse. And so there will
20 always be disparity in the imposition of mandatory
21 minimums, and therefore they can't serve the function
22 of promoting uniformity.

23

1 CHAIR SESSIONS: Your red light has been
2 on for awhile. Do you want to try to wrap up so we
3 can make sure everybody has an opportunity?

4 MR. NACHMANOFF: Yes, absolutely.

5 We appreciate that, in addition to urging
6 Congress to take the principled stance of repealing
7 all mandatory minimums, that it's also appropriate
8 for the Commission to recommend interim measures.
9 And we've set those out.

10 One of them was discussed briefly, which
11 was the expansion of the safety valve, and we believe
12 that that is critical, important, justified; the
13 statistics bear it out; expanding it to Criminal
14 History III, expanding it beyond drug crimes, are all
15 appropriate ways of partially solving the problem
16 without in any way solving them in their entirety.

17 Secondly, addressing the specific issues
18 of 924(c)s, consecutive 924(c)s, 851 enhancements,
19 and ACCA 924(e). I was very pleased to hear the
20 Department of Justice identify those as areas in
21 which they appreciate that the way they are written
22 casts far, far too wide a net and we would urge the

23

1 Commission to focus on those specifically with regard
2 to Congress taking action soon. In fact, the sooner
3 they can do it, the better. I have five or six cases
4 right now which are addressing those exact issues.

5 Finally, de-linking. And this is an issue
6 we have briefed and discussed many times. We know
7 there is a difference of opinion with regard to
8 whether the Commission feels that it can de-link on
9 its own, as the Supreme Court recognized in *Neal*, or
10 whether or not that's been changed.

11 Regardless of the difference of opinion,
12 we urge the Commission to seek, if it feels
13 necessary, from Congress permission to de-link.
14 Because of course what that does is it distorts and
15 over-punishes even in the advisory guidelines. And
16 that would go a long way to fixing the problem. And
17 I don't mean to take time from my colleagues. Thank
18 you, very much.

19 CHAIR SESSIONS: All right, thank you,
20 Mr. Nachmanoff. Mr. Steinback?

21 MR. STEINBACK: Yes. Good morning, Chair
22 Sessions, distinguished members of the Commission.

23

1 Before I begin my remarks, I wish to make
2 sure that I reiterate the things that I was well
3 coached last evening to say, which were: repeal,
4 repeal, and repeal. I don't want to be criticized by
5 those far wiser than myself by having forgotten those
6 words.

7 CHAIR SESSIONS: So I'm sure everyone is
8 happy now, so go ahead.

9 (Laughter.)

10 MR. STEINBACK: Thank you.

11 While I was preparing my remarks for
12 today, a colleague sent me a 1995 article from the
13 *Boston Globe*. It had an interview in it of some
14 length from a judge by the name of Cortland A.
15 Mathers. Judge Mathers is a state court judge, but
16 much of what he discussed had equal application I
17 think in the federal system.

18 Judge Mathers was known as someone to
19 impose a stiff sentence where warranted and never
20 shirked the responsibility to do so. But this
21 article described a case in which Judge Mathers was
22 faced with a relatively young woman, four young
23

1 children, in a drug conspiracy where she had a very
2 minor role, and yet was facing what was in that state
3 a mandatory minimum six years without possibility of
4 parole.

5 Judge Mathers made it plain to the parties
6 during the course of the proceedings that he just
7 could not square, or reconcile the underlying conduct
8 of the defendant, as he understood it, with the
9 punishments which would inevitably be wrought upon
10 the defendant and her family, leaving her embittered,
11 angry, and only destined for more trouble when she
12 finally emerged from prison.

13 And the defense lawyer in that case, not
14 missing a beat, asked for a bench trial; received
15 one; and Judge Mathers found the individual guilty of
16 a lesser included offense, and in so doing was able
17 to avoid the mandatory minimum and imposed instead a
18 sentence of probation.

19 And the judge observed in connection with
20 that imposition of sentence the following:

21 "A judge is either an automaton, rubber-
22 stamping these sentences, or is driven by a sense of
23

1 justice." And the judge reflected in this article on
2 the philosophy which guided his decision when he
3 said, "Disobey the law in order to be just."

4 Now I've been at this for about 35 years,
5 and in the last 25 pretty much in the areas of plea
6 negotiations and sentencing almost exclusively on the
7 federal level, and I sort of have a view from the
8 trenches. And I can tell you with, after about 30
9 different districts' worth of experience, a number of
10 different things.

11 First, no matter where you go, no matter
12 how the different practices present themselves, what
13 you ultimately find is the problems are the same
14 everywhere in connection with mandatory minimums.

15 My colleagues have -- in their excellent
16 submissions have written about the arbitrary and
17 unwarranted disparities, placing far too much control
18 in the hands of the prosecution, and removing it from
19 the judiciary, and it too often distorts the
20 sentencing process. And with the Commission's
21 permission I want to talk about one particular
22 illustration which I think reifies much of that.

23

1 It's the *Brigham* decision from the Seventh
2 Circuit in 1992. The facts that I set forth in my
3 submission are more extensive, but essentially
4 they're these:

5 Anthony Brigham, 63 years of age with very
6 little criminal record, occupied the bottom rung of
7 the food chain of a drug conspiracy at the apex of
8 which was an individual who was also his son-in-law,
9 Craig Thompson.

10 Thompson had two basic things to his
11 credit. Number one, he had a connection with the
12 Cali cartel and was receiving hundreds of thousands
13 of kilos over years making millions of dollars. And
14 number two, at least up until 1992, he'd remained
15 uncaught. So he had a clean record at the time of
16 his indictment.

17 Thompson had a regular crew. That crew
18 involved two individuals, a thug by the name of
19 Jeffrey Carter who was an enforcer; and a courier by
20 the name of Tyrone Amos.

21 Now what happened in the Thompson case
22 essentially was, one of his distributors, as they
23

1 oftentimes do, got caught. And when he got caught,
2 he did what most rational drug dealers do. They run
3 in and make a deal, telling the DEA everything that
4 they know about drug dealing, which included
5 Thompson.

6 The timing of that was outstanding because
7 Thompson at that point had one of these brief halts
8 from the constant flow of drugs from Cali into
9 Chicago, and he needed ten kilos. He called, who
10 we'll call the CS -- this individual who was caught,
11 who was working with the DEA -- and got the nod, yes, I
12 can find out another source for the ten keys you need
13 in order to make your customer happy.

14 Getting that nod, Thompson enlisted his
15 crew, his two individuals, and he did one other thing
16 which was out of the ordinary. During the
17 negotiations, he called his father-in-law, Brigham,
18 and he said: Look, I know you're out of work, and
19 essentially you can make \$500. This guy Amos is
20 going to pick you up. I want you to keep your eyes
21 open and your mouth shut.

22 Unfortunately, Brigham takes that offer

23

1 and, as what almost inevitably happens when you're
2 dealing with undercover operations, they all got
3 arrested. And when they did, the three of the four
4 ran into the U.S. attorney's office -- Thompson,
5 Carter, Amos.

6 Now then, as now, buying or selling or
7 attempting to buy or sell ten or more kilos obviously
8 invokes the mandatory minimum penalty. But the
9 Seventh Circuit on the appeal in that case said
10 "mandatory" is only mandatory from the perspective of
11 judges. From the perspective of the parties,
12 everything is negotiable.

13 For guys like Thompson, who I represented,
14 I can tell you he had lots to negotiate. He could
15 draw and lure and did in fact lure those Cali cartel
16 members into Panama where the DEA could arrest them,
17 and they were very pleased with Thompson. So much so
18 that, notwithstanding his millions of dollars and
19 thousands of kilos, he [was given] a seven-year sentence.

20 Now for Amos's efforts, he got a six-year,
21 three-month sentence, even though he was involved in
22 all of these deals as well.

23

1 Incredibly, Carter -- and no one really
2 quite understands why, and I was in this case and I
3 couldn't understand it -- he was allowed to plead to a
4 phone count. And as you all know under 843, I
5 believe, phone counts do not carry mandatory
6 minimums. They have a maximum statutory punishment of
7 four years. And essentially what happened with
8 Carter was he received probation and four months of
9 community service and a stay in the local Salvation
10 Army.

11 Now the *Brigham* court said: The goon --
12 that's how they referred to Carter -- gets probation.
13 And recognizes that Anthony Brigham -- and I can tell
14 you, because I followed this case -- served every bit
15 of his ten years, less some good time. To add insult
16 to injury, Thompson, while out on bond, did a little
17 more cooperating and wound up ultimately with a six-
18 year sentence under Rule 35.

19 So what's happened is, in this case,
20 Thompson winds up doing his six years in a camp,
21 while Brigham does ten years in an FCI in
22 Minnesota.

23

1 The question that is raised here, in
2 addition to the obvious inversion of sentencing which
3 was recognized by the Seventh Circuit in its opinion,
4 is what prevented the government from offering
5 Brigham, who was clearly the low man on the totem
6 pole and the odd man out, that same deal, for a phone
7 count.

8 I can tell you what the prosecution said.
9 It said, Brigham, having very little to do with this
10 case, never made a phone call in furtherance, and
11 therefore we couldn't bring a phone count.

12 And the question obviously was raised by
13 his counsel -- I spoke with him. Well, manufacture
14 one. I mean, let's find a way to find some justice
15 here.

16 The prosecutors weren't willing to do
17 that, and obviously honesty and truth in sentencing
18 is a very important policy, but who could blame a
19 defense lawyer for asking for that. Or even, for
20 that matter, some prosecutor for acquiescing to it.
21 And if that happened, no judge would be in a position
22 to question whether there was a phone count or not.

23

1 And I'm not so sure how many judges would really want
2 to pursue that inquiry.

3 So while we have honesty and truth as a
4 noble and worthy and significant goal, the temptation
5 to compromise is overwhelming in connection with
6 cases just like this.

7 A second aspect of this is the pressure to
8 provide what's known as false cooperation. In the
9 *Brigham* case they recognized from the sentencing
10 transcript, the appellate court did, that Brigham had
11 attempted to come in, after all was said and done, he
12 went to trial because he felt he had no choice, to
13 try to say, yes, I was involved in big-stakes
14 dealings with Thompson.

15 Now I was at Thompson's proffer, and
16 Thompson said, no way. Brigham is a first timer. In
17 any event, ultimately the prosecution said: You
18 haven't given us enough details to really offer you a
19 3553(e) downward departure. And I think the reason
20 for that is quite simple.

21 At that point, Brigham was so desperate
22 that he would of said anything, including making
23

1 himself look far more culpable than he was, just to
2 be able to get a deal. And the irony of that has to
3 just crash into everybody, because it's just
4 overwhelming.

5 And yet, as long as mandatory minimums are
6 around, as long as that pressure and coercion is
7 there, you are going to find very unhealthy and
8 unjust circumstances and environments just like the
9 one that obtained here.

10 Now observing the sentencing inversion --
11 and I'll be very quick in completing this -- what is
12 clear is what the Seventh Circuit said, that, and I'm
13 quoting:

14 "What makes the post-discount
15 sentencing structure topsy-turvy is the mandatory
16 minimum, binding only for the hangers on. What is to
17 be said for such terms, which can visit draconian
18 [sentences] on the small fry without increasing
19 prosecutors' ability to wring information from their
20 bosses?"

21 And the truth of the matter is that there
22 is nothing consistent about mandatory minimums. All

23

1 of the language we have seen come out of *Gall* and
2 *Kimbrough* and *Rita*, and for that matter the
3 guidelines which as I understand them always were a
4 work in progress, something that was done to give
5 judges ranges based on empirical data and continuing
6 ongoing reconsideration so that they could treat like
7 offenders in like fashion.

8 What happened in this case essentially was
9 that the Seventh Circuit said: You know, I'm sorry,
10 Brigham, we don't have anything that we can do for
11 you, and you have no right to be sentenced in
12 proportion to your wrongs. And that is a very
13 troubling statement. And that is the kind of
14 troubling statement which the repeal of the mandatory
15 minimums would immediately ameliorate, if not
16 completely solve.

17 And so I lend my voice to my colleagues
18 here in urging the Commission to continue its work in
19 resisting and working towards the repeal of those
20 mandatory minimums. Thank you.

21 CHAIR SESSIONS: Okay. Thank you,
22 Mr. Steinback.

23

1 I just want to clarify one thing. I
2 thought in your written submissions you had indicated
3 that you in fact represented Mr. Thompson, was at his
4 debriefing, not Mr. Brigham? Is that --

5 MR. STEINBACK: That's correct. I
6 represented Mr. Thompson, and it was from my
7 representation of Thompson that I came to understand
8 that from Thompson's perspective Brigham hadn't
9 anything to do with him prior to this.

10 CHAIR SESSIONS: I think in your statement
11 you sort of indicated that you represented
12 Mr. Brigham. But, anyway --

13 MR. STEINBACK: My apologies.

14 CHAIR SESSIONS: That's okay. All right,
15 Mr. Felman.

16 MR. FELMAN: Thank you, Chair Sessions,
17 and distinguished members of the United States
18 Sentencing Commission.

19 It is an honor to appear before you this
20 morning on behalf of the American Bar Association.
21 The American Bar Association is the world's largest
22 voluntary professional membership organization, with
23

1 almost 400,000 lawyers, including a broad cross-
2 section of prosecuting attorneys, criminal defense
3 counsel, judges, and law students worldwide as
4 members.

5 The ABA continuously works to improve the
6 American system of justice, and to advance the rule
7 of law in the world. I appear today at the request
8 of ABA President Carolyn Lamm to present to the
9 Sentencing Commission the ABA's position on mandatory
10 minimums.

11 The ABA strongly supports the Commission's
12 long-standing opposition to the use of mandatory
13 minimum sentences. I provided to the Commission in
14 my last appearance the startling statistics about the
15 fact that for the first time in our country's history
16 more than one in 100 of us are imprisoned. And the
17 manner in which our rates of imprisonment eclipsed
18 that of any other nation such that one quarter of all
19 persons imprisoned in the entire world are behind
20 bars here in our country.

21 As I said the last time, the time has come
22 to reverse this course of over-incarceration. The

23

1 Commission's recent amendment submitted to the
2 Congress represent modest but very positive steps in
3 this direction. The elimination of mandatory minimum
4 sentences would be a dramatic further step.

5 Sentencing by mandatory minimums is the
6 antithesis of rational sentencing policy. There are
7 few if any who would dispute the proposition that
8 criminal sentencing should take into account a wide
9 array of considerations, including the nature and
10 circumstances of the offense, the history and
11 characteristics of the defendant, the defendant's
12 role in the offense, whether the defendant has
13 accepted responsibility for his or her criminal
14 conduct, and the likelihood that a given sentence
15 will further the various purposes of sentencing, such
16 as just deserts, deterrence, protection of the
17 public, and rehabilitation.

18 Mandatory minimum sentencing reflects a
19 deliberate election to jettison this entire array of
20 undisputedly relevant considerations in favor of a
21 single, solitary fact: usually a quantity of drugs,
22 or possession of a firearm that may bear no
23

1 relationship to the defendant's particular
2 culpability.

3 Mandatory minimum sentencing declares that
4 we do not care even a little about the defendant's
5 personal circumstances. Mandatory minimum sentencing
6 announces as a policy that we are utterly
7 uninterested in the full nature or circumstances of
8 the defendant's crime.

9 Mandatory minimum sentencing blinds the
10 courts to the defendant's role in the offense and his
11 or her acceptance of responsibility.

12 Mandatory minimum sentencing is uniformly
13 indifferent to the evaluation of whether the result
14 furthers all or even any of the purposes of
15 punishment.

16 The critical flaws of mandatory minimum
17 sentencing are not newly discovered. They were well
18 documented by the Sentencing Commission in its 1991
19 report which found that the lack of the uniform
20 application of them creates unwarranted disparity;
21 that honesty and truth in sentencing is compromised
22 because the charging and plea negotiations are not

23

1 open to the public and not generally reviewable by
2 the courts; that disparate application of them
3 appears to be related to the race of the defendant;
4 offenders seemingly not similar, nonetheless receive
5 similar sentences thus creating unwarranted
6 sentencing uniformity; and of course they transfer
7 sentencing power from the courts to the prosecution.

8 It is of no importance whether the goals
9 sought to be achieved by these statutes were
10 themselves unobjectionable, or whether the statutes
11 were well intentioned when enacted.

12 History now reveals that the assumptions
13 underlying these statutes have not been borne out,
14 and experimentation with a one-size-fits-all
15 sentencing has demonstrated that there are better,
16 smarter, more compassionate, and ultimately more
17 sensible approaches to sentencing policy.

18 Mandatory minimums as sentencing policy do
19 not look any better today than they did when the
20 Commission issued its 1991 report calling for their
21 across-the-board repeal.

22 As the Commission drafts its latest report

23

1 for Congress, the arguments for repeal have only
2 grown stronger.

3 As I say, like the Sentencing Commission
4 the ABA opposes mandatory minimums, and has done so
5 for more than 40 years. This was reflected in their
6 first and their 1968 standards, the commentary to
7 which read:

8 "Suffice [it] to observe here that mandatory
9 sentences rarely accomplish the ends they seek."

10 We don't think much has changed in the
11 last 40 years. The ABA's opposition to mandatory
12 minimums was confirmed in an action by the house of
13 delegates in 1974, in the second edition of its
14 sentencing standards in 1980, and in its third
15 sentencing standards in 1994.

16 And of course in the wake of Justice
17 Kennedy's address to our annual meeting in 2003, this
18 re-energized our organization. We created the
19 Justice Kennedy Commission.

20 I am pleased to see that the chair of that
21 commission, Professor Saltzburg, will be here to
22 address you this afternoon, but suffice it to say

23

1 that that commission again called for the repeal of
2 mandatory minimum sentencing.

3 The flaws of mandatory minimum sentencing,
4 as I've said, are pretty well established and have
5 been written about by many. They result in
6 excessively severe sentences. And I am pleased to
7 hear that the Department of Justice agrees with that
8 proposition, at least as to some cases.

9 Second, mandatory minimum statutes lead to
10 arbitrary sentencing. That is what occurs when you
11 shift from the wide focus on the crime itself to a
12 focus on an exclusive or single fact. You can no
13 longer consider any of a host of mitigating, or
14 indeed aggravating, factors.

15 I guess I want to stress that treating
16 unlike offenders identically is as much a blow to
17 rational sentencing policy as is treating similar
18 offenders differently. And that is where I believe
19 the ABA parts company with the Department of Justice.

20 The fact that there is a disparity in
21 sentencing does not necessarily reflect an
22 inappropriate or unwarranted disparity; it may

23

1 reflect that for the first time judges are able to
2 consider the wide range and the rich mix of relevant
3 sentencing criteria. It may mean for the first time
4 we have more adherence to the purposes that underlie
5 the Sentencing Reform Act.

6 But in any event, I join in what was said
7 by Mr. Steinback about the perversity that more
8 culpable offenders can sometimes [receive] substantial
9 assistance, more so than lower-level offenders, such
10 that you can have symmetrically inverse justice.

11 The masterminds bargain out from under the
12 mandatory minimums leaving only the lower-level
13 defendants in the net cast by mandatory sentences.

14 In addition, female offenders, typically
15 minor players in drug dealing and disproportionately
16 the sole caretaker, parents of minor children,
17 frequently bear the brunt of mandatory minimums.
18 Their numbers and the duration of their confinement
19 have increased dramatically under mandatory minimum
20 sentencing.

21 Prosecutors sometimes claim that mandatory
22 minimums are necessary to induce defendants to

23

1 cooperate and to plead guilty. There does not appear
2 to be any sound empirical basis for this claim.
3 Defendants appear to cooperate in roughly the same
4 numbers in cases for which there are no mandatory
5 minimum sentencing.

6 Moreover, I must stress that the ABA
7 rejects the very premise that the inducement of
8 cooperation or guilty pleas could be a legitimate aim
9 of sentencing policy.

10 The ABA and the Sentencing Commission of
11 course are not alone in their opposition to mandatory
12 minimums. As was referenced by Mr. Nachmanoff, the
13 Judicial Conference of the United States has
14 consistently opposed mandatory minimum sentences for
15 nearly 60 years.

16 A number of ideologically diverse
17 individuals and groups have come out in opposition to
18 mandatory minimums. Those include the late Chief
19 Justice Rehnquist, the former chair of the Commission,
20 Judge Wilkins, and Justice Breyer. And Justice
21 Breyer I thought had a particularly good analogy,
22 although I wish to improve on it. He said that, "In
23

1 sum, Congress in simultaneously requiring guideline
2 sentencing and mandatory minimum sentencing, is riding
3 two different horses." As an amateur horseman, I wish
4 to speak for the defense of horses because I think
5 he's done them an injustice. I think it's a fair
6 analogy to guideline sentencing. Horses can be
7 troublesome and you can get hurt, but for the most
8 part they will go where you tell them to go, and you
9 can change their course in mid-direction.

10 I think with mandatory minimums, Congress
11 is riding a rhinoceros.

12 (Laughter.)

13 MR. FELMAN: Others who oppose mandatory
14 minimums include the American Law Institute in its
15 Model Penal Code; the federal -- I mentioned the
16 Federal Judicial Center; Senator Orrin Hatch; the
17 Constitution Project's Sentencing Initiative; and
18 again I'm pleased to see that Tom Hillier will be
19 here this afternoon on behalf of that group; the
20 United States Conference of Mayors; the RAND
21 Corporation; a panel of the National Academy of
22 Sciences; of course Families Against Mandatory

23

1 Minimums, and you'll hear from Julie Stewart I see;
2 numerous judges and academics, including Stephen
3 Schulhofer, who I was pleased to see will be here
4 today as well who has written some very early ground-
5 breaking information about the flaws of mandatory
6 minimum sentencing.

7 Indeed, I think mandatory minimums are so
8 patently irrational as sentencing policy that
9 virtually no one applauds them after their enactment.
10 The only person I could find writing in support of
11 them was Jay Apperson.

12 (Laughter.)

13 MR. FELMAN: There is no question that
14 criminals must be punished, and that prison serves
15 legitimate retributive and incapacitative purposes.
16 But punishments must be proportionate to the
17 circumstances of the crime and the offender, as well
18 as the gravity of the underlying offense.

19 Unduly long and punitive sentences are
20 counterproductive and many of our mandatory minimums
21 approach the cruel and unusual level, as compared to
22 that of other countries and past practices of our

23

1 own.

2 I found very poignant the statement of
3 Judge Wald, the former chief judge of the D.C.
4 Circuit, before the Inter-American Commission on
5 Human Rights, where she said:

6 "On a personal note, let me say that on the
7 Yugoslav War [Crime] Tribunal -- where she sat as a judge
8 -- I was saddened to see that the sentences imposed [on]
9 war crimes perpetrators responsible for the deaths
10 and suffering of hundreds of innocent civilians did
11 not come near to those imposed in my own country for
12 dealing in a few bags of illegal drugs."

13 On behalf of the American Bar Association,
14 we urge the Commission to continue its unwavering
15 opposition to mandatory minimums, and to report the
16 many and serious flaws of such statutes to the
17 Congress. We appreciate the Commission's
18 consideration of the ABA's perspective on these
19 important issues, and are happy to provide any
20 additional information the Commission may request.

21 Thank you.

22 CHAIR SESSIONS: Thank you, Mr. Felman.

23

1 Ms. Orr?

2 MS. ORR: Thank you, Commissioner
3 Sessions, and the distinguished Sentencing
4 Commission, for inviting the National Association of
5 Criminal Defense Lawyers to present its views
6 regarding mandatory minimums.

7 Mandatory minimums were enacted by
8 Congress to limit judicial discretion in sentencing
9 for crimes that it deemed warranted stiff penalties.
10 They intended, I'm sure, that persons who were
11 culpable, blame-worthy for the conduct, should be
12 sentenced under them.

13 Certainly the U.S. Supreme Court
14 contemplated that when it stated in *Gall* that the
15 guideline range, which reflects the defendant's
16 criminal conduct, and the defendant's criminal
17 history, should continue to be the starting point and
18 the initial benchmark for sentencing.

19 There I'm emphasizing the Court's focus on
20 the defendant's criminal conduct. But as we have
21 heard from my distinguished colleagues, that is
22 certainly not the case when we enter the zone of
23

1 mandatory minimums.

2 So I would place them in the category of
3 unintended consequences. They undermine the very
4 underpinning of the sentencing guidelines. They
5 cause, rather than prevent, sentencing disparities.
6 They do so by shifting sentencing discretion from a
7 neutral arbiter, whose role is nonadversarial, the
8 sentencing judge, to the wrong party, whose role in
9 no way encompasses fashioning an appropriate sentence
10 for a defendant: the prosecutor.

11 This is true even when the DOJ's policy
12 was to charge the readily provable offense with the
13 highest penalty. It will continue under a more
14 flexible standard that we heard announced March
15 19th -- I'm sorry, May 19th, from Attorney General
16 Holder.

17 A sentencing judge can recognize in white
18 collar cases where the definition of "loss" is too
19 loosely defined to allow correct determination of
20 legal causation by a particular defendant when
21 imposing a white collar sentence.

22 A judge can recognize and determine under
23

1 evidentiary hearings when a person is just sitting at
2 a computer looking at photos but never having contact
3 with a child when determining a sentence variance is
4 appropriate in such a case.

5 The prosecutor's focus on its exercise of
6 discretion is to pressure cooperation and, please,
7 not to fashion an appropriate sentence; not to
8 sentence less harshly the less culpable, and more
9 harshly the more culpable, as this Commission has
10 heard from my colleagues.

11 Because of mandatory minimums and charging
12 discretion and 5K1 motions that both work to get
13 below-mandatory minimums, the more culpable get lower
14 sentences than less knowledgeable, less culpable,
15 lower-level offenders.

16 Perhaps in Georgia the smaller drug cases
17 don't make it to the federal court, but in the border
18 states -- and I will tell you that I come from the
19 Western District of Texas, San Antonio, and I know
20 also in the Southern District of Texas where they
21 have the heaviest criminal dockets in the nation -- in
22 these states, and at least in Texas, federal courts

23

1 routinely handle small-level drug cases, as well as
2 the large cases, because the financial burden on the
3 state and the counties is too burdensome for them to
4 handle all these low-level offenders.

5 So many low-level offenders are getting
6 subjected to mandatory minimums, and I think that is
7 borne out by the statistics presented by the Federal
8 Public Defenders in their testimony here today.

9 Sentencing discretion needs to be returned
10 to judges, with the guidelines of course as a
11 starting place. To the extent of course that they're
12 supported by empirical data, which is the important
13 work of this Commission, mandatory minimums prevent
14 persons who commit similar crimes and have similar
15 culpability from being treated similarly.

16 They also prevent the careful analysis and
17 distinction of the specific facts and circumstances
18 of each particular case, as General Holder recently
19 said in his new memo. Echoing my colleague, he said
20 equal justice depends on individualized justice. But
21 that determination needs to be made by judges,
22 sentencing judges who are charged with fashioning

23

1 appropriate sentences.

2 This is particularly important since drug
3 amount -- in the case of these mandatory minimums in
4 drug cases being hinged upon that amount -- that this
5 is frequently not under the control of the person
6 being sentenced. Sometimes it's completely outside
7 the direct knowledge.

8 Often the quantity is set at the whim of
9 law enforcement in a sting, or a higher up where
10 you're dealing with a mule, or someone who is a
11 little more but still minimally involved. Often
12 bragging about drug amounts, which one cannot
13 fulfill, forms the basis for sentencing. And
14 therefore the discretion in fashioning a sentence in
15 each of these cases needs to rest with a judge
16 without his hands and her hands being tied.

17 Guidelines' manipulation takes this form
18 at the front end with the amounts being determined by
19 law enforcement in a sting or by persons above the
20 defendant's pay grade in a criminal conspiracy.

21 Guidelines' manipulation takes form at the
22 back end as well, hidden in unfettered prosecutorial

23

1 charging and plea negotiation, and in 5K1 motions.
2 They have -- statistically they are in the light of day
3 a demonstrable effect on guideline sentencing. We
4 can tell that it affects it substantially.

5 How much more so would be revealed if we
6 could keep statistics on the charging decisions and
7 plea negotiations, decisions that occur in
8 prosecutors' offices.

9 In this atmosphere, what mandatory
10 minimums do is cause racially and gender disparate
11 sentencing. And I recall in my very early days, my
12 salad days as a lawyer, a case in a large drug
13 conspiracy case, Ricky Garza was my client, and he
14 was the kingpin in a large marijuana and cocaine
15 importation case. And everyone was convicted,
16 including his wife and his mistress -- I was charged
17 with sitting between the two during the trial; not a
18 pleasant experience --

19 (Laughter.)

20 MS. ORR: -- but at the sentencing, it was
21 a pre-guidelines case, and we had the unique
22 circumstances where we were allowed to speak to the

23

1 jurors. And they said they had convicted my client's
2 wife, who was really very out of the loop, because
3 she was wearing a new outfit to the trial every day.

4 Fortunately, the judge was able to fashion
5 a sentence not tied by mandatory minimums -- the
6 amounts of drugs were off the charts in that case,
7 measuring in the tons -- that allowed this woman to
8 remain home with her children, even though she'd been
9 convicted.

10 Stepping back further from all that we
11 heard about individual cases and stories that we've
12 relayed about our individual representations, I want
13 to call to this august body's attention the recent
14 study released by the NACDL along with the Heritage
15 Foundation, *Without Intent: How Congress Is Eroding*
16 *the Criminal Intent Requirement in Federal Law*. And
17 I know that this will be distributed to the
18 Commission.

19 The reason I bring it to your attention is
20 not because the report delves into how sentencing
21 legislation makes it through Congress, but it does
22 focus on how criminal legislation does. How
23

1 oftentimes these measures do not go through the
2 appropriate congressional committee for study.

3 Based on our statistical analysis in this
4 report, we recommended that Congress require every
5 bill that would add or modify criminal offenses or
6 penalties to be subject to automatic sequential
7 referral to the relevant judiciary committee.

8 As we explained, the judiciary committees
9 alone have the special expertise required to properly
10 draft and design criminal laws. This would force
11 Congress to adopt measured and prioritized approaches
12 to criminal law making.

13 Again, while we didn't specifically study
14 judiciary committee referral on sentencing policy, it
15 stands to reason that judiciary committee members and
16 staff will be more familiar with the complexities of
17 the sentencing guidelines and the unintended
18 consequences of mandatory minimum sentences, which I
19 mentioned I think that mandatory minimum sentences
20 fall into that category.

21 Thank you very much for allowing NACDL to
22 present its views on mandatory minimums, and I

23

1 appreciate your attention to our submitted written
2 remarks and hope you look forward to receiving our
3 report that was prepared for the Heritage Foundation.

4 CHAIR SESSIONS: Okay. Thank you, Ms. Orr.
5 We did start 15 minutes late with this panel. We
6 want to give this panel full opportunity for that
7 full hour-and-a-quarter period, so we will extend the
8 period for questions till eleven o'clock.

9 So, Commissioner Howell?

10 COMMISSIONER HOWELL: Yes. I just want to
11 start with a comment, and then I want to talk a
12 little bit about cooperation. And since you all have
13 a fairly strong position about the use of mandatory
14 minimums as leverage to induce cooperation. But let
15 me start with the Federal Public Defenders.

16 I do want to say that the FPD has quite
17 rightly and consistently raised the issue of access
18 to the Commission's data sets for purposes of
19 independent research, and I do want to compliment the
20 FPD because you always have very illuminating use of
21 statistics, as you did in your testimony today.

22 I just want to say that the Commission has
23

1 been trying to do a better job with releasing its
2 statistics with our data conference a year ago, the
3 first one in about decade, or over a decade. And we
4 are hoping to unveil a new web site that at some
5 point will have, we hope, a web portal to provide
6 easier access to our data sets. Our goal is to make
7 it easier and to make our data sets more accessible
8 for researchers to use it.

9 I did want to compliment you for some of
10 your very constructive guidance on where you think
11 for this specific report the Commission should be
12 focusing on questions to probe our data for
13 statistical results that might be helpful on the
14 policy questions we address. And I want to invite
15 all the other members of the panel to also give us
16 their suggestions for where you think our empirical
17 research should be directed for our report.

18 But let me turn to the issue of
19 cooperation in the use of the statistics that the FPD
20 used in its report, because I thought it was quite
21 illuminating.

22 There are opponents of mandatory minimums,

23

1 and we're going to hear even from Professor Levenson
2 later on today who, despite their opposition to
3 mandatory minimums, actually acknowledge the fact
4 that mandatory minimums can help induce defendants to
5 decide to cooperate with law enforcement.

6 And for me personally this is an issue
7 that I am interested in exploring the policy
8 ramifications of this, particularly under an advisory
9 system of guidelines.

10 One of the things that the FPD testimony
11 provided in terms of the empirical research for, or
12 statistics supporting its positions that mandatory
13 minimums don't induce cooperation, is comparing
14 certain types of prescription drug use -- oxycodone,
15 OxyContin, and some others -- that have no mandatory
16 minimums, and comparing the substantial assistance
17 rate in those kinds of cases with drug trafficking
18 cases overall. And the statistics that you point out
19 show that the rate of substantial assistance was
20 higher in those prescription drug cases than in the
21 overall drug trafficking cases.

22 When we looked -- and part of our research,

23

1 when we're looking preliminarily at our 2009 data set
2 and doing a similar kind of comparison, what we're
3 finding is that the rate of substantial assistance
4 motions is more than three times higher in cases with
5 mandatory minimums than without, generally: 27
6 percent with mandatory minimums -- that's the
7 substantial assistance rate; compared to 7.8 percent
8 with no mandatory minimums.

9 And then this comparison holds true if we
10 drill down into specific offense types. So that for
11 example just taking firearms. Firearm offenders have
12 a substantial assistance rate of 22.6 percent in the
13 case with mandatorys, compared to 8.4 percent of the
14 cases without.

15 Drug trafficking cases, the substantial
16 assistance rate is double in cases with mandatory
17 minimums at 30 percent compared to cases with no
18 mandatory minimums, which is at 15.8 percent.

19 So our statistics are showing that the
20 rates are about two or three times higher -- the
21 substantial assistance rates are about two or three
22 times higher in cases with mandatory minimums than

23

1 without. So how would you suggest, as we're basing
2 our research and our analysis of cooperation, putting
3 aside the policy debate -- and I understand, Mr.
4 Felman, the ABA's position that no matter what the
5 statistics show you do not think as a policy matter
6 it is appropriate to consider mandatory minimums as
7 leverage -- but statistically, our statistics are
8 showing different results than the ones that you
9 mentioned in your testimony. And how would you
10 suggest we deal with that? Just ignore them and just
11 opt for the policy debate? Or what would your
12 suggestion be?

13 MR. NACHMANOFF: Sure. And, first of all,
14 thank you very much for the compliment, and let me
15 say that a lot of that material comes from my
16 colleagues who understand statistics and math far
17 better than I do. I went to law school because I
18 don't understand math.

19 But I think what you've just suggested
20 underscores exactly the importance of why sharing
21 data is important. Which is, for me, obviously it's
22 hard to respond as to what your research has shown

23

1 without knowing exactly what methodology was used and
2 what you were looking at and to compare it to see
3 whether or not it can be replicated. I think this is
4 true across the board.

5 But to specifically answer your question,
6 it is impossible to do so without having that access.
7 So I appreciate the compliment, and also think that
8 the best way to address these problems is to share
9 that information and to have it accessible to others
10 so that we could come to conclusions by all looking
11 at the same information.

12 Secondly, I would say that, while it
13 sounds like perhaps there's a difference with regard
14 to what you may have found with regard to the
15 comparison of particular drug defendants to other
16 drug defendants, the other statistics that we have
17 included include areas where there is no mandatory
18 minimum at all. And so there's no comparison here.

19 But in white collar cases, there's a
20 tremendous amount of cooperation. In antitrust
21 cases, which albeit is a fairly narrow area, the rate
22 of cooperation is 85 percent. In money-laundering

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1 and in bribery, it's 30 percent, it's 25 percent.

2 And so I think it is without a doubt
3 empirically true that people are motivated to
4 cooperate when they face jail. It may be that when
5 they face more jail they worry even more, but I've
6 represented countless clients who have not had
7 mandatory minimums who want to do whatever they can
8 to minimize the damage. And I think that is true as
9 a matter of common sense, and I think it is true as a
10 matter of what the numbers reflect.

11 So first of all, I share Mr. Felman's view
12 that this is not a consideration that the Commission
13 should be looking at when determining whether or not
14 to reaffirm its principled stance against mandatory
15 minimums; that somehow if there was some showing that
16 cooperation increased with this hammer, that it would
17 be a good idea to back away from that. But I don't
18 think the numbers show it. And I think we know that
19 people will cooperate in order to avoid having to go
20 to jail, or to go to jail for a shorter time.

21 I would also note that in the Holder
22 Memo -- and I'm not sure, because I haven't compared it

23

1 to the Ashcroft Memo -- there's a sentence that I think
2 is extremely relevant to this discussion. Which is,
3 that it says, "Charges should not be filed simply to
4 exert leverage to induce a plea."

5 If this is new language, it is a radical
6 departure from the use of mandatory minimums by
7 prosecutors around the country to induce pleas. If
8 it is a reiteration of what was said before, I'm not
9 sure that that was followed to the letter of the law.
10 The examples that we've put in that I'm sure the
11 Commission will hear about the rest of the day with
12 sentences of 159 years, or 55 years for Weldon
13 Angelos reflect exactly this problem: prosecutors
14 using a leverage of enormous sentences to induce
15 cooperation.

16 And then they have a structural problem.
17 They've been given a tool, and they use it; and if
18 someone, for whether a good reason or a bad reason,
19 irrational or rational, decides to take their chances
20 and go to trial, the prosecutor feels obliged to
21 follow through and pursue what will inevitably be an
22 unjust sentence -- not because they think that's what

23

1 the person deserves, but because they don't want to
2 send a message that if they threaten this leverage
3 and the person calls their bluff, they won't suffer
4 this consequence.

5 And this is why it's so important that the
6 Commission tell Congress in no uncertain terms to
7 remove this tool.

8 MR. FELMAN: If I could just make a very
9 quick observation also -- and I don't know the data
10 either -- but there is a variety of explanations for
11 what you've described.

12 One is that if there's a mandatory minimum
13 in a case, the only way you can cut the person a
14 break is to file the motion. If there's no mandatory
15 minimum, I hate to say it, but there are other ways
16 that get used to cut people a break. It may be
17 they'll agree on a lower quantity, a lower role, or
18 not to give a minimum instruction. There's a whole
19 host of ways you can give people a break to reward
20 them for their cooperation without having to file the
21 motion and maybe subjecting them to impeachment at
22 trial, et cetera. So that could be skewing your

23

1 data.

2 MS. ORR: And I was going to say what
3 Mr. Felman said, but also to add that the 5K1 motion
4 is not the litmus test for cooperation. In
5 innumerable cases folks provide cooperation that
6 doesn't quite warrant, in the discretion of the
7 prosecutor, a substantial assistance downward
8 departure motion.

9 MR. NACHMANOFF: Let me also note -- and I
10 think this issue has been raised before because it's
11 particularly relevant to the Eastern District of
12 Virginia, which is that we have a very, very low rate
13 of substantial assistance motions under 5K1.1. We
14 have a very high rate of Rule 35s.

15 This has been a very serious problem in
16 terms of analyzing what sentences are actually being
17 received. And it's probably particularly relevant to
18 this issue in particular in measuring the rate of
19 cooperation.

20 In these oxy cases, which have no
21 mandatory minimum and in which we see high rates of
22 cooperation, the Eastern District of Virginia has had

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1 several cases involving 20, 30, 50 defendants, all of
2 whom cooperated, all of whom got Rule 35s, none of
3 whom would be reflected in this data, so far as I
4 know, and that's another issue.

5 VICE CHAIR CARR: Is that Rule 35 practice
6 driven by the U.S. attorney's office, or the court?

7 MR. NACHMANOFF: Well this is a long
8 debate, probably not exactly on topic, but it is,
9 historically it's the decision of the U.S. attorney's
10 office to want to have an initial sentencing and move
11 on. It's also a district that is known as being the
12 rocket docket, and judges perhaps are less willing to
13 allow people to be hanging out there waiting to be
14 sentenced at one time.

15 It's a bad combination from the defense
16 perspective.

17 CHAIR SESSIONS: Vice Chair?

18 VICE CHAIR JACKSON: I appreciate that
19 practitioners want all mandatory minimums to be
20 eliminated, and I'm just wondering whether or not
21 there is a distinction to be drawn between the
22 existence of a mandatory minimum penalty and the

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1 level of the punishment that's being prescribed?

2 So your testimony, at least in the written
3 form, Mr. Nachmanoff, says that at the very least the
4 minimum should be set for the least harmful offense
5 that could be committed by the least culpable
6 offender.

7 And I'm just wondering if we were to
8 advocate that Congress do that -- meaning adjust all of
9 the levels -- would that be something that the defense
10 community would support? Or is this an all-or-
11 nothing proposition?

12 MR. NACHMANOFF: Well, clearly there's the
13 difference between the principled stance that we
14 think is important, and important for the Commission
15 to articulate to Congress, which doesn't always get
16 nuanced that well and the pragmatic reality that
17 there should be interim measures. And of course
18 something is always better than nothing.

19 But the problem is this: Congress has
20 determined in many, many cases -- including some of the
21 examples the Department of Justice gave regarding
22 what I think everyone would agree are the most
23

1 serious crimes, murder and rape and things like
2 that -- that there is a wide range of punishments based
3 on the fact that crimes can be committed, and people
4 can have backgrounds in which the culpability can
5 vary greatly. And those ranges have included
6 historically everything from probation to many, many
7 years in jail.

8 And in those particular examples, we don't
9 have mandatory minimums. And so if that level is
10 lowered, certainly that would be a better thing. But
11 it doesn't answer the question, which is the least
12 culpable defendant in really almost any circumstances
13 may be probation. In other words, however difficult
14 it may be to imagine, there may be cases where people
15 who have committed serious crimes for reasons that
16 are based on the circumstances of the case and the
17 history of that person deserve to be sentenced to a
18 period that does not include incarceration.

19 And that is why the principled stance is
20 the right one. Which is, that Congress should be
21 told that giving that freedom to consider the least
22 punishment for the least culpable defendant would

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1 include something that doesn't involve jail.

2 VICE CHAIR JACKSON: Just quickly to
3 follow up on that, if we accept that, nonetheless,
4 Congress wants to constrain judicial discretion in
5 some fashion, would the practitioner position be to
6 get behind presumptive guidelines, as opposed to
7 mandatory minimums or mandatory minimums with a
8 substantially altered set of penalties?

9 MR. NACHMANOFF: Well I think the first
10 answer is that it's impossible to pass judgment or
11 give an opinion on a hypothetical without all of the
12 details that would be necessary to consider what's
13 being offered.

14 So the idea of a trade of no mandatory
15 minimums for mandatory guidelines is impossible to
16 give a view. But the answer is: No.

17 First of all, there's a constitutional
18 problem. It's not even as simple as saying, well, if
19 it could be done with a magic wand that would be
20 better, or that would be acceptable. So to address
21 the constitutional problem, if it could be overcome
22 it would require a wholesale revision of the entire

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1 Criminal Code. There is no other way to do it.

2 And that is an undertaking that would be
3 ambitious for any group at any time. For Congress at
4 this time to wade into that is not something that, on
5 behalf of Federal and Community Defenders, or the
6 defense bar in general if I could be so bold, we
7 could ever endorse.

8 And secondly, it's not necessary. We have
9 the Sentencing Reform Act. We have discretion.
10 Judges are constrained. The guidelines continue to
11 play an important and fundamental role in the
12 sentencing process. And the Commission can make
13 guidelines even more relevant by revising them and
14 lowering them so that there will be more compliance.

15 And so the short answer is: No.

16 CHAIR SESSIONS: Can I just ask you to
17 explain that just a little bit more?

18 One of the proposals that's been floated
19 about is to set up a presumptive guidelines system
20 with many fewer offense levels, broader ranges,
21 discretion within the broader ranges, fold a lot of
22 the enhancements within these broader ranges --

23

1 suggesting at the high end or the low end based upon
2 those factors; leave out some of the factors which
3 are key to a jury trial right -- that's loss amount,
4 drug quantity.

5 And why in that kind of situation would
6 you have to go through an entire revision of Title
7 18?

8 COMMISSIONER WROBLEWSKI: Judge can I ask
9 a follow-up --

10 CHAIR SESSIONS: Sure.

11 COMMISSIONER WROBLEWSKI: Follow that
12 question? It's the same thing. The defense
13 community testified in this very room not many years
14 ago in complete agreement that such a system was
15 something that they advocated for.

16 In fact, I can quote for you from one of
17 your colleagues, Ms. Baron-Evans who said, we
18 support, the PAG supports what Jim Felman has
19 submitted to the Commission and that he calls
20 "codified guidelines." This would involve decreasing
21 the number of ranges, widening them accordingly. She
22 says: We support this approach for a number of

23

1 reasons, one of which is that it honors the letter
2 and spirit of the constitutional right to have facts
3 that are essential to punishment charged in the
4 indictment submitted to a jury and proved beyond a
5 reasonable doubt.

6 It also maintains a system of guidelines,
7 and we agree -- and I think most people who care about
8 rational and sound sentencing policy agree -- that
9 guidelines are good because they prevent unwarranted
10 disparity and they give us certainty.

11 And finally, she says, we do not support
12 advisory guidelines because we think that it -- maybe
13 not at first but eventually -- will invite too much
14 disparity.

15 What was she and the full defense
16 community thinking at that time?

17 MR. NACHMANOFF: Well, first of all let me
18 say this: If Amy Baron-Evans said it, it must be
19 right.

20 (Laughter.)

21 MR. NACHMANOFF: Number two, if Jim Felman
22 agreed with her, it must be right.

23

1 (Laughter.)

2 MR. NACHMANOFF: No, in all seriousness, I
3 don't know when that was said, but my guess is that
4 perhaps it was either before *Booker*, after *Blakely*
5 but before *Booker*, or certainly before we've had the
6 five years or more of understanding how the advisory
7 system works.

8 Nobody, including the Commission,
9 anticipated what the Supreme Court would do in an
10 extremely fractured opinion in *Booker*, and the
11 results of its remedial holding. But we now have
12 something far more valuable, and I would never run
13 away from any prior testimony, but I would also say
14 that we have to recognize the world that we live in
15 and the time that has passed.

16 And what we know is that the advisory
17 guideline system is working very well. And in fact
18 it is resulting in more fairness and more discretion
19 for judges; and that if this Commission can urge
20 Congress to act in the direction that even the
21 Department of Justice appears to be going in terms of
22 repealing at least some mandatory minimums, expanding

23

1 the safety valve, and doing other things to remove
2 and eliminate the conflict between mandatory minimums
3 which have no relation to the purposes of sentencing,
4 are not based on empirical evidence or the product of
5 political efforts that may not be subject to reasoned
6 thinking, that this is a system that works better
7 than we've had before.

8 Now at the time that all occurred, there
9 was a tremendous amount of uncertainty about what
10 kind of a system we would have, and how the Supreme
11 Court would view it. And I think we now know that
12 the advisory system works very well, and it would
13 work even better without mandatory minimums.

14 VICE CHAIR CASTILLO: I think I know the
15 defense perspective on regional variations with
16 regard to the advisory guidelines, but what I'd like
17 to know is: Are you at all concerned from a defense
18 perspective on the considerable regional variations
19 on the use of mandatory minimums?

20 Some districts are up -- 60, 70 percent of
21 their cases are mandatory minimums cases; other
22 districts are, you know, more in the 20 percent

23

1 range. It seems to me that defendants are being
2 treated differently.

3 Yes, Jeff.

4 MR. STEINBACK: The concern is a very real
5 one. In our district, as Your Honor knows, there has
6 been an increasing utilization of the 851 notice,
7 almost stock, every single case where it could apply
8 it is being applied. And it is being applied I think
9 as a backlash response, if I can be presumptuous, to
10 the so-called blind plea that is being undertaken in
11 the white collar cases where there are no mandatory
12 minimums.

13 But what has happened is, in addition to
14 punishing across the board everyone who could
15 potentially be eligible for an 851 notice -- even the
16 *Johnson* case that I submit in my papers -- it has
17 another indirect effect, whether conscious or
18 subconscious. Judges who are in the process on a
19 daily basis of having to make these evaluations will
20 take an individual with a couple of prior, relatively
21 minor drug offenses, and be forced to give that
22 individual 20 years in prison.

23

1 And perhaps that individual made a few
2 thousand dollars in his or her role in this
3 particular conspiracy, and there they are. And there
4 that judge is forced to give a 20-year mandatory
5 sentence with no parole.

6 The next day, that judge has on his or her
7 docket a case in which someone has embezzled \$2 or
8 \$3 million in a white collar context and is left
9 scratching their head saying, how do I justify having
10 just given this individual 20 years, and now this
11 individual here before me under the advisory
12 guidelines is looking at maybe five or six years?

13 They are very uncomfortable. They express
14 their frustrations openly. But the answer is almost
15 a gravitational pull upward, so that this five- or six-year
16 individual is now going to probably be getting a
17 high-end guideline range because yesterday some poor
18 schmo got 20 years.

19 And that updraft is creating part of the
20 problems which the ABA has very poignantly pointed
21 out that creates a 1-in-100 statistic ratio of people
22 incarcerated in this country in a Bureau of Prisons
23

1 system I can tell you is already overburdened.

2 And so the fact that that happens in some
3 districts is a, I think, kneejerk response to the
4 frustration over the blind plea, and I think that
5 explains it in Chicago. It also maybe explains why
6 the regional differences exist. But they also
7 underscore one other very important point which has
8 been touched upon.

9 That is, no matter how much prosecutorial
10 internal review there is, no matter how much
11 supervisory review over a line assistant's judgment
12 there may be, it is still internal. It is still
13 behind closed doors. It is unreviewable. And that
14 is the main difference between what happens in a
15 courtroom and what happens in the judgment making
16 that goes on in a prosecutor's office. No matter
17 what kind of good faith or well-meaning intentions
18 are behind it, you cannot understand, review or
19 determine what went on that gave rise to Jeffrey
20 Carter's probation, and Anthony Brigham's ten years.

21 And the only other thing I would add is
22 that when you look at guidelines, first of all in my
23

1 travels they are the benchmark. And everywhere I go,
2 federal district courts are beginning by calculating
3 what are the advisory guideline range. And they
4 really become the benchmark. They have not been
5 disregarded. They have not, I think, removed the
6 prosecution and left it simply as a dialogue between
7 defense counsel and the court with respect to
8 3553(a).

9 They very much are on the minds of the
10 vast majority of judges. Yes, there are variations,
11 but only when they are well meaning and well founded
12 variations based on a very careful and reasoned
13 determination.

14 And lastly, with respect to the
15 guidelines, people will cooperate because they're
16 scared to death of jail; not because the mandatory
17 minimums guidelines are there. And in many of these
18 cases where mandatory minimums exist, they are far
19 lower than the guidelines that are advice.

20 I just had a case in which an individual
21 was looking at 324 to 405 months. The mandatory
22 minimum had nothing to do with it. He was never

23

1 going to get that much of a departure. He didn't
2 need a mandatory minimum to get him to go into the
3 U.S. attorney's office and proffer.

4 And even with people who are looking at a
5 Level 13, a year and a day to 18 months, those people
6 don't want to go to jail for one more day than they
7 have to. And if they can get that good word from the
8 prosecutor, they're going in. Mandatory minimums
9 have absolutely nothing to do with that.

10 And I don't think that the idea behind
11 them that the prosecutors utilize to promote them is
12 really, as a practical matter, what motivates people
13 to do what they think they are doing.

14 CHAIR SESSIONS: Okay, Judge Hinojosa will
15 have the last question.

16 COMMISSIONER HINOJOSA: It's really not a
17 question, it's a quick comment. I see that Mr. Bobby
18 Vassar is here, and so I'm sure he would agree that
19 Jay Apperson needs no one to stand up for him.

20 (Laughter.)

21 COMMISSIONER HINOJOSA: However, I have to
22 make a correction, Mr. Felman. There have been

23

1 others who have expressed their support in writing
2 for mandatory minimums -- namely, Congress and the
3 Presidents who have signed them into law, and
4 therefore put their support in writing. Just to
5 clear the air here.

6 MR. FELMAN: I think my comment was, after
7 the day they were enacted.

8 COMMISSIONER HINOJOSA: After the day? I
9 didn't hear that part of it.

10 (Laughter.)

11 COMMISSIONER HINOJOSA: I didn't hear that
12 part. But nevertheless, I do want to clear that from
13 Mr. Apperson's standpoint, because I'm sure that's
14 what he would say. So there is no question.

15 CHAIR SESSIONS: All right. Thank you
16 very much. Let's take a -- we are a little bit behind,
17 let's take a ten-minute break and start at quarter
18 after.

19 (Whereupon, a recess was taken.)

20 CHAIR SESSIONS: Let's call the next panel
21 to order. Okay, good morning and welcome. Can we
22 have people's attention at this point?

23

1 Good morning, and thank you very much for
2 your attendance and participation today. Let me
3 introduce the law enforcement panel.

4 First, Jiles Ship is the national second
5 vice president of the National Organization of Black
6 Law Enforcement Executives, and administrator of
7 investigations in the State of New Jersey Attorney
8 General's Office in the Division of Criminal Justice.

9 He also serves as a governing board member
10 of the New Jersey Regional Community Policing
11 Institute. Previously he served as director of
12 public safety for the City of Plainfield; as an
13 officer on the Edison Police Department; and as a
14 United States Marine.

15 Mr. Ship earned a master's degree in
16 administration and supervision from Seton Hall
17 University, and a B.S. in administration of justice
18 from the Thomas A. Edison State College.

19 Thank you, Mr. Ship, for being with us
20 today.

21 Next, David Hiller is national vice
22 president of the Fraternal Order of Police, and has
23

1 been a member of the FOP for over 38 years, serving
2 in various capacities, including the national trustee
3 for the State of Michigan for 12 years. Mr. Hiller
4 earned his bachelor of arts degree in criminal
5 justice from Wayne State University in Detroit, and a
6 master's degree in public administration from Central
7 Michigan University.

8 Thank you, Mr. Hiller, for being here
9 today.

10 MR. HILLER: My pleasure.

11 CHAIR SESSIONS: And finally, Chief
12 Maxwell Jackson has been the chief of police for
13 Harrisville, Utah, for the past 15 years; and is a
14 member of the Advisory Board for the National Center
15 for Rural Law Enforcement at the University of
16 Arkansas Criminal Justice Institute.

17 Previously he served as the elected
18 sheriff of Kane County, Utah; deputy sheriff for
19 Kane, Garfield, and Wayne counties also in Utah; and
20 chief of police at Snow College in Ephraim, Utah.
21 Chief Jackson is also a commander of the Kane/
22 Garfield Counties Narcotics Strike Force.

23

1 Chief Jackson majored in police science
2 and industrial arts at Southern Utah State College.
3 And thank you for being with us, Chief Jackson.

4 So, Mr. Ship, would you please go first.

5 MR. SHIP: Well, first of all, thank you
6 all, distinguished panelists, for having us here and
7 having us as a part of this discussion. We
8 appreciate the opportunity.

9 Just to give you a little quick background
10 about our organization -- and I will try to be very
11 succinct as possible -- NOBLEE, the National
12 Organization of Black Law Enforcement Executives, was
13 founded in September 1976 during a three-day
14 symposium to address crime in urban low-income areas.

15 The symposium was co-sponsored by the
16 Police Foundation and the Law Enforcement Assistance
17 Administration. The Joint Center for Political
18 Studies coordinated this unprecedented event, and
19 with 60 top-ranking Black law enforcement executives,
20 representing 24 states and 55 major cities, gathered
21 in the Washington, D.C., area to participate.

22 They exchanged views about the critical
23

1 high rate of crime in Black urban communities, and
2 the socioeconomic conditions that led to crime and
3 violence.

4 NOBLEE consists of 59 chapters and 6
5 regions throughout the United States, the Caribbean,
6 and the UK. NOBLEE is committed to conducting
7 research and sponsoring programs that lead to the
8 formation of policies or procedures to improve the
9 delivery of law enforcement services.

10 NOBLEE's membership and staff also produce
11 a variety of manuscripts and monographs of interest
12 to citizens and criminal justice practitioners. Our
13 mission: to ensure equity in the administration of
14 justice, and a provision of public service to all
15 communities, and to serve as a conscience of law
16 enforcement by being committed to justice by action.

17 Our goal is to be recognized as a highly
18 competent public service organization that is at the
19 forefront of providing solutions to law enforcement
20 issues and concerns, as well as the ever-changing
21 needs of our communities.

22 Again, thank you for being here.

23

1 I, as was noted earlier, have been in law
2 enforcement for approximately 25 years, starting at a
3 patrol rank and achieving the rank of chief
4 executive. I have been involved in many court cases,
5 representing the state for people that we have
6 arrested for a variety of crimes -- everything from
7 homicides down to disorderly person offenses.

8 An extensive amount of research has been
9 done on this subject area. NOBLEE's position is
10 quite frankly that although mandatory minimums were
11 put in place with good intent, along the way we think
12 that we have not really -- it has not served its
13 purpose. By that, I mean that it totally takes all
14 the discretion away from the people who are charged
15 with being the trier of the facts.

16 We believe that that discretion needs to
17 go back to those individuals charged with that
18 responsibility. Also, our judicial system is set so
19 that if we feel that the trier of the facts have been
20 wrong on the law, or something else, then we have
21 court of appeals that those cases could be taken to
22 at that time.

23

1 So we firmly believe that that discretion
2 needs to go back to that proper authority.

3 Mitigating factors, aggravating factors, cannot be
4 taken into account if a trier of the facts just has
5 to rule on the specific law. You know, it's been
6 concluded that the most efficient and effective way
7 for the Congress to exercise its powers to direct
8 sentencing policies is through the established
9 process of sentencing guidelines, permitting the
10 sophistication of the guidelines structured to work,
11 rather than through mandatory minimums.

12 There is every reason to expect that by so
13 doing, Congress can achieve the purpose of mandatory
14 minimums while not compromising other goals which it
15 is simultaneously committed to.

16 Just to give you a quick example, in our
17 state an individual was a first-time offender. But
18 growing up as a young person in an under-served
19 community with socioeconomic conditions, he had other
20 disorderly persons offenses, which subsequently led
21 him to being involved in the drug industry.

22 When he was arrested on a charge, he

23

1 didn't have an opportunity -- our system, as it was
2 structured initially as a reform system and a
3 rehabilitation system. By putting these guidelines
4 into place, that individual did not really have an
5 opportunity to benefit from the time that he was
6 incarcerated to looking at what he is going to be
7 doing when he's coming out.

8 So that individual subsequently had a
9 tremendous amount of opportunities taken away from
10 him, and really had no -- nothing to look forward to as
11 far as coming out and re-establishing his life. And
12 again, without being redundant, the triers of the
13 facts can look at the totality of the circumstances,
14 and we firmly believe that that discretion should be
15 solely up to that individual.

16 Thank you.

17 CHAIR SESSIONS: Thank you. Thank you,
18 Mr. Ship.

19 Mr. Hiller?

20 MR. HILLER: Thank you, Mr. Chairman, and
21 distinguished Vice Chair, and Commissioners.

22 As the worthy chairman indicated, my name
23

1 is Dave Hiller. I am representing the National
2 Fraternal Order of Police. We represent 327,000
3 rank-and-file officers from across this country.
4 We're the largest labor organization for police in
5 the United States.

6 I want to thank you and the rest of the
7 Commission for allowing us to be here today to
8 express the views of those rank-and-file officers
9 across this country.

10 Throughout our nation's history, Congress,
11 as well as the legislatures of many states, has
12 routinely imposed mandatory minimum sentences for a
13 variety of offenses. There are three principles
14 which lead Congress and other bodies to adopt
15 mandatory minimums.

16 Number one is to deter future offenders;

17 Number two, to provide a defined period of
18 separation of the offender from society; and

19 Three, to ensure consistency throughout
20 the criminal justice system so that individuals
21 convicted of specific crimes receive similar
22 sentencing. I would like to take a few minutes just

23

1 to touch on those three points in order.

2 Obviously the effectiveness of deterrence
3 is something that's difficult to quantify, but the
4 establishment of specific, and hopefully harsh,
5 punishment for serious offenders is to deter
6 individuals from engaging in crimes in the future,
7 leading -- again in theory -- to a reduction in crime.

8 Another deterrence factor is that
9 offenders charged with crime, like drug or human
10 trafficking, can be induced to provide evidence and
11 information about other members of their illegal
12 operations in exchange for reduced time or reduction
13 of sentencing.

14 I've been involved in law enforcement for
15 40 years, and I currently hold the rank of chief of
16 my department also. But for 12 years I was the
17 officer in charge of our detective bureau. I can
18 assure you that that is an extremely powerful weapon
19 to have: certainty of punishment is a factor that
20 police use on an every-day, regular basis. It is
21 critical to our job.

22 Secondly, sentencing of a specific length

23

1 separates the offender from the public for that time
2 period. That protects the public and functions as an
3 absolute deterrent against that particular individual
4 while he or she is incarcerated. The greater the
5 offense, the more serious the punishment.

6 Violent crimes, which are a grave threat
7 to our public safety, necessarily require mandatory
8 minimum sentencing. The fight against crime
9 involving firearms is an excellent example, with
10 mandatory minimums applying to both initial and
11 repeat offenders.

12 The use of mandatory minimums is crucial
13 to eliminating gun violence and reflect the
14 seriousness of using firearms to commit those
15 crimes.

16 The third rationale for mandatory minimums
17 is to ensure fairness, consistency, and uniformity so
18 that offenders receive similar sentencing throughout
19 the criminal justice system for committing similar
20 crimes.

21 In fact, the establishment of this worthy
22 body, the United States Sentencing Commission, in

1 1984 was done in large part to achieve that goal.
2 The adoption of the Comprehensive Crime Control Act
3 of 1984 established mandatory minimum sentences in an
4 effort to combat the growing problem of drug
5 trafficking and violence associated with those
6 operations.

7 Increased mandatory minimums were put in
8 place for offenses committed in the vicinity of
9 schools, the use of firearms during the commission of
10 drug-related offenses, all of which triggered harsher
11 mandatory penalties.

12 The adoption of these policies by Congress
13 was a result of considered deliberation and an
14 overall crime-fighting strategy. The Anti-Drug Abuse
15 Acts of '86 and '88, as well as the Crime Control Act
16 of 1990, expanded mandatory minimum sentences for a
17 variety of serious offenses, from drug-related to
18 financial offenses.

19 These acts, along with the renewed
20 emphasis on community policing and federal programs
21 to allow us to deploy 100,000 additional law
22 enforcement officers in our nation's communities,
23

1 turned the tide in our crime -- in our efforts to
2 conduct and reduce crime.

3 Crime rates have reached historic lows in
4 the past 15 years, in part because of our policing
5 approach and the effectiveness of mandatory minimums
6 for most of our dangerous offenders.

7 It is important to recognize that reduced
8 crime rates are not just statistics on a page. They
9 mean less victims of violence, reduced availability
10 of narcotics to our children, safer neighborhoods and
11 schools, and a wonderful community which our
12 residents can enjoy.

13 The FOP recognizes that there are those
14 who cite individual instances, or cases where
15 nonviolent first-time offenders are serving lengthy
16 prison terms in federal facilities, but this is
17 inconsistent with the available data.

18 In fiscal year 2008 there were 105 federal
19 cases of simple possession in which only 58 were
20 sentences to statutory minimum penalty.

21 Additionally, Congress has implemented a safety valve
22 which provides for additional protection for first-

23

1 time offenders who, without a prior criminal history,
2 did not employ firearms or violence in furtherance of
3 the commission of the underlying offense, and who are
4 not significant components of a large criminal
5 enterprise. These individuals are not and should not
6 be the target of our nation's crime-fighting
7 strategy, of which the use of mandatory minimums is
8 an integral part.

9 Congress itself is considering legislation
10 to greatly reduce sentencing of those convicted of
11 trafficking in crack cocaine. It is possible that
12 they will consider reducing or increasing mandatory
13 sentences for other crimes and offenses, and the FOP
14 stands ready and believes that our input on these
15 issues is critically important to you in these
16 debates and we are ready to move forward at any given
17 time.

18 In conclusion, Mr. Chairman, I want to
19 thank you and the Commission again for allowing us to
20 be here, and we would be pleased to answer any
21 questions at the end of the panel that you may have.

22 CHAIR SESSIONS: Thank you, Mr. Hiller.

23

1 Chief Jackson?

2 CHIEF JACKSON: Well I appreciate the
3 opportunity to address the panel and represent the
4 National Center for Rural Law Enforcement.

5 The National Center is a part of the
6 University of Arkansas, Little Rock, Criminal Justice
7 Institute. It was a brainchild of Dr. Lee Colwell,
8 who was the former deputy director of the FBI. The
9 National Center has been in existence for about 15
10 years, and we stand as a clearinghouse for
11 information, policies, and procedures, leadership and
12 management training, for the smaller agencies
13 throughout the United States.

14 It's interesting to note that the majority
15 of law enforcement agencies throughout the United
16 States qualify as "rural" because there are under 20
17 sworn officers. And so when [they] noticed me up that
18 they'd like me to come back and address the body, I
19 was happy to do so. They were also wanting to
20 emphasize the problem that rural America is
21 experiencing with the meth epidemic.

22 The majority of my testimony will be

23

1 circumstanced around that. So the rise of
2 methamphetamine use and abuse since the 1990s has
3 become an enormous concern for rural communities
4 nationwide.

5 Rural areas were typically viewed as being
6 immune from what was perceived as the urban problem
7 of drug abuse. It's now patently evident that the
8 meth problem has completely permeated rural America,
9 leaving small law enforcement agencies in the
10 communities we serve scrambling to find solutions.

11 Rural America has been disproportionately
12 affected by this problem for several reasons. Remote
13 areas with little law enforcement presence, combined
14 with the existence of many abandoned or seldom-used
15 ranch houses or farm sheds are being set up as
16 temporary meth labs.

17 These labs produce toxic waste which
18 contaminates land, waterways, and family recreational
19 sites. It also renders structures uninhabitable.
20 Damage to children is perhaps the worst meth-related
21 problem that we are experiencing at this time.

22 Often referred to as "meth orphans," some
23

1 3000 children are removed annually from toxic homes
2 that are being used to produce and sell
3 methamphetamine. These removals are overwhelming
4 our rural family service agencies and foster care
5 systems.

6 Farmers and ranchers are losing millions
7 of dollars annually due to theft. For example,
8 anhydrous ammonia, which is a commonly used
9 agricultural fertilizer, is also a methamphetamine
10 precursor chemical. It, along with irrigation
11 equipment, farming implements, tools, fencing
12 material, and anything that meth addicts and
13 producers can get their hands on in order to convert
14 to cash are targeted for theft.

15 Half of our nation's sheriffs report that
16 methamphetamine is their number one drug problem.
17 And over the past three years, 45 states show a 90
18 percent increase in meth-related crime.

19 Individual states shouldered a majority of
20 the burdens caused by the production and use of
21 methamphetamine. Most states have a five-tier
22 response plan in order to deal with this ever-

23

1 increasing problem.

2 One is to control access to precursor
3 chemicals. Two is to protect endangered children.
4 Three is to clean up labs and property contaminated
5 by labs. Four, improve treatment for users. And
6 five, to strengthen law enforcement and prosecution
7 efforts.

8 I am going to focus the remainder of my
9 testimony today on strengthening law enforcement and
10 prosecution efforts and how the use of minimum
11 federal mandatory sentencing has provided us in the
12 rural law enforcement community with an additional
13 tool to help us in this battle.

14 The majority of rural meth prosecutions
15 are held at the state court level. Programs such as
16 drug courts have enjoyed some success whereby jail
17 and prison sentences can be waived if the offender,
18 which is usually a common abuser, successfully
19 completes programs which typically emphasize
20 rehabilitation and have professional counseling
21 components.

22 Probation is usually offered in lieu of

23

1 incarceration. Repeat offenders are generally
2 incarcerated if these other programs fail.

3 Federal prosecutions, which carry with
4 them minimum mandatory sentencing guidelines vary
5 from state to state. Every U.S. attorney seems to
6 have a slightly different philosophy when it comes to
7 initiating federal drug prosecutions.

8 But as a general rule, the determining
9 factors with most federally initiated prosecution
10 usually hinges on two determining questions:

11 One, are there large quantities of drugs
12 involved?

13 And two, was a firearm used in the
14 commission of a drug-related crime?

15 In other words, federal prosecutions in
16 rural America are rare and are usually reserved for
17 the worst of the worst offenders. These are the
18 people who are locally producing or transporting
19 methamphetamine in large quantities throughout our
20 jurisdictions. Firearms and boobytraps are often
21 found in their associated makeshift labs and
22 transport vehicles.

23

1 There are two major advantages in
2 prosecuting these types of offenders federally.

3 One is incapacitation. Minimum mandatory
4 sentences remove these most extreme offenders from
5 society for long periods of time.

6 Two, the threat of minimum mandatory
7 sentences often lead to plea bargain agreements at
8 the state level wherein the offenders, in exchange
9 for a lighter state sentence, can lead law
10 enforcement up the food chain to higher level and
11 even international organized crime figures.

12 These are the people who truly need to be
13 prosecuted and incarcerated under the federal
14 mandatory minimum guidelines.

15 In closing, may I express on behalf of
16 both the National Center for Rural Law Enforcement
17 and rural law enforcement executives across the
18 country, our gratitude to the United States
19 Sentencing Commission for including us in this
20 discussion, for the concern you have shown to the
21 rural states and communities for doing their level
22 best to combat this ever-increasing menace.

23

1 We would like to go on record
2 acknowledging that we realize that there have been
3 some problems with the minimum sentencing guidelines
4 in the past, and that perhaps some reforms are in
5 order. We also welcome this seldom-used weapon into
6 our arsenal as a means to remove the worst of the
7 worst from society, and to pursue those who profit
8 from this drug numbering in the billions of dollars.

9 It would also be most helpful if federal
10 laws could be enacted and strong minimum mandatory
11 sentences meted out against those who do harm to the
12 most vulnerable among us -- namely, our children.

13 Meth-related crimes drain our resources in
14 so many ways, not to mention the countless lives that
15 are ruined and are lost each year due to this
16 epidemic.

17 Thank you again for this opportunity. I
18 would like now to yield the rest of my time and
19 answer any follow-up questions that members of the
20 Commission may wish to ask.

21 CHAIR SESSIONS: Okay. Thank you, Chief
22 Jackson. So let's open it up for questions. Judge

23

1 Castillo?

2 VICE CHAIR CASTILLO: I want to thank you
3 all for the day-to-day work that you do in your
4 communities.

5 We are exploring potential reforms,
6 obviously, so you can tell me if you disagree with
7 this. I think you might agree, but I'm not sure. Do
8 you agree that long mandatory minimum sentences are
9 inappropriate for nonviolent first-time offenders who
10 have no real connection to large criminal
11 conspiracies?

12 And, you know, we can bring up different
13 examples. Probably the most common example that
14 occurs nationally is just the typical drug mule,
15 somebody who is asked to transport drugs, knows
16 nothing more than they need to go from point A to
17 point B, but because the quantities are caught up in
18 a mandatory minimum sentence? Do you think that that
19 is an appropriate use of a mandatory minimum
20 sentence?

21 CHIEF JACKSON: I would just like to say
22 that when they're initially arrested, if they're

23

1 willing to cooperate and lead up the food chain, that
2 threat of a long sentence is very helpful in leading
3 us to the ones that really need it.

4 VICE CHAIR CASTILLO: But it seems to me --
5 and I was a prosecutor -- that drug organizations are
6 getting better about not letting these people, these
7 so-called "mules," know anything about the next
8 level. I've been in situations now where people just
9 are delivering money from point A to point B. No
10 other connection. They've been given cell phones,
11 disposable cell phones. Or they're delivering drugs.
12 They know nothing, so they can't really cooperate.
13 They would love to cooperate. They're surprised when
14 all of a sudden they're looking at ten, five years,
15 whatever the mandatory minimum, but they're not in a
16 position to cooperate.

17 MR. HILLER: I think the key word you said
18 is "long mandatory."

19 VICE CHAIR CASTILLO: Um-hmm.

20 MR. HILLER: That might be the word that --

21 VICE CHAIR CASTILLO: I agree with that.

22 MR. HILLER: I can give you --

23

1 VICE CHAIR CASTILLO: You and I can
2 disagree as to what is too long --

3 MR. HILLER: Correct.

4 VICE CHAIR CASTILLO: -- and I'm sure maybe
5 that would occur, maybe it wouldn't --

6 MR. HILLER: I believe "certainty" is the
7 word that should be in place.

8 VICE CHAIR CASTILLO: Okay.

9 MR. HILLER: Certainty of punishment. You
10 are going to go to jail. Now the question is: How
11 long are you going to go to jail? On a local level
12 we can arrest these young students, like the chief
13 said, that are kids, and they'll say, well, I can
14 tell you where there's a dope house in such-and-such
15 a city. Well, you don't have to tell me. We already
16 know. That's not the information that we're looking
17 for.

18 So "certainty" to me is the key word.

19 MR. SHIP: And I believe we can still
20 achieve that same objective, but let's let the trier
21 of the facts make that determination.

22 VICE CHAIR CASTILLO: Okay. Thank you.

23

1 COMMISSIONER HOWELL: Can I just follow up
2 on that so that I make sure that I'm understanding
3 what you're saying? Because, Mr. Hiller and Mr.
4 Jackson at least, you have both suggested your
5 support in your written testimony for mandatory
6 minimums per se because of the assistance that they
7 provide in inducing cooperation.

8 Do you think it's the -- under the federal
9 system, the guidelines also make recommendations for
10 certain sentences. Do you think that it's the fact
11 that if somebody that you've arrested is going to be
12 brought federally, is it the fact that they might be
13 facing a mandatory sentence versus just perhaps a
14 guideline sentence? Would the fact that they're
15 facing a guideline sentence be a sufficient
16 inducement, do you think?

17 VICE CHAIR JACKSON: I think if they
18 realized that a federal prosecution would be a lot
19 worse than a local prosecution, if we could get the
20 same level of cooperation for the assistance from
21 them, I think we would be amenable to that.

22 COMMISSIONER HOWELL: Because I think

23

1 we've -- I'm sorry?

2 VICE CHAIR JACKSON: But just the fact
3 that that federal hammer is hanging there, no matter
4 if it's a minimum or if it's severe like the chief
5 says, that's -- I think we'd be fine with that.

6 COMMISSIONER HOWELL: So it's not
7 necessarily the fact that it's a mandatory minimum
8 sentence?

9 VICE CHAIR JACKSON: Right.

10 COMMISSIONER HOWELL: Because we've heard
11 from other social scientists during the course of the
12 last year when we've been holding regional hearings
13 that have said that certainly people arrested at the
14 state level care strongly about the fact that they
15 might be facing federal charges.

16 But some of the social scientists that
17 we've heard from have said it's not because of
18 mandatory minimum sentences, it's because if they are
19 brought federally they're going to be serving their
20 sentence in unfamiliar areas, there's less
21 flexibility, they know, once they've been sentenced to
22 actually get out early, and that there's a whole host

23

1 of other reasons associated with federal enforcement
2 having nothing to do with mandatory minimum sentences
3 that makes -- that helps induce that cooperation
4 without a mandatory minimum.

5 Is that consistent with your experience?

6 MR. HILLER: There is a -- part of my career
7 is also as an instructor at the college level, and
8 there is a video that we play for integrity of police
9 officers. It involves the three police officers who
10 were arrested and charged and indicted, and they were
11 indicted under federal court.

12 These officers are state. They know the
13 state courts like you said, and to a man their
14 statements are: When you go to federal court, you're
15 in a different ballgame. You're playing with the big
16 guys. That's the important factor, and that's what
17 the chief is mentioning.

18 You are playing serious rules now. So if
19 you have these guidelines, you have these
20 mandatories, you know it's a different ballgame.

21 CHIEF JACKSON: I think the fact that they
22 realize they may be going to Minnesota, or Arizona to

23

1 a federal penitentiary rather than staying locally,
2 separated from family and friends, that type of thing
3 alone is a deterrent.

4 VICE CHAIR CARR: Also, you're almost
5 undoubtedly going to be denied bail.

6 CHIEF JACKSON: Right.

7 COMMISSIONER HOWELL: Thank you.

8 COMMISSIONER FRIEDRICH: Mr. Hiller and
9 Mr. Jackson, just to follow up on this conversation,
10 we've heard from at least one local law enforcement
11 officer in our regional hearings. He expressed a
12 concern that in the advisory guideline scheme in
13 which we now function he was witnessing a shift in
14 enforcement policies on a local level.

15 That is, that many offenses that typically
16 were historically brought to federal court were now
17 going back to the state. Are you witnessing that,
18 either first-hand or in your rank-and-file? Are you
19 hearing that across the country? Or is that unique
20 to that -- this was a large city.

21 CHIEF JACKSON: It's kind of unique to
22 whoever's the U.S. attorney operating in the state.

23

1 They vary. They'll come. They'll talk to the chiefs
2 and the sheriffs and say, I want as many of these
3 types of cases, firearms cases, meth cases, send
4 them. And then some of them are very selective in
5 the ones they want.

6 So a lot of federal prosecution hinge on
7 the philosophy of each individual U.S. attorney for
8 that state. And if they want them, if we have a case
9 that meets the criteria for a federal prosecution,
10 we'll typically send it up and let a USA review it,
11 and they ultimately decide whether they want to take
12 it or not. So --

13 COMMISSIONER FRIEDRICH: And this
14 discussion also centered around offenses that did not
15 involve a mandatory minimum penalty, the thinking
16 being that the level of certainty was much less in an
17 advisory system and therefore that was prompting some
18 shifting of resources.

19 MR. HILLER: The Eastern State of
20 Michigan, I don't have a number that I can swear to,
21 but there is an increase in federal prosecution. And
22 they have taken, like the chief said, it's an
23

1 aggressiveness on the part of the U.S. attorney. So
2 that is probably the key factor.

3 CHIEF JACKSON: And I think when they were
4 talking earlier on the panel previous, they were
5 comparing white collar crime to drug crime, and there
6 really is no comparison because of the violence and
7 the death and the harm to children, the killing of
8 police officers. There's really no comparison from
9 the law enforcement's perspective when you're dealing
10 with these types of people, rather than your average
11 white collar criminal.

12 CHAIR SESSIONS: Vice Chair.

13 VICE CHAIR JACKSON: Just to follow up on
14 that, in your experience does that fact that there is
15 a mandatory minimum make any difference from the
16 actual investigation or law enforcement standpoint?
17 Do crimes with mandatory minimums, are they enforced
18 any differently from an investigation standpoint?

19 MR. HILLER: The initial investigation
20 will be the initial investigation. The direction we
21 go from there will be predicated on what we
22 determine, what evidence comes forward.

23

1 As the vice chair indicated, someone
2 indicates, I don't know anything. It's not going to
3 go anywhere. I mean, we have enough common sense as
4 a background as investigators to realize he doesn't
5 have any information. There's no sense taking it to
6 another level. We know. But there are also those
7 that swear they don't know anything, but when they're
8 suddenly charged in a federal court and there's a
9 mandatory minimum, the recollection comes back
10 quickly for some reason; I don't understand how that
11 happens.

12 (Laughter.)

13 MR. HILLER: It's like children.

14 VICE CHAIR JACKSON: Do you tend to use
15 the information about mandatory minimums in the
16 context of your investigation in that way?

17 MR. HILLER: In the discussion we have
18 with them?

19 VICE CHAIR JACKSON: In the discussion,
20 even prior to charges.

21 MR. HILLER: Oh, yes.

22 VICE CHAIR JACKSON: I mean, if you know
23

1 that this case could implicate a mandatory minimum,
2 then you bring that out in the context --

3 MR. HILLER: We say you could be facing X,
4 Y, and Z, yes.

5 VICE CHAIR JACKSON: Thank you.

6 CHAIR SESSIONS: Ricardo.

7 COMMISSIONER HINOJOSA: Mr. Hiller, you
8 pointed out that in the federal system, at least in
9 the drug trafficking cases, there is some relief for
10 low-level offenders from the mandatory minimums in
11 the form of the safety valve. And you may be
12 familiar. The requirements for the safety valve are:

13 That you not have more than one criminal
14 history point;

15 You not use violence or credible threats
16 of violence, or possess a firearm;

17 There was no death or serious bodily
18 injury to anyone;

19 The defendant was not an organizer,
20 leader, manager, or supervisor;

21 And that prior to the sentencing hearing
22 the defendant stated what his role in the offense was

23

1 as far as giving the factual involvement in the case.

2 If you had to add, or change any of this,
3 what if any of this would you add to or change? And
4 also, do you think that this provision, the safety
5 valve provision that applies to drug trafficking
6 mandatory minimums, should be expanded to other
7 crimes?

8 MR. HILLER: I'm going to use my
9 get-out-of-jail-free card as the previous panel said.
10 I went to the police academy; I didn't go to law
11 school.

12 (Laughter.)

13 MR. HILLER: I've been doing this for a
14 long time. When it gets to that level, it's the
15 federal prosecutor who -- I trust their judgment.
16 We're done at that point with our investigation.
17 We've turned the matter over to them. Everything
18 we've got, they've got on paper ready to go.

19 My policy, and I think the chief's policy,
20 if we've done our job and we've dotted the "i"s and
21 crossed the "t"s and given it to the prosecution,
22 that's their job, and I trust their judgment.

23

1 COMMISSIONER HINOJOSA: Well let's put it
2 on the level of would you extend this to other
3 crimes? Or would you limit it to drug trafficking
4 crimes, as far as having this --

5 MR. HILLER: I'd be comfortable with other
6 crimes, having the safety valve, sure.

7 COMMISSIONER HINOJOSA: Thank you.

8 CHAIR SESSIONS: Yes, Commissioner Howell.

9 COMMISSIONER HOWELL: I just wanted to ask
10 one last question. We're going to hear later on this
11 afternoon from Professor Schulhofer who talks about
12 something he calls "the cooperation backlash."
13 Perhaps it's a more widely known term, but I first
14 learned of it when I read his testimony.

15 What he talks about with cooperation
16 backlash is something that would affect law
17 enforcement, actually, trying to solicit cooperation
18 from citizens to report crime, cooperate as
19 witnesses, and so on, that if the citizenry views
20 certain federal penalties -- particularly mandatory
21 penalties -- as overly severe, unjust, racially
22 motivated in their application, that they will

23

1 decline to cooperate with law enforcement.

2 And I wanted to know from the three of
3 you, who work in enforcement on the ground, in the
4 trenches, trying to solicit the support of citizens
5 to help in your investigations, do you have any view
6 about what this professor calls "cooperation
7 backlash"?

8 MR. HILLER: I've never read it. I've
9 never heard it. But if someone's going to cooperate
10 with us, we don't discuss penalties, or sentencing,
11 or either you're going to tell us the information or
12 you're not. And usually it's because they want to
13 cooperate. That's at the real, real early stages of
14 our background investigations, criminal
15 investigations with witnesses, and residents, and the
16 community. That's where we get a lot of information
17 to begin with. Someone comes forward with something
18 that's not right. They don't like what's happening.
19 They're not asking what the penalties are.

20 CHIEF JACKSON: As a general rule, John Q
21 Citizen is just, they just like to see somebody
22 arrested. They don't really know where it goes to

23

1 from there. The thoughts of whether it's going to go
2 federal with still penalties, or state, it just
3 doesn't cross their mind. They're happy to give the
4 information and see that arrests are made, and it
5 generally ends there.

6 COMMISSIONER HOWELL: Mr. Ship, did you
7 have any comments?

8 MR. SHIP: Yes. I haven't obviously read
9 his position, but I can appreciate his position,
10 because in most cases you're dealing with communities
11 who have a suspicion about the judicial process to
12 begin with.

13 And if they can see where it's being -- it's
14 treating people that are arrested in their respective
15 communities more fairly, it would have to have some
16 type of effect on them with respect to partnering
17 more so with law enforcement.

18 So I would -- I could appreciate his
19 position on that study.

20 CHAIR SESSIONS: Can I just follow up with
21 that? There's a real concern that mandatory minimums
22 may be applied in unfair ways. For instance, African

23

1 Americans make up 24 percent of the docket of the
2 federal courts, and yet 35 percent, roughly, 35.7
3 precisely I think, of mandatory minimums apply to
4 African Americans.

5 And I guess as a general question, do you
6 see that particular disparate use of mandatory
7 minimums, either in the state system or the federal
8 system? Or do you see that as a particular
9 significant difficulty that we should respond to
10 because of the community reaction that may happen as
11 a result of that kind of application of mandatory
12 minimums?

13 MR. SHIP: Yes, exactly. And in part, and
14 that's because they don't necessarily have the
15 resources to get the best defense counsel. I've been
16 in this for over 25 years now, and the facts are what
17 they are. If you go into court with a better defense
18 counsel, you have a higher probability of getting a
19 better result. That's just the facts. And the
20 community, they see it. They respond to that. And
21 it sort of brings down their trust in the criminal
22 justice system. And in order for it to work most

23

1 effectively and efficiently, people have to have
2 trust in the system, and they have to believe in the
3 system's integrity.

4 CHAIR SESSIONS: Any other comments?

5 (No response.)

6 CHAIR SESSIONS: Any other questions at
7 all?

8 (No response.)

9 CHAIR SESSIONS: Well thank you very much
10 for coming and testifying today. This was most
11 informative, and we really appreciate it.

12 MR. HILLER: Thank you.

13 MR. SHIP: Thank you.

14 CHIEF JACKSON: Thank you.

15 CHAIR SESSIONS: So I just have one matter
16 to put on the record. I've had a long conversation
17 with U.S. District Judge Julie Carnes, Chair of the
18 Criminal Law Committee, and she is offering her
19 written testimony concerning mandatory minimum
20 statutory sentencing provisions. Judge Carnes
21 testified, or the testimony was given before the
22 Subcommittee on Crime, Terrorism, and Homeland
23

1 Security of the Committee of the Judiciary of the
2 U.S. House of Representatives on July 14, 2009, on
3 behalf of the Criminal Law Committee.

4 Judge Carnes has requested her testimony
5 be entered as part of the Commission's record of
6 today's hearing, but she also reserves the
7 opportunity to follow it up with additional
8 submissions after consulting with the Criminal Law
9 Committee.

10 So with that, we stand in recess, and let
11 us reconvene at 1:15.

12 (Whereupon, at 11:59 a.m., the hearing was
13 recessed, to reconvene at 1:15 p.m., this same day.)

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AFTERNOON SESSION

(1:24 p.m.)

CHAIR SESSIONS: Good afternoon. Welcome, and thank you very much for coming. This is the panel, the "View From Academia." Let me introduce the panelists.

First, Laurie Levenson is a professor of law at Loyola Law School in Los Angeles, serving as both the William M. Rains Fellow and the David M. Burcham, or "Birkam" Chair in Ethical Advocacy. From 1996 to 1999 she served as Loyola's associate dean for academic affairs. She previously served as an assistant U.S. attorney in the Central District of California. She also taught as an adjunct faculty member at Southwestern University Law School faculty from 1982 to 1989. Professor Levenson received her A.B. from Stanford, her J.D. from the University of California at Los Angeles, and served as a law clerk to the Honorable James Hunter III of the United States Court of Appeals for the Third Circuit.

Thank you, Professor, Levenson, for being here today.

1 MS. LEVENSON: Thank you, Your Honor.

2 CHAIR SESSIONS: Next, Stephen Saltzburg
3 has testified before us many a time. He is the
4 Wallace and Beverley Woodbury University Professor of
5 Law at the George Washington University Law School,
6 and served as chair of the ABA's Justice Kennedy
7 Commission. Professor Saltzburg previously taught at
8 the University of Virginia School of Law. He also
9 has served as deputy assistant attorney general in
10 the Criminal Division of the U.S. Department of
11 Justice and as the Attorney General's *ex-officio*
12 representative to the Sentencing Commission.

13 Professor Saltzburg earned a J.D. from the University
14 of Pennsylvania, got his B.A. from Dickinson College.

15 Next, Stephen Schulhofer is the Robert B.
16 McKay Professor of Law at NYU, New York University
17 School of Law -- I was just there Friday, or Monday.

18 MR. SCHULHOFER: I saw you, Judge.

19 CHAIR SESSIONS: Oh, you were there?

20 MR. SCHULHOFER: You were terrific.

21 CHAIR SESSIONS: I was terrific?

22 MR. SCHULHOFER: Yes.

23

1 CHAIR SESSIONS: That's a great way to
2 start.

3 (Laughter.)

4 CHAIR SESSIONS: It's just a great way to
5 start your discussion here.

6 (Laughter.)

7 MR. SCHULHOFER: Thanks.

8 CHAIR SESSIONS: -- where he has taught
9 since 2000. Prior to joining the faculty at NYU, he
10 was a professor of law and director for Studies in
11 Criminal Justice at the University of Chicago Law
12 School, and a professor of law at the University of
13 Pennsylvania Law School. He received his A.B. degree
14 from Princeton, and his L.L.B -- which goes back away,
15 I assume -- from Harvard.

16 So, Professor Levenson, can we start with
17 you?

18 MS. LEVENSON: Yes. Thank you, Your
19 Honor. First let me thank all of the commissioners
20 for inviting me to testify here today. I am
21 particularly honored to be here with my colleagues,
22 giants in this area of the law, Professor Schulhofer

23

1 and Professor Saltzburg.

2 As you mentioned, my background is not
3 simply that from academe, although I proudly wear my
4 over-20 years of teaching, but also from being in the
5 trenches as an AUSA, and being there both before the
6 sentencing guidelines and the proliferation of the
7 mandatory minimums, and then afterwards.

8 I also am somewhat of a student of the
9 media and the headlines and how the public is
10 reacting to the sentencing system we have here. And
11 I am afraid the news has not been so good.

12 Whatever perspective you look at, there's
13 been a great deal of criticism -- I think justly so -- of
14 the mandatory minimums. They are perceived as
15 unfair, costly, inequitable, and ineffectual in
16 achieving all of our goals.

17 And so therefore of course this is the
18 right time for this Commission and Congress as well
19 to address this issue.

20 I notice that the discontent with the
21 guidelines is really across the board, but right now
22 quite a bit with the judges themselves. And all of

23

1 us might have noted last week Judge Jack Weinstein's
2 comments regarding his case where he referred to
3 mandatory minimums in a phrase that resonates with
4 me, quote, "The unnecessary cruelty of the law."

5 Both of those aspects I think are right.
6 Mandatory minimums, as I'll discuss in my testimony,
7 simply are not necessary to accomplish the sentencing
8 goals, and they are cruel, as others during the
9 hearings have testified to this Commission.

10 When we take a look at it, we've just been
11 swimming in a sea of mandatory minimums. They took
12 for no reason known, other than they were perceived
13 as being harsh on crimes -- not necessarily effective
14 on crimes, but harsh on crimes. And today we have
15 over 171 mandatory minimums on the books of federal
16 courts.

17 There are numerous studies that have been
18 submitted to this Commission -- and I know that there
19 will be others as well -- that demonstrate how the
20 mandatory sentences work and how they don't work. I
21 don't plan to replot that ground. I just want to
22 focus on some highlights.

23

1 First of all, the question of whether they
2 actually make us safer. Because when you go out to
3 the American public, that's what they want to know.
4 And there really is no evidence to support the claim
5 that at this point, as opposed to when some earlier
6 mandatory minimums individually might have been
7 selected, that at this point our overall system of
8 mandatory minimums makes us safer.

9 And the reason for that is, as this
10 Commission is aware, there are so many ways around
11 the mandatory minimums. So we are left with a system
12 where you might actually have people who are more
13 dangerous getting away to circumvent the mandatory
14 minimums, and those people who are less of a threat
15 are caught in the web of them.

16 They are also not fair. They can be
17 grossly excessive, particularly when you get to
18 certain types of crimes where they've been
19 overplayed. And that would be, in my opinion, the
20 narcotics offenses, the possession of pornography
21 offenses, the 924 offenses, and sometimes in the
22 immigration -- and I'm sure I'm forgetting another one

23

1 as well, but I'll get to it -- in those types of
2 offenses, we've had gross excess in use of the
3 mandatory minimums. I think it's because the courts
4 can't find a way out.

5 In addition to the things that the
6 mandatory minimums have not accomplished, I think it
7 is worth mentioning some of the things that they have
8 led to, as this Commission knows, which is an
9 overcrowding, a flood of inmates into our federal
10 prisons that don't need to be there. And that is a
11 very costly perspective that I think Congress and the
12 American public realizes as well.

13 When you're up to a \$6.1 billion budget
14 for the Federal Bureau of Prisons, it's time to take
15 a hard look as to whether people actually have to be
16 there.

17 We know of course that it has a grossly
18 disparate impact on defendants of color, as opposed
19 to white defendants; and most significantly, I think
20 we've been stymied by saying that the problem is so
21 huge, if we do anything we might make a mistake;
22 let's not do anything at all.

23

1 And that's what I want to overcome with
2 the suggestion in my testimony. On an absolute,
3 theoretical level I would urge this Commission to
4 urge Congress to eliminate mandatory minimums. I
5 think that they are philosophically inconsistent with
6 our current federal approach to sentencing.

7 I think under our statutory approach of
8 3553, we should be looking at all of the elements
9 regarding the individual of the offense and having
10 the judges make their decision with a review by
11 appellate court. And of course the prime tool that
12 they would use is the very good tool created by this
13 body, the Commission guidelines. That would be
14 optimal.

15 And not having the mandatory minimums
16 linked right into the sentencing guidelines, because
17 those are two different things. One is what Congress
18 thinks the punishment should be; the other is what a
19 studied commission, by this Commission, would
20 indicate would be appropriate.

21 That would be my hope. But I'm not sure
22 that we can accomplish that, given that back in 1991

23

1 we have similar presentations of recommendations
2 being made to Congress and everything stayed the
3 same, or went the other direction.

4 Today I have more hope. I think that
5 there are remedies that in reading over the testimony
6 of others may be more palatable to this body as well
7 as Congress.

8 One is to take a hard look at those
9 particular areas of mandatory minimums that have
10 caused a problem and see if there are any there that
11 we can agree should not have mandatory minimums. If
12 you do that, you will have an enormous impact overall
13 on some of the injustices that you hear testified to.

14 For example, if you were to deal with the
15 mandatory minimums for the narcotics offenses, for
16 the possession of porn offenses, for some of the
17 weapons offenses, my calculations are -- and it's
18 worth further study -- about 80 percent of the problem
19 cases that will be testified to today would never be
20 coming up because you wouldn't have those mandatory
21 minimums.

22 Now my other suggestion is this -- and I
23

1 agree that it's a bit more radical -- which is, if you
2 cannot get rid of them, at least minimize them and
3 make it such that we're dealing with a real problem.
4 Realistically, I think that the reason there's been
5 such a cry for mandatory minimums is that people are
6 afraid that an individual judge might go off the
7 charts in giving too lenient of a sentence; and that,
8 given the current appellate review standards that is
9 so deferential when it comes to reasonableness, that
10 in certain courts, certain circuits, there might be a
11 problem in saying that was unreasonable.

12 And instead, people are suggesting, well
13 let's expand the safety valves. I'm not completely
14 against that, but I would go another direction. I
15 would get rid of mandatory minimums. And if you had
16 that fear for particular crimes that judges might
17 depart too much, then create what I would suggest is
18 a reverse safety valve program.

19 Which is, that for those crimes -- and you'd
20 have to study carefully which ones you're that
21 concerned about -- that if there was a showing that the
22 elements of that crime, which now of course under the
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1 Supreme Court law would have to include and my
2 suggestion would be only crimes of violence, then you
3 would limit the discretion for the sentencing judge.
4 And, that there would be a closer review by the
5 appellate court as to what reasonableness is.

6 Those are two suggestions that I offer at
7 this time. Once again I reiterate, I probably join
8 in the camp of others that if we could get rid of
9 mandatory minimums we should. But until we can, I
10 would like to make myself available to this
11 Commission to explore other alternatives.

12 Thank you.

13 CHAIR SESSIONS: Thank you, Professor
14 Levenson. Professor Saltzburg.

15 MR. SALTZBURG: Thank you, Mr. Chairman,
16 members of the Commission.

17 You have my written testimony, and I am
18 going to put it aside. You have either read it, or
19 will chose not to, and that's your choice but I
20 wanted to say a few other things. There are a couple
21 of points I wanted to emphasize.

22 When I sit in the Thurgood Marshall
23

1 Building, I always feel good because I was a Thurgood
2 Marshall law clerk. But before that, was a law clerk
3 at the federal district court in San Francisco. I
4 clerked for a judge called Stanley Weigel. It was
5 1971. And at that time -- those of you who are almost
6 as old as I am will remember the Vietnam War was
7 going on -- one-third of all draft resisters ended up
8 refusing induction in San Francisco. They all got
9 prosecuted. And this is the way it worked.

10 There were six judges -- there are seven
11 active judges on the district court there. One judge
12 took senior status and was replaced -- President Nixon
13 replaced him with a new judge, Judge Conti. The
14 other six judges, who had been there previously,
15 would sentence routinely every case, they would
16 sentence a draft resister to two years probation.
17 Judge Conti thought that that wasn't respectful
18 enough of those who were actually accepting induction
19 and gave them three years in prison.

20 And so the way it worked in the Northern
21 District of California was, six-sevenths of all
22 defendants charged with refusing induction got

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1 probation; and one-seventh, it was like one day of
2 the week, ended up with three years in prison.

3 That was a system no one thought was fair.
4 Either it was unfair to those who were getting
5 probation, unfair to the community; or it was unfair
6 to those who happened to hit Judge Conti on the one-
7 seventh of the time.

8 Having seen that, when I went into
9 academia I became an advocate -- I still am -- of a
10 system that provides guidelines. You could call it
11 presumptive sentencing -- I did. I co-wrote the first
12 proposed sentencing legislation, presumptive
13 sentencing in Virginia, in the mid-1970s, well before
14 Congress ever turned its attention to this.

15 But I confess to you, I never dreamed that
16 I would become part of the system that was as
17 profoundly complicated as the federal sentencing
18 guidelines system. If I had had a voice in Congress
19 as to how the system should develop, I would have
20 given this Commission the kind of leeway the states
21 have to come up with ranges that were broader and
22 didn't result in 43 different guideline levels. But

23

1 that's where we are.

2 The thing I would like to emphasize today
3 is, for those of us who believe that there should be
4 an appropriate mix of sort of treating like offenders
5 alike, but recognizing individual differences in
6 cases -- and that's always a tradeoff; there's no
7 magic. You judges know. You're forced to do it all
8 the time. There's no magic that gives you a perfect
9 answer, but we need to have both elements of a
10 system.

11 Now one thing that was true when I was a
12 ex officio member here is that we recognize right off
13 the bat that the 1986 legislation Congress passed,
14 which put in the drug mandatory minimums, drove the
15 guidelines higher than they ever would have been from
16 the beginning.

17 One of the reasons sentences are so harsh
18 was the Commission, I think rightly at the time,
19 believed that it had to tailor all the sentences so
20 that what Congress said was severe enough to get a
21 mandatory minimum; other sentences had to be adjusted
22 accordingly, and they all got adjusted upward. And I

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1 think we've suffered from that ever since. That's
2 number one.

3 Number two, every single member of the
4 Commission, whether they were -- and they were really a
5 disparate group, let me tell you -- maybe you still
6 are, but back then everybody was different -- they all
7 tended to agree on one thing: That whatever you
8 thought of mandatory minimums as a way of being tough
9 on crime, as Professor Levenson said, that they
10 didn't fit in a guideline sentencing system because
11 they created what I mentioned in my paper was what we
12 used to call "cliffs." And the analogy was,
13 basically it was you drive your car, and if you stop
14 one inch short of the cliff you're fine and safe.
15 You go over the cliff, and you're done, you know,
16 you're toast.

17 And that's what mandatory minimums do.
18 You take a drug crime. Somebody has 49 grams of a
19 particular drug, they get one sentence. Somebody has
20 50, and they get a mandatory minimum. The mandatory
21 minimums in my judgment end up being more perverse
22 actually in a system that is not binding, when the

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1 guidelines don't actually bind the judges, for this
2 reason:

3 As bad as it was that all of the sentences
4 got ratcheted up because of the mandatory minimums,
5 at least we were treating like people kind of alike.
6 All of them too harshly, but there was -- if that was
7 what Congress wanted, that's what we were getting.

8 But now you have the cliff, which is still
9 there, and you have a judge free to give a lower
10 sentence under 3553(a) so that you can have one
11 defendant who will go to prison for the mandatory
12 number of years, and another defendant who can get
13 probation. And that didn't exist before.

14 I think that anyone looking at this would
15 say, whether you're from the Department of Justice or
16 on the defense side, you'd say this doesn't make
17 sense in a system that is supposed to be fair, that
18 is supposed to be trying to cut the tradeoffs to get
19 them right, to have like crimes and like individuals
20 treated alike to the right extent, and recognizing
21 individual differences to the right extent. I think
22 this is really a problem.

23

1 Now I was pleased to see that the
2 Department this morning for the first time in my
3 recollection has sort of conceded that maybe the
4 mandatory minimums have driven sentences in some
5 areas too high. I think Professor Levenson has given
6 you a pretty good summary of where most of the
7 problems are. And I think that's really quite
8 healthy in terms of telling you that the defense side
9 and the academics are not alone here in identifying
10 the problem.

11 At some point people will talk about
12 whether there should be stronger presumptions built
13 into guidelines than we currently have. My own view
14 about that is that anybody who, as I do, looks at the
15 sentencing system we have, we really have a kind of
16 presumptive sentencing system right now. A judge is
17 required to do the sentencing guideline calculation
18 in every case. Then the judge is required, as I
19 think he or she should be, to do the 3553(a) factors
20 and to consider them.

21 And the judges do give deference to the
22 expertise of this Commission. I believe, by the way,

23

1 if we ever got rid of the mandatory minimums, and if
2 you were free to go back and lower some of these
3 sentences, you would find even greater compliance
4 once the judges did the guideline calculation.

5 One of the reasons that judges don't give
6 guideline sentences is they're too high. And you ask
7 how do I know they're too high? Again, it's not like
8 God speaks to anyone and says I know these are too
9 high, but when judges feel that, based on their
10 experience and what they see in a particular case,
11 that's unfair to impose a certain sentence, and
12 judges do that routinely East and West, North and
13 South, we get some clue that some of these sentences
14 are just simply too high.

15 And so I would urge you to support, as
16 Professor Levenson said, to the extent it's possible,
17 getting rid of mandatory minimums, promising
18 Congress that one of the things that exists in the
19 system, that will continue to exist, and she's right
20 about this, is we have appellate review.

21 Back in 1971 when Judge Conti gave people
22 three years for draft resistance, that was it. There

1 was no appeal. It didn't matter whether he was doing
2 justice or not. He was the last word.

3 The last thing I would say is, I think we
4 don't want to read too much right now into our
5 appellate review standards and assume that the way
6 appellate courts approach their function right now is
7 going to remain constant.

8 You know, *Booker* is relatively new. It's
9 2005. We're just five years out, and we've had a
10 fair number of appellate cases. And I think if you
11 look carefully you see in some of the circuits that
12 some of the appellate courts are actually taking a
13 slightly more rigorous view, despite the abuse of
14 discretion standard that's there.

15 I think there may be what's already
16 existing, what Professor Levenson might build into
17 the system, a sense that, despite what the Supreme
18 Court has said, that when there is a real outlier
19 sentence, I think the appellate courts take a really
20 hard look at that.

21 And when there's an outlier sentence that
22 is too low, the Department takes it up. And I think

23

1 that the indications are they have a very good chance
2 of prevailing, when it's a really unreasonable
3 sentence.

4 And so what we have is a system that has a
5 lot of elements that could work, and work really
6 effectively. It may be too late in the game, but
7 I've said this before. If Congress would just
8 change the statute and permit you to get rid of some
9 of the levels, those 43 levels, I think you could
10 have a system that was clearer, that was easier for
11 judges to follow, that would permit them to give
12 guideline sentences most of the time, as well as
13 taking into account the individual characteristics
14 under 3553(a).

15 And I, like Professor Levenson, am for the
16 first time in a long time, I'm kind of encouraged
17 that the system which has become so technical and
18 made me feel as though we'll never be able to change
19 it, that that system may in fact be more malleable
20 than I thought. And I thank you for the opportunity
21 to be here today.

22 CHAIR SESSIONS: Thank you, Professor

23

1 Saltzburg. Professor Schulhofer.

2 MR. SCHULHOFER: Thank you, Mr. Chairman,
3 Commissioners.

4 Is this [microphone] on?

5 CHAIR SESSIONS: It is.

6 MR. SCHULHOFER: Thank you. Like my co-
7 panelists, I've been studying sentencing for many
8 years. One focus of my work has been on how
9 sentencing laws actually operate in practice.

10 Right after the Commission adopted its
11 initial set of guidelines, it authorized a very
12 extensive study of actual sentencing practices on the
13 ground. Commissioner Ilene Nagel and I led that
14 research, which continued for nearly six years, and
15 we studied confidential case files. We held candid
16 discussions with prosecutors, judges, probation
17 officers. Most of them had made very crucial
18 decisions in problematic cases that we wanted to
19 explore.

20 We reviewed sentencing practices in large
21 districts and small districts, all regions of the
22 country, and this continued over the course of three

23

1 presidential administrations.

2 Our principal conclusion goes right to the
3 heart of today's hearing. Because what we found is
4 that there's virtually no such thing as a mandatory
5 minimum sentence.

6 In practice, the so-called "mandatories"
7 are almost never compulsory. They are discretionary
8 punishments.

9 Now what I just said sounds like it must
10 be an over -- you must be thinking that surely I'm
11 overstating for purposes of catchy phrase in a
12 hearing, but I want to make clear why I'm not
13 exaggerating about this.

14 In the analysis that the Commission
15 conducted in 1991, the mandatories usually were not
16 evaded at the charging stage; 74 percent of
17 defendants were charged at the highest mandatory
18 indicated by their conduct. That's not perfect
19 compliance by any means, but the mandatories were
20 charged in most cases.

21 The place where the mandatories stopped
22 being mandatory is after indictment. In the

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1 Commission's 1991 data, more than half the defendants
2 who pled guilty were sentenced below the mandatory
3 level for which they appeared eligible.

4 In the study that I conducted with
5 Commissioner Nagel, we took a more conservative
6 approach. And even so, we estimated that statutory
7 requirements had been evaded in at least 30 to 50
8 percent of all guilty plea cases. And that was in a
9 regime, as now, where the Main Justice instructed
10 prosecutors to charge all readily provable conduct.

11 In many districts we found the problem was
12 far worse. If you look at the tools that we found
13 prosecutors were using to avoid the mandatories such
14 as the so-called "telephone count," we found, and we
15 still find today, that in some districts these means
16 of evasion account for more than two-thirds of all
17 guilty pleas in drug cases, more than two-thirds.

18 Nationally, the tools of evasion now show
19 up in more than 50 percent of the non-safety valve
20 drug convictions, more than 50 percent nationally,
21 and much higher in many districts.

22 Now these are very disconcerting numbers,

23

1 but even by themselves they don't fully support the
2 claim I made a few minutes ago, which was that the
3 mandatories are almost never mandatory. Mandatories
4 are imposed in almost half, or roughly half of the
5 appropriate cases.

6 The problem is that where a mandatory
7 sentence is imposed, that usually happens only
8 because the prosecutor made a choice, a discretionary
9 choice, to enforce it.

10 So when a drug defendant gets what we call
11 a "mandatory" ten-year term, that sentence results
12 from the fact that the front-line decision makers
13 chose to trigger that statute, when they could have
14 chosen some other sentencing option instead.

15 In other words, the mandatory minimum is a
16 discretionary choice in any guilty plea situations.
17 And guilty pleas account for over 95 percent of
18 convictions in cases that are subject to the
19 mandatory minimums.

20 So the so-called mandatory is really
21 mandatory only in the four to five percent of cases where
22 you have a conviction in a contested trial.

23

1 So we're talking here about discretion
2 when we talk about mandatorics. Some prosecutors and
3 judges feel obliged to apply them, and we heard that
4 in our research. They feel obliged to apply them
5 even when they think the resulting sentence is
6 unjust. But other times prosecutors tinker with the
7 charges to produce a sentence that they consider
8 fair. Either way, there is no uniformity and the
9 inconsistency undercuts any severity gains that we
10 might think we would be getting.

11 So in operation, the mandatorics actually
12 dis-serve Congress's own goals. They are applied
13 haphazardly, with very little oversight, and with no
14 transparency at all.

15 Since the time is limited, I want to just
16 touch briefly on three other points: excessive
17 uniformity; the cooperation paradox; and the
18 cooperation backlash.

19 Uniformity: Uniform punishments obviously
20 aren't appropriate when offenders aren't similarly
21 situated, but that's what mandatorics require. We
22 all understand that.

23

1 The problem is especially severe in drug
2 cases because the rules of co-conspirator liability
3 hold the low-level offenders accountable to the same
4 conduct as the ring leaders.

5 Congress assumed that larger drug
6 quantities would mark the more important players, but
7 the accountability rules under the *Pinkerton* case,
8 for example, mean that street-level sellers get tied
9 to the same quantities as their bosses.

10 Now critics of the mandatories often
11 attack Congress for what they consider its overly
12 punitive attitudes, but in this instance I think
13 Congress itself never contemplated these kinds of
14 results. Congress used drug quantity as a proxy for
15 culpability. And Congress clearly did not realize
16 that the co-conspirator liability rules would produce
17 sentences that are antithetical to its own judgments
18 about grading and proportionality.

19 Then, that problem is compounded by what I
20 call "the cooperation paradox." Co-conspirator
21 liability puts the big fish and the small fry at the
22 same punishment level, but typically it's only the
23

1 important players who can get big breaks from
2 substantial assistance.

3 So as a result, uniformity is replaced by
4 what I'd call "inverse proportionality." The
5 small fry wind up with the more severe sentences than
6 the supervisors and kingpins. Now I've given some
7 really shocking examples of that in my prepared
8 testimony, but all judges know that there are many,
9 many examples of this.

10 My third concern is the cooperation
11 backlash. That's something that's almost always
12 overlooked. One of the major supposed advantages of
13 mandatories is their ability to elicit cooperation,
14 but the research indicates that when criminal justice
15 policies are considered overly harsh many people
16 become reluctant to cooperate with law enforcement.

17 So any additional offender cooperation can
18 easily be offset by the increased difficulty of
19 getting cooperation from law-abiding citizens, which
20 is equally important, sometimes more important.

21 In the New York City data that I discussed
22 in my prepared testimony, willingness to work with
23

1 the police increased 20 percent, and willingness to
2 report suspicious activity doubled when the
3 respondents believed that law enforcement practices
4 weren't unfair.

5 Now obviously co-conspirator cooperation
6 is crucial. I don't minimize that for a minute. But
7 we can get it with the more flexible 5K departure
8 without having mandatories that chill cooperation by
9 law-abiding citizens, and chill it very substantially
10 as far as the data indicates.

11 Now on next steps, I just want to take a
12 minute to look forward. Personally I don't believe
13 that the Commission should question the overall
14 severity levels that are set by mandatories. That
15 may put me a little bit out on one end of the
16 spectrum, at least among academics, but I think that
17 punishment levels are a matter that Congress sees as
18 its own prerogative. It is not going to be persuaded
19 to leave that issue to the Commission's expertise.

20 But the issue of how mandatories actually
21 work, that is an issue on which Congress really needs
22 some help. And that's an issue that is within this

23

1 Commission's expertise.

2 So I think the most important point that
3 the Commission can clarify for Congress is that the
4 mandatories are almost entirely discretionary. They
5 actually undercut Congress's own goals, and they
6 aggravate devices of the pre-guideline sentencing
7 system because they provide almost no transparency or
8 accountability, even less than the system that
9 Professor Saltzburg just described, because we knew
10 what was going on in that district in California.

11 The remedy I would recommend is simply to
12 ask Congress whether it supports truth-in-sentencing
13 or not. Congress has pushed that principle on the
14 states very vigorously. It abolished federal parole
15 for the same reason. But most voters and most
16 [congressional] members probably don't understand that
17 mandatory minimums are a flagrant violation of the
18 truth-in-sentencing principle.

19 So the truth-in-labeling would mean
20 transforming mandatory minimums into laws that
21 instruct the Commission on how high certain base
22 offense levels should be. I know that's not popular

23

1 among commissioners and academics, but I think that
2 would be a solution that would be honest, and it
3 would respect Congress's appropriate role in setting
4 severity levels.

5 In the absence of that step, I think
6 there's one important option that is worth
7 considering. And again it's something that's not
8 often discussed, but it's something very specifically
9 within the Commission's expertise.

10 That is, that I think the Commission
11 should urge Congress to clarify that mandatory
12 minimums should never be triggered by conduct for
13 which the defendant is accountable only on a
14 foreseeability theory.

15 Sentencing courts should apply mandatorics
16 only on the basis of conduct in which the defendant
17 had a personal role, not conduct of co-conspirators
18 that's reasonably foreseeable.

19 Finally, the Commission can take one very
20 important step on its own, whether or not Congress
21 chooses to act. And I don't mean dropping base
22 offense levels in a way that would flout

23

1 congressional preferences. As I've said, I don't
2 support that, and it's not politically feasible in
3 any case.

4 But what the Commission can do, while
5 fully respecting Congress's preferences, is to fix
6 the definition of "relevant conduct" under [USSG]
7 §1B1.3. The co-conspirator foreseeability test that
8 causes so much havoc in mandatory minimum cases is
9 not something that Congress itself ever dictated.
10 You did that. You, the Commission, did that in
11 [USSG] §1B1.3. And you have the power to change that
12 without in any way flouting congressional intent.

13 In fact, that change would bring the
14 concept of drug quantity back into line with the idea
15 that Congress had in mind all along. So the fix
16 would be to limit "relevant conduct" to acts in which
17 the defendant had some personal role.

18 That fix would have its most direct effect
19 in cases not governed by mandatory minimums. That
20 alone would be a huge achievement. But if Congress
21 won't make changes, fixing the definition of
22 "relevant conduct" would also open the door for
23

1 courts to reinterpret the existing statutes. Because
2 without 1B1.3 in the way, courts can hold that
3 mandatorics apply only to acts in which the defendant
4 was involved personally. There's nothing in the
5 statute that prevents that. In fact, properly
6 interpreted that is what the statute should have been
7 understood to mean all along.

8 I have covered other possible remedies in
9 my prepared statement, so I don't want to take
10 further time with that. But I would be happy to
11 answer questions. Again, I thank you very, very much
12 for this chance to be here today.

13 CHAIR SESSIONS: Okay, thank you,
14 Professor. Let's open it up for questions. Ricardo.

15 COMMISSIONER HINOJOSA: As all of you
16 know, at some point in our history we've had a
17 mandatory minimum in some case or another that
18 Congress has passed through the years that goes way
19 back.

20 In 1970, Congress did away with mandatory
21 minimums with regards to drug cases. But by 1986,
22 they were right back. And so my question to you is:

23

1 What happened during that 16-year period that made
2 Congress go back to the mandatory minimums on drug
3 trafficking offenses when they had just made this
4 decision in 1970 to do away with a lot of the
5 mandatory minimums in drug trafficking, and then 16
6 years later came back and did it again?

7 What happened during that 16-year period
8 that caused Congress as a policy matter to change its
9 mind? And the President, obviously, to agree to it?

10 MS. LEVENSON: Well I think some of it was
11 the rhetoric of the "War On Drugs." Literally, that
12 we took a political agenda and put it into our
13 criminal justice system, and from there they took
14 off.

15 In terms of whether there was an actual
16 problem that had increased, I think we would have to
17 go back and study that. But I don't think that we
18 were in a similar situation today. Because when that
19 happened, you had a complete discretionary system, as
20 Professor Saltzburg had described.

21 We're not really at that anymore. With
22 the advent of the guidelines, with or without

23

1 mandatory minimums, we have much greater guidance
2 than we had at that time. So when they brought in
3 the mandatory minimums, you did not have the type of
4 very detailed guidance that there is today for
5 district judges.

6 COMMISSIONER HINOJOSA: The guidelines had
7 already been passed. They were going to go into
8 effect --

9 MS. LEVENSON: Right, they weren't in
10 effect yet.

11 COMMISSIONER HINOJOSA: But the Sentencing
12 Reform Act was already two years old when they came
13 back and came up with the mandatory minimums. So
14 they had just passed 3553(a), the enabling statute
15 for the Commission, and obviously thought the
16 guidelines would be mandatory with possibilities of
17 departures. And so what is it that caused Congress,
18 as a policy matter, to come [26] years after the
19 Sentencing Reform Act back to the mandatory minimums?

20 MS. LEVENSON: Well I'll defer to others,
21 but I will say the War on Drugs, and the second thing
22 is that the guidelines had not been given an

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1 opportunity to actually be used. And so I think that
2 there was a concern about will guidelines be enough.

3 COMMISSIONER HINOJOSA: So are we back to
4 that system where Congress would feel, now that
5 they're advisory, that we're back to the system pre-
6 1984?

7 MS. LEVENSON: No. I think we're in a
8 much better situation now precisely because of what
9 this Commission does; by collecting the information,
10 we have indications that we do not have that broad of
11 the use of discretion.

12 Frankly, when you look at the statistics,
13 you don't have that many judges who are going that
14 far afield from the guidelines. So I don't think
15 we're in the same situation today.

16 COMMISSIONER HINOJOSA: Does it make a
17 difference that it depends on what part of the
18 country we're talking about?

19 MS. LEVENSON: Well I think that that is
20 the concern, which is, you know, do we have parts of
21 the country. But even then, I don't know that we
22 have the type of disparity that you had before you

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1 had the guidelines in operation, as we have today.

2 MR. SALTZBURG: I think there are three
3 short answers, and they're overly simplistic but they
4 have some accuracy to them.

5 Number one, that crime rates soared in the
6 '70s and the early part of the '80s. And we'd be
7 kidding ourselves if we thought that no matter how
8 perfect the system is that Congress or any
9 legislative body is not going to respond to
10 increasing crime rates. That's number one.

11 Number two, the Justice Department, before
12 I got there, and then even while I was there, the
13 Justice Department took a very hard line with
14 respect to a number of criminal justice issues,
15 including, some of you will remember, there were
16 people in the Department pushing to overrule *Miranda*
17 and blaming Supreme Court decisions for this large
18 rise in crime.

19 COMMISSIONER HINOJOSA: Sounds like today.

20 (Laughter.)

21 MR. SALTZBURG: Well I think it was
22 probably worse then. And there was a lot of

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1 campaigning that focused on crime at the time. And I
2 think the last thing that was really true is there
3 were clearly disparities in sentencing not only in
4 different parts of the country, but in particular
5 courts, and they got headlines.

6 And one of the things I learned when I
7 chaired the Kennedy Commission is, one headline, one
8 sentence that strikes the public as being out of
9 proportion often gets a legislative reaction that is
10 a kneejerk reaction, but it's very powerful. And I
11 think you had some of that.

12 MR. SCHULHOFER: I largely second what my
13 co-panelists have said. I would particularly
14 underline the point that Professor Saltzburg just
15 made, which is that crime rates were absolutely
16 soaring in the 1970s.

17 We now know that it was mostly the result
18 of demographics. It was a result of baby boomers
19 after the parents of the World War II generation -- of
20 "the greatest generation," their children were a huge
21 cohort that was coming into the high crime years.

22 Then we had the crack epidemic on top of
23

1 that. Both of those things created tremendous public
2 preoccupation with crime. The media during the
3 period of the late '70s and early '80s, the media
4 made crime a federal issue in a way that it had never
5 been before. So both of those were playing a role.

6 And I think that crime and drugs both were
7 at the very center of the political agenda. So I
8 think all three of those things are no longer true
9 today. I'm not an expert on politics, and Congress
10 will do what it wants to do. We in many ways can't
11 predict it. But crime is trending the opposite way
12 from what it was then.

13 The crack epidemic has burned itself out
14 and is not preoccupation in the way it was. I don't
15 minimize the dangers of drugs, but it's not a
16 preoccupation.

17 And the other point that Judge Hinojosa
18 just made about *Miranda*, that's being raised in the
19 context of terrorism, which I think underscores the
20 point. The public is preoccupied with terrorism,
21 much more so than drug mandatories.

22 So I think all three of those factors

23

1 create an opportunity.

2 CHAIR SESSIONS: Vice Chair Jackson.

3 VICE CHAIR JACKSON: Yes.

4 Professor Schulhofer, you were speaking
5 about charge-tinkering, and adjustments that are made
6 that make it so that the mandatory minimums are not
7 necessarily mandatory. And I'm just wondering
8 whether your research has shown that there is more or
9 less tinkering in various geographical areas, or with
10 respect to certain crimes that would explain the
11 application of mandatory minimums in some areas and
12 not others?

13 MR. SCHULHOFER: Yes. First of all, the
14 tinkering that we found was certainly much more acute
15 with respect to certain crimes, particularly drugs
16 and 924(c) weapons possession cases. That's where
17 you would most particularly see it.

18 And --

19 VICE CHAIR JACKSON: And can I just
20 interrupt? Is that because the mandatory minimum
21 levels are so high in those cases? Or what would
22 account for that?

23

1 MR. SCHULHOFER: Well our study, which
2 started right on the day that the guidelines went
3 into effect, was focused as much on guideline
4 compliance as it was with mandatory minimum
5 compliance. And back in those days, the guidelines
6 were much more binding than they are today. And also
7 I think the Commission was somewhat inappropriately
8 focused on policing compliance with the guidelines to
9 an extent that I think we learned created some
10 backlash in the judiciary.

11 But our focus was on guidelines generally.
12 And what we saw was evasion of the guidelines -- I
13 don't mean departures. Departures are not an
14 indication of noncompliance. Departures are
15 contemplated.

16 But we found evasion of the guideline
17 system throughout. And where it was most acute was
18 in cases covered by mandatory minimums.

19 Now there was some variation regionally.
20 We found in one district in the Southwest people
21 thought the bank robbery guidelines were too lenient,
22 which would have amazed anybody from a district in
23

1 the Northeast, but there was some variation. But
2 generally we saw this everywhere.

3 And the variation was much less
4 significant than the fact that it was everywhere.

5 VICE CHAIR JACKSON: Thank you.

6 CHAIR SESSIONS: Okay, Beryl.

7 COMMISSIONER HOWELL: Did you want to go?

8 VICE CHAIR CASTILLO: Go ahead. No, go
9 ahead.

10 COMMISSIONER HOWELL: I sort of wanted to
11 follow up on one of Commissioner Jackson's questions
12 about this, because I think that, although we talked
13 earlier about inconsistent application, or bringing
14 of mandatory minimum charges by prosecutors, but one
15 way to look at it is inconsistent application.

16 Another way to look at this interesting
17 research that you did with former Commissioner Nagel
18 is as an indication of where prosecutors themselves
19 across the country view certain mandatory minimum
20 charges as too high, and therefore use what you
21 called the tools of evasion.

22 And so this research can sort of be viewed

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1 in two ways. Do you -- and one of the things that
2 we're dealing with in part of this report is figuring
3 out what research foci we should have.

4 And so I invite you to sort of give us,
5 you know, any suggestions you have for how we can be
6 looking at, you know, some of those similar areas
7 today, and under an advisory system.

8 MR. SCHULHOFER: Yes. Thank you.

9 The kind of -- the ideal approach would be
10 to replicate in some way the kind of research that
11 Commissioner Nagel and I did. That research required
12 tremendous support from the Commission itself, and
13 from the Department of Justice.

14 We couldn't have done it as academics. We
15 never went anywhere without having the Attorney
16 General tell the U.S. attorney to open all doors for
17 us.

18 And it was also very time-consuming. So
19 between now and the time that your report is due in
20 October, I don't think it would be feasible to do
21 that, unless you had a couple of commissioners who
22 were willing to do this full time.

23

1 We went to a district, you know, two days
2 a month. I suppose if somebody wanted to do that
3 hands-on for the next month, they could get it done
4 by the end of the summer. That would be a
5 possibility.

6 Other than that, one thing that I think is
7 very feasible to do is to look at the data that's
8 reported.

9 Together with my research assistant we
10 looked at the data on what I called the tools of
11 evasion. And as I said in my prepared testimony, I
12 don't want to imply that these are always nefarious
13 or inappropriate in some way. The 5K motion is
14 perfectly appropriate, but you have to wonder when
15 you see 5K motions in 40 to 50 percent of the drug
16 cases.

17 So what you can do is look at tools of
18 evasion broken down by districts. We were able to do
19 that from data that's on your web site, but we
20 weren't able to take out the safety valve cases,
21 because those aren't broken down by districts, or at
22 least we didn't find it.

23

1 If you were to break down the safety
2 valve -- this is one example, and I think maybe I
3 should end my response there because it could take
4 too long to develop the whole methodology -- but I
5 think if you were to take safety valve cases and take
6 them out, district by district, and see what's left,
7 we certainly -- we found that nationally if you take
8 out the safety valve cases you find the tools of
9 evasion being used in more than 40 percent -- I'm
10 sorry, more than 50 percent of all drug cases. And I
11 bet you could find districts where that's up to in
12 the 80 percent.

13 VICE CHAIR CASTILLO: I have sort of two
14 optional questions, and so don't feel like you have
15 to answer them, because they're going to cover just
16 recent events.

17 One of them is Attorney General Holder's
18 memo of May 19th. I don't know if any of the three
19 of you have seen that memo as it affects
20 prosecutorial charging for sentencing practices.
21 Have you seen that?

22 And do you think that's going to have any
23

1 effect on the disparities that occur with regard to
2 the charging of mandatory minimums?

3 MS. LEVENSON: I've only heard second hand
4 that it unties from the Ashcroft Memorandum and gives
5 more flexibility to the charging assistant to pick
6 the appropriate charges, which seems to me I applaud
7 an effort in that direction.

8 And the problem again is an issue of
9 timing. Will that take care of the problem? Well,
10 we're not likely to know by October whether it will.
11 Will it help? I think it will help, and that's why I
12 think it was a good idea. I don't know that it will
13 help enough.

14 VICE CHAIR CASTILLO: So your sense as a
15 former prosecutor is it may help?

16 MS. LEVENSON: Yes.

17 VICE CHAIR CASTILLO: Okay. The other
18 question is: This Monday the Supreme Court decided
19 *U.S. v. O'Brien* where I saw that Justice Stevens, as
20 one of his last acts -- who knows how many are left --
21 but sought to really overturn *Harris v. United*
22 *States*, which is the fundamental legal underpinning

23

1 of all of the mandatory minimums after *Booker*.

2 And there's been a lot of question as to
3 whether or not *Harris v. U.S.*, which after all is a
4 2002 case, is still viable after *Booker* was decided
5 in 2005.

6 Do any of you want to comment on that?

7 MR. SALTZBURG: I don't think anybody on
8 this panel could possibly predict. I mean, those of
9 us who thought it was a bad decision when it came
10 down thought the Supreme Court would overrule it.
11 That was before we had new membership. And that one
12 new Justice, no one knows what her view on this
13 subject is, and we've got another one who will be
14 soon on the Court.

15 So I mean they may have read her crystal
16 ball, but I think it's really hard to know.

17 VICE CHAIR CASTILLO: I don't have a
18 crystal ball. I do think that Justice Breyer, who
19 voted in *Harris* uphold that system, I think he's
20 likely to reconsider as a result of the remedial
21 holding in *Booker*. So that gives you one vote the
22 other way.

23

1 We don't know what the new Justice, or
2 Justice Sotomayor thinks on this subject, so we don't
3 know. But as five to four rulings go, it's a pretty
4 shaky ruling.

5 MR. SCHULHOFER: But as a matter of
6 policy, it seems to me that *Harris* was wrong from the
7 beginning, and that for something as important as
8 mandatory minimums, and with the numbers that we're
9 talking about, to think that those numbers are in
10 some way different from a maximum was never
11 realistic.

12 And so I think as a matter of policy those
13 facts, those drug weights for example, should be
14 proved beyond a reasonable doubt. That I think is
15 true.

16 But it won't fix something like the
17 relevant conduct problem, which I think this
18 Commission can fix tomorrow, or in your next
19 amendment cycle.

20 The other point with respect to the new
21 Attorney General guidelines, I did want to comment on
22 that briefly, because the Ashcroft guideline were

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1 basically like the Thornburgh Memo under which we did
2 most of our research. And the Thornburgh Memo
3 required prosecutors to charge every readily provable
4 count.

5 The Ashcroft Memo, as strict as it is, is
6 actually more flexible than the Thornburgh. So we
7 found even under a strict regime, as strict as Main
8 Justice could possibly make it, there was all kinds
9 of simply ignoring mandatory minimums.

10 There's no doubt that it became more
11 flexible with Ashcroft, and it would be still more
12 flexible under the new ones.

13 How do I feel about that is very
14 ambivalent, because I don't like the results of the
15 mandatory minimums and this is a way to mitigate
16 them. But it mitigates them in the worst possible
17 way, and you still have -- every judge still has
18 cases where the U.S. attorney doesn't use the
19 discretion.

20 Judge Gleeson just wrote an opinion a
21 couple of weeks ago in a case, *United States [v.]*
22 *Vasquez* where the U.S. attorney in the Eastern
23

1 District of New York, which is one of the more
2 tolerant districts as far as drug quantities are
3 concerned, dropped one guy down from the ten-year
4 minimum to five-year minimum but refused to go lower.
5 Judge Gleeson said: That's ridiculous.

6 He sent the AUSA back to her office. And
7 she returned and said: I'm sorry, my boss won't let
8 me go any lower. And Judge Gleeson writes in his
9 opinion that this time her supervisor was shadowing
10 her in the courtroom to make sure that she stayed in
11 line.

12 So it solved some of the problem, but it
13 creates a different problem. And that's why I think
14 it's appropriate to go to Congress and say there's
15 nothing mandatory about these things.

16 MS. LEVENSON: And I want to emphasize I
17 agree with what Professor Schulhofer just said. I
18 don't think this problem goes away by having the
19 Justice Department make these incremental allowances,
20 because (a) it's still shifting the discretion from
21 the sentencing judges to the prosecutors, and (b) you
22 will still have these situations and nothing in the

1 law that will be guiding the AUSAs other than what
2 their office policy might be.

3 CHAIR SESSIONS: Jonathan?

4 COMMISSIONER WROBLEWSKI: Thank you,
5 Mr. Chairman.

6 Professor Saltzburg, first of all I want
7 to say what a pleasure it is not only to see you but
8 to hear the name of Judge Weigel mentioned. I first
9 became interested in federal sentencing working for
10 Judge Peckham, just down the hall from Judge Weigel.

11 I want to ask you a question really about,
12 it's more about political science than I think it
13 really is about sentencing. I know you've worked for
14 a long time with the ABA and on the ABA sentencing
15 standards, and as you know those standards which have
16 been in place for a long time do call for presumptive
17 guidelines, for guidelines with the force of law and
18 with meaningful appellate review.

19 And I do take issue, frankly, with your
20 assessment of the current appellate review standards.
21 The Justice Department now, because of the standards
22 that have been laid down by not only the appellate

23

1 courts, which I think you were right at the beginning
2 were really struggling to figure out what this
3 reasonableness review was about, but then the Supreme
4 Court told them in no uncertain terms several years
5 after *Booker*, which is: It's deference.

6 And that's what the appellate courts are
7 applying, by and large, is deference. And so the
8 result of that is the Justice Department is appealing
9 a few dozen cases a year in a system of 75,000. So
10 I'm not sure we have meaningful guidelines with
11 meaningful appellate review.

12 But the ABA Sentencing Standards always
13 called for that. And it seemed to me that we were
14 moving in this direction of maybe finding a consensus
15 among the defense community, the academics, the
16 Justice Department, and Congress, a consensus that
17 has evaded us since the Sentencing Reform Act that we
18 might be able to find a way of no mandatory minimums,
19 but presumptive guidelines, maybe some changes in
20 severity levels, and there was a lot of discussion --
21 you testified in front of the Commission, a number of
22 others testified in front of the Commission -- about

23

1 such a system, a system that was less complex, more
2 simple, but had the force of law behind those
3 guidelines.

4 And that has now evaded us again. And I'm
5 curious. From your experience, number one, why do
6 you think that's evaded us? And how do we get some
7 consensus back?

8 Because it strikes me, if there's no other
9 lesson to be learned from the crack/powder
10 experience, it's that without consensus we're not
11 going to get meaningful reform in the way that we're
12 talking about.

13 MR. SALTZBURG: Actually, I appreciate the
14 opportunity to answer that question because it
15 actually hits me where I live, and what I thought for
16 a long time, which is this:

17 I like the ABA guidelines, for the most
18 part, the standards, I should say, and I think that
19 the system really makes very good sense.

20 I had hoped -- and I'm speaking here only
21 for myself; I have the ABA sitting behind me, and God
22 knows they don't want me to say this on their

23

1 behalf --

2 COMMISSIONER WROBLEWSKI: Yes, they're
3 shadowing you.

4 (Laughter.)

5 MR. SALTZBURG: I had hoped the Supreme
6 Court was going to say that the greater the departure
7 from the guideline sentence, the stricter the review.
8 That made sense to me in a system of guidelines.

9 And that still seems to me the right
10 approach. Now unlike the jury trial holdings of the
11 Supreme Court, and unlike the Sixth Amendment
12 holdings, I think this was previously -- I think
13 Professor Levenson previously mentioned this -- that
14 Congress is free to adjust the appellate review
15 standard when a judge decides to give a sentence
16 that's outside the guideline range.

17 I would think that in fact there could be
18 a wide -- and I'm not saying -- there's never universal
19 consensus, but a fairly broad consensus on several
20 things. I do think the sentences are too high. I
21 think they are where they are, as I said, because of
22 mandatory minimums being there.

23

1 And I'm not sure, by the way, I don't --
2 never believe that Congress follows this in a very
3 careful way and makes this delicate judgment, we
4 really want the sentences to be here; that's why we
5 picked this mandatory minimum.

6 I think these mandatory minimums are drawn
7 out of thin air. They tend to come in response to
8 particular highly publicized crimes or sentences from
9 time to time. And they tend not to be well thought
10 out. But a system in which there was a presumptive
11 character to the guideline determination, left the
12 trial judge free to say I'm going to take some of the
13 3553(a) factors into account and adjust the sentence,
14 and the greater the adjustment the stronger the
15 appellate review, makes sense to me.

16 I think, and the reason that the Supreme
17 Court didn't say that, is that very few of the
18 Supreme Court Justices at the time had any trial
19 experience as a judge. The only two Justices who had
20 trial experience, in my recollection, were Justice
21 Souter and Justice O'Connor. The rest of them had
22 been appellate judges.

23

1 And to tell you the truth, appellate
2 judges I think were not extremely anxious to get into
3 the business of having to review a lot of sentences.
4 And one of the things the Supreme Court decision was
5 I think it discouraged to some extent the Justice
6 Department from appealing, and it kept the workload
7 of the federal appellate courts down.

8 There's no doubt that to the extent
9 appeals become a larger part of the system, that's
10 more work for appellate courts and not something they
11 would probably welcome, but it's something that I
12 think is an important part of a rational sentencing
13 system.

14 MR. SCHULHOFER: If I could comment
15 briefly on that, and I know that we're nearing the
16 end of the time, but just briefly, I think the
17 consensus that you referred to is already here among
18 all those constituencies that you mentioned, except
19 for Congress. And even within Congress I think it's
20 here, except that many of them don't have much room
21 to maneuver to vote.

22 I think the reason that we've gotten to
23

1 where we are is worth mentioning, because back in the
2 1970s it was not just severity that was driving this
3 movement. I'm sure you all remember that it was
4 Senator Thurmond, together with Senator Kennedy, that
5 pushed this regime forward. And that was because, at
6 least equally important as the push for severity was
7 the concern about inequality.

8 It is hard to imagine that today, with so
9 much of what we've seen about the inequality of the
10 sentencing guidelines, but in the '70s the concern
11 was that underclass African American defendants were
12 getting much harsher sentences than white collar, or
13 White defendants. And that was a big part of the
14 push. That's why the Sentencing Reform Act passed
15 with only one dissenting vote in the Senate, and so
16 on.

17 That was the consensus. And I think we've
18 learned a couple of things. One is that there are
19 some things that are worse than inequality, and we
20 are seeing that. The other is that even with the
21 regime of guidelines and mandatories, we have huge
22 inequalities. To some extent they are worse than

23

1 they were before.

2 So certainly I don't think you would find
3 many people worried about harsh treatment of African
4 American defendants who would attribute that -- who
5 would think that the guidelines were a solution to
6 that problem. So that again, I think that creates
7 an environment.

8 The guidelines have accomplished a great
9 deal in this area that we forget. Drugs were not
10 such a big thing in the federal docket back in 1970,
11 or even in 1986. I believe it was under the first
12 President Bush that the number of U.S. attorneys was
13 doubled in order to bring more drug cases into the
14 federal system.

15 But at that time, the problem was there
16 were white collar crimes, there were bank robberies,
17 there was mail fraud, that was the federal docket.
18 And stockbrokers whose families were suffering got
19 probation, while the kid who held up a mom and pop
20 store, or robbed a federal bank got 25 years in
21 prison. That's what we were worried about. And the
22 guidelines have contributed enormously to solving

23

1 that problem.

2 I don't think we should lose sight of
3 that. But in a world where drugs now represent more
4 than 50 percent of the federal docket, that's not
5 just one offense. That's almost the whole show. So
6 I think that we can -- part of moving this problem
7 forward is to see that the guidelines themselves, and
8 rigidity, has created new problems, different
9 problems of inequality. They're in a more narrow
10 area, but they're in many ways more important.

11 The 43 levels that you have is the result
12 of the 25 percent rule. Nobody sat there, because as
13 I mentioned it's nice to be back in this building, I
14 remember when the Commission was in ramshackle
15 quarters over near the White House, and when we were
16 drafting the guidelines, nobody wanted 46 levels. We
17 were locked in by the 25 percent rule. And you can't
18 get sentencing ranges with only 15 points on the grid
19 unless you have more flexibility.

20 That might be an area, maybe you could go
21 back to Congress. That's separate from the mandatory
22 minimum issue, but it might be something that would

23

1 be easier for Congress to understand, especially in a
2 post-Booker world. That may be a 35 or a 40 percent
3 spread between the minimum and the maximum would be
4 something more sensible.

5 CHAIR SESSIONS: I just have a couple of
6 questions to ask. First, you used the word
7 "consensus." I'm unclear as to whether or not you
8 suggested that we are near consensus in terms of our
9 view on the severity of sentencing, or to a
10 presumptive guideline structure, which may be
11 different than the guideline structure that exists.
12 I think that's what Commissioner Wroblewski was
13 talking about.

14 I would be interested to know from the
15 panelists whether you would think that a presumptive
16 guideline system with wider ranges and more inherent
17 flexibility, et cetera, could meet constitutional
18 muster under the Sixth Amendment in particular, and
19 how exactly you would do that.

20 And the second thing I wanted to bring up
21 is in relation to whether or not we have the power
22 essentially to de-link the drug guidelines from the

23

1 mandatory minimums. I mean, obviously those were
2 linked at the very beginning in 1987. That's
3 contributed to the severity of sentencing.

4 The language I think in 994(a) as I recall
5 is consistent with all pertinent provisions of any
6 federal statute. Does that mean that we are
7 foreclosed from de-linking the guidelines from the
8 mandatory minimums because of the guidelines being
9 the result of Congress statutes?

10 Those are the two questions. First,
11 generally -- well, second, de-linkage; first, general
12 presumptive guideline system.

13 MR. SALTZBURG: And there's a third you
14 had in there, which is constitutionality under --

15 CHAIR SESSIONS: Well that was sort of
16 linked to the presumptive. But how about 1(a)?

17 (Laughter.)

18 MR. SALTZBURG: I think the states have
19 demonstrated, and the Supreme Court review of the
20 state decisions, you can have presumptive guideline
21 ranges that don't require jury trials on every fact,
22 as long as you're in the range.

23

1 What the Supreme Court has said is that
2 when you move from one range, guideline range, to
3 another then it goes up, then you have to have jury
4 fact-finding justifying that increase.

5 But I think the de-linkage poses two
6 separate questions. One is the statutory question:
7 Can you do it lawfully? I think you can.

8 The second question is: Do you want to do
9 it? And there, either way you get perverse results,
10 it seems to me. Right now, where you are linked, as
11 I said before, you have the wonderfulness of
12 equality, which as Professor Schulhofer pointed out
13 is not so wonderful sometimes, and that is where the
14 mandatory minimums drive up the other sentences and
15 everybody gets too much.

16 So you could change it. And then what
17 you'd end up with is a system where, in the 50
18 percent of the cases where the prosecutor in
19 discretion chooses the mandatory minimums, they get
20 slammed. That's the cliff. Boom. And the judge
21 though on the other 50 percent of the cases can now
22 impose a lower, more reasonable sentence and you've
23

1 now at least for 50 percent of the cases you have a
2 better sentence but you have more disparity.

3 So I mean personally I would rather have
4 the latter. I mean, anything that will start driving
5 down sentences to reasonable ranges in drug cases I'd
6 be for.

7 CHAIR SESSIONS: Any other response from
8 any other panelist?

9 MS. LEVENSON: I would only add to the
10 response that, rather than look at the cure as being
11 a wholesale change in everything that you need to do
12 with all the guidelines, I do think it is possible to
13 just look at those offenses that deal with the
14 mandatory minimums and ask about having presumptive
15 ranges for them, once again consistent with the
16 Supreme Court's decisions on fact finding.

17 In other words, I don't think you have to
18 change everything with regard to how the guidelines
19 operate in order to make some of these changes.

20 To answer the question about whether you
21 can deal with the "consistent with" language in the
22 statute, I do think you can. It's an open question,

23

1 obviously; the courts will have to answer it. But
2 part of it is looking at what the role of the
3 guidelines are as opposed to the role of the
4 mandatory minimums.

5 I don't hear anything from this Commission
6 as saying we are usurping Congress's role. What
7 we're asking Congress to do is take a look at a
8 different approach. Should Congress give that to
9 you, I don't see that there'd be any problem at all.

10 MR. SCHULHOFER: I may differ, Judge, from
11 my fellow panelists on this. I think that even
12 before the Commission existed on any question of
13 statutory interpretation, or any question of applying
14 the law, courts are in a partnership with the
15 Executive Branch and with Congress. And I think
16 courts should see themselves as working as partners
17 with Congress.

18 The Commission, having a commission re-
19 emphasizes that point, that I think the Commission is
20 working in a partnership with the judiciary and with
21 Congress. So when Congress says that we think the
22 minimum sentence for possessing 500 grams of powder

23

1 cocaine should be five years in prison, I don't think
2 it's right -- I can't predict whether the Supreme Court
3 would slap you down, but I think it's quite
4 inappropriate for the Commission to say that you
5 think the sentence should be two years instead of
6 five years.

7 You can say it could be five years, with a
8 reduction of four levels for minimal role, that's a
9 different matter, but I think you should start at the
10 right level.

11 I was schooled in this in a world where
12 the chair of the Commission, Chairman Wilkins, Chief
13 Judge Wilkins now, had been the chief legislative
14 aide for Senator Thurmond, and the principal other
15 member of the Commission, now Justice Breyer, had
16 been the chief legislative aide for Senator Kennedy.
17 And both of them understood very well that their job
18 was to be good agents for Congress, and to work with
19 Congress, and to implement a partnership with
20 Congress.

21 So I really don't -- much as I -- I don't
22 think that I dislike the high sentences any less

23

1 strongly than my fellow panelists, but I really don't
2 think it's right here across the street from Capitol
3 Hill for you to, what might seem to be thumbing your
4 nose at Congress.

5 And I think you accomplish a lot more by
6 saying, yes, we hear you. This is what you've said.
7 We understand that. But that is not inconsistent
8 with having downward adjustments, and so on.

9 CHAIR SESSIONS: Any others?

10 COMMISSIONER HINOJOSA: Just a real quick
11 question to Professor Schulhofer. This may make no
12 difference to you, but the docket is slightly
13 different now, Professor. The drug cases are down to
14 about 29-point-some percent of the federal docket.
15 The felony and Class A misdemeanors and immigration
16 is up to 32 percent. And we've also changed the
17 makeup of the defendants; 42 percent of the
18 defendants are now non-citizens, which therefore
19 raises all sorts of other equality questions about
20 availability of other possibilities within sentencing
21 procedures.

22 MR. SCHULHOFER: I would say, number one,
23

1 I'm not an expert in those cases. Number two, the
2 fast-tracking system that operates strongly in
3 immigration cases I think has a bearing on this, but
4 you're right. Drug cases are not -- in a way that
5 reinforces my point, which is that part of the goal
6 that we've appropriately been preoccupied with drug
7 cases because there are many of them, 10 -- 20,000, I
8 think, 25,000 at last count, there are many of them,
9 and the sentences are huge, and the injustices -- not
10 only are they long sentences, but you don't find
11 people -- I don't hear people ringing their hands about
12 the bank robber, his fourth bank robbery, and he
13 shot, although he didn't kill, but he shot five
14 tellers and he gets life, people aren't ringing their
15 hands about that.

16 What they're ringing their hands about is
17 the street-level schlemiel who gets tagged with 700
18 kilos of cocaine because his bosses were dealing
19 that, and he gets life, or he gets 20 years.

20 So drug cases preoccupy us because there
21 are a lot of them, because the sentences are high,
22 and because the sentences are clearly unjust.

23

1 They're unjust, as I said in my prepared statement, I
2 don't challenge Congress's value judgments. These
3 sentences are unjust from Congress's own perspective.
4 Congress never thought that the guy on the street
5 should be charged with 600 kilos.

6 So that's why those cases preoccupy us,
7 and I think that's still a source of concern even as
8 other cases start to occupy a bigger part of the
9 docket.

10 CHAIR SESSIONS: So the word "schlemiel,"
11 how do you spell that?

12 (Laughter.)

13 MR. SCHULHOFER: I don't even know. "Sch-
14 le-meil" I think in Vermont, I think it's pronounced
15 SCH-LE-MEIL.

16 CHAIR SESSIONS: We don't have sha-meil.

17 (Laughter.)

18 CHAIR SESSIONS: Well thank you for a very
19 informative discussion. Thank you, very much. Let's
20 take a 15-minute break.

21 (Whereupon, a recess was taken.)

22 CHAIR SESSIONS: Good afternoon, and thank

23

1 you very much for coming to testify today. This is
2 the view from the Public Policy Analysts.

3 Let me begin by introducing you all. Cory
4 Andrews is a senior litigator at the Washington Legal
5 Foundation in Washington, D.C. Before joining the
6 Washington Legal Foundation, Mr. Andrews was an
7 appellate attorney at the Law Firm of White & Case in
8 Miami, Florida?

9 MR. ANDREWS: Yes.

10 CHAIR SESSIONS: White & Case is in Miami?

11 MR. ANDREWS: They're everywhere.

12 (Laughter.)

13 CHAIR SESSIONS: They are? He received
14 his J.D. Magna Cum Laude from the University of
15 Florida where he was Editor-in-Chief of the Law
16 Review; served as Law Clerk for the Honorable Steven
17 D. Merryday who has testified before us on a number
18 of occasions, of the U.S. District Court for the
19 Middle District of Florida. Welcome, Mr. Andrews.

20 Next, Dr. David Muhlhausen is a Senior
21 Policy Analyst at the Heritage Foundation's Center
22 for Data Analysis. Prior to joining the Heritage
23

1 Foundation he served on the staff of the Senate
2 Judiciary Committee where he focused on crime and
3 juvenile justice policy. Dr. Muhlhausen -- "Ma-
4 hawsen," "Moll-hausen"?

5 DR. MUHLHAUSEN: Mool-howsen.

6 CHAIR SESSIONS: Muhlhausen?

7 DR. MUHLHAUSEN: Yes.

8 CHAIR SESSIONS: -- previously served as a
9 manager at a juvenile correctional facility in
10 Baltimore. Dr. Muhlhausen earned a doctorate in
11 public policy from the University of Maryland,
12 Baltimore County, and a bachelor's degree in
13 political science from Frostburg State University.
14 Welcome.

15 DR. MUHLHAUSEN: Thank you.

16 CHAIR SESSIONS: And next, Erik Luna is an
17 adjunct scholar at the Cato Institute; is on the
18 faculty of Washington & Lee University School of Law.
19 He has taught in various capacities at the University
20 of Utah, S.J. Quinney College of Law; at Washington &
21 Lee University; at the Cuban Society of Criminology
22 in Havana in 2002; at the Max Planck Institute for

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1 Foreign and International Criminal Law in Germany;
2 and at the University of Chicago. He previously
3 served as deputy district attorney in the San Diego
4 district attorney's office. He received a B.S. from
5 the University of Southern California in 1993, and a
6 J.D. from Stanford in 1996. And, welcome.

7 MR. LUNA: Thank you, Judge.

8 CHAIR SESSIONS: So let's begin with
9 Mr. Andrews.

10 MR. ANDREWS: Thank you, Your Honor, and
11 good afternoon, and thank you again for the
12 invitation to be here and speak before you. The
13 Washington Legal Foundation always appreciates the
14 opportunity to give you positive feedback and -- the
15 way we view matters at least from our particular
16 perspective.

17 CHAIR SESSIONS: Well you are free to give
18 us negative feedback, as well, if you wish.

19 (Laughter.)

20 MR. ANDREWS: I'm sure you've heard a
21 little bit of that today.

22 I would like to just begin my remarks by
23

1 sort of contextualizing the issue of minimum
2 mandatories as a symptom of what we view as a larger
3 problem. That is, sort of the over-federalization of
4 criminal law in the United States.

5 Just by way of a story, in the beginning
6 of the republic, in the early days right after the
7 ratification of the Constitution, there were three
8 federal crimes. There was a crime against treason, a
9 crime against piracy, and a crime against
10 counterfeiting. Now today, at least estimate --
11 although even the Congressional Research Service
12 tells us they're not entirely sure how many federal
13 crimes there are -- there are around 4500 crimes, or
14 statutes carrying criminal sanction on the book.

15 The really remarkable thing about those
16 4500 crimes is that 50 percent of them have been
17 enacted just in the past 35 years. So something very
18 dramatic is happening in Congress.

19 And by federalizing conduct that otherwise
20 is being addressed, or could be addressed by state
21 governments, federal criminal laws, including those
22 that carry minimum mandatories are just a symptom of

23

1 this increasing and disturbing trend of over-
2 federalization.

3 Traditionally under our system criminal
4 conduct was punished by the states, and only in the
5 rarest cases was it prosecuted by the federal
6 government. And so this unhealthy emphasis on
7 federal criminal laws basically in part undermines
8 the careful balance that our system struck with
9 federalism.

10 State governments are often more flexible,
11 more creative, more responsive than the federal
12 government. States can tailor criminal laws to local
13 needs and community norms without consequence to the
14 rest of the nation. And such a decentralized
15 approach allows for greater innovation and
16 experimentation among the 50 states to find good
17 social policy, you know, as opposed to a centralized
18 one-size-fits all federal solution.

19 Perhaps the most famous case for
20 encouraging states to function as laboratories of
21 democracy and experimentation was made by Justice
22 Brandeis himself in his famous dissent in *New State*

23

1 *Ice Company v. Liebmann* in which he observed that
2 the "[d]enial of the right to experiment may be fraught
3 with serious consequence to the nation. It is one of
4 the happy incidents of the federal system that a
5 single courageous state may, [without risk to the rest
6 of the country] if its citizens choose, serve as a
7 laboratory; and try novel social and economic
8 experiments."

9 Brandeis went on to explain that, because
10 they are closer to their constituencies, states are
11 often able to react to social problems much more
12 swiftly and responsively than the federal government.
13 And nowhere is state experimentation more vital today
14 than in the area of criminal justice, where the
15 latest axiom seems to be: If it's a good idea to
16 criminalize something at the state level, it must be
17 even 50 times better to criminalize something at the
18 national level.

19 WLF also supports enhancing the statutory
20 tools that are available to district judges by which
21 they may sentence defendants below statutory
22 mandatory minimums in nonviolent offenses.

23

1 As the Commission is well aware, currently
2 the only way that a district judge can do so is under
3 the "substantial assistance" provision of 3553(e), or
4 under the "safety valve" mechanism of 3553(f). And
5 we believe expanding those mechanisms to other
6 nonviolent offenses would allow Congress to do what
7 it seems intent on doing, and what I will tell you in
8 a moment I think is probably the best thing, to
9 maintain a system that includes mandatory minimums
10 but providing district judges with meaningful
11 opportunities to avoid harsh and unintended
12 sentencing results.

13 One idea that we support is to expand the
14 idea of the safety valve to all nonviolent first-time
15 offenders with a Criminal History Category I.
16 Another idea worth considering and studying is to
17 grant district judges the authority to impose a
18 sentence below a mandatory minimum for a nonviolent
19 offense if the court finds that it's necessary to do
20 so to avoid violating the requirements of 3553(a).

21 This allows a judge to consider the
22 seriousness of the offense of the defendant, the

23

1 defendant's criminal history, and all the factual
2 context surrounding the crime.

3 At the same time, it obligates the judge
4 to articulate why the minimum mandatory sentence in
5 this case would violate 3553(a). Such a sentence, of
6 course, as was discussed previously, is subject to
7 appeal by the government if it's unreasonable or if
8 it's insufficient.

9 And, while WLF feels that most mandatory
10 minimums should be re-evaluated and even eliminated
11 in instances, we believe it would be a mistake to
12 return to the kind of arbitrary disparity that Judge
13 Frankel decried in his classic book, *Criminal*
14 *Sentences: Law Without Order*, which is the milieu
15 in which many of today's problems both sprang from
16 and were a response to.

17 And so we share common cause with those
18 who seek to reform the current mandatory minimum
19 regime. We don't favor the sweeping elimination of
20 mandatory minimum penalties in all cases. We believe
21 that repeat offenders and hardened criminals who fail
22 to learn from sentences and who are true recidivists

23

1 should receive harsher sentences. And, most
2 importantly, we believe that some crimes are so
3 serious and pose such a pervasive threat to the
4 nascent citizenry that a tough mandatory minimum
5 sentence is entirely appropriate.

6 For example, for the crime of treason. We
7 have no problem with a minimum mandatory of the crime
8 of treason, although five years somehow seems a
9 little bit low when you look at some of the other
10 minimum mandatories that are on the books.

11 Likewise, terrorism is sort of a concern
12 it seems increasingly everywhere you turn, and there
13 are several minimum mandatories such as airplane
14 hijacking, the use of atomic weapons, the use of
15 biological and chemical weapons that result in the
16 death of another, these are the kind of crimes that
17 are so heinous, so unambiguous in nature that no
18 examination of any fact other than the commission of
19 the crime itself should be necessary to establish
20 that the mandatory penalty is appropriate.

21 There's strong bipartisan and postpartisan
22 concern, and I think a growing consensus, to reform

23

1 the current minimum mandatory regime, and I look
2 forward to your questions, and thank you for the
3 opportunity to testify.

4 CHAIR SESSIONS: Okay. Thank you,
5 Mr. Andrews. Dr. Muhlhausen?

6 DR. MUHLHAUSEN: Thank you.

7 My name is David Muhlhausen. I am a
8 senior policy analyst in the Center for Data Analysis
9 at the Heritage Foundation. I thank Chairman William
10 Sessions and the rest of the Sentencing Commission
11 for the opportunity to testify today.

12 The views I express in this testimony are
13 my own and should not be construed as representing
14 any official position of the Heritage Foundation. My
15 spoken testimony will focus on four points:

16 My first point is that Congress and the
17 Commission need to place special emphasis on the
18 doctrine of just deserts when considering the use of
19 mandatory minimum sentencing statutes.

20 In general, there are four justifications
21 for criminal sanctions: deterrence, incapacitation,
22 rehabilitation, and just deserts. With my spoken
23

1 testimony I will focus on just deserts.

2 Under the doctrine of just deserts, the
3 commission of a crime is itself sufficient
4 justification for punishment. Punishment should be
5 commensurate with the moral gravity of the offenses.
6 Regardless of utilitarian benefits or hypothetical
7 root causes, the moral gravity of the offense
8 validates punishment.

9 The amount of punishment to be
10 administered should be guided by proportionality,
11 with minor crimes receiving more lenient punishments,
12 and more serious crimes receiving harsher
13 punishments. Thus, the level of punishment is
14 determined by the seriousness of the crime.

15 Even if punishment fails a utilitarian
16 cost/benefit analysis, punishment is still morally
17 justified. Punishment appropriately applied is
18 inherently just and deserved.

19 While some criticize this approach as
20 playing into public outrage expressed for certain
21 crimes, public anger epitomizes a moral judgment that
22 is most properly depicted as moral indignation.

23

1 Moral indignation is an appropriate response to
2 inherently wrongful conduct carried out intentionally
3 with knowledge that the act is unlawful or wrongful.

4 While the utilitarian goal of lower crime
5 through deterrence and incapacitation is worthwhile,
6 lawmakers need to place a special emphasis on the
7 moral gravity of offenses in determining the
8 proportionality of punishment.

9 As political scientist James Q. Wilson
10 has explained, "The most serious offenses are crimes
11 not simply because society finds them inconvenient,
12 but because it regards them with moral horror. To
13 steal, to rape, to rob, to assault -- these acts are
14 destructive of the very possibility of society and
15 affronts to the humanity of their victims. Parents
16 do not instruct their children to be law abiding
17 merely by pointing to the risks of being caught."

18 Professor Wilson's statement brings me to
19 my second point: Some crimes are so heinous and
20 inherently wrongful that legislatures have a moral
21 responsibility to establish sentencing for [them]
22 that do not involve probation.

23

1 Mandatory minimum sentences should be
2 justified based on the nature of the crime. Such
3 factors as inherent wrongfulness, depravity of the
4 crime, harmfulness to the victim, and dangers to
5 society should serve as a guide in setting mandatory
6 minimum sentence lengths.

7 According to the Constitution Project's
8 Sentencing Initiative, there is no constitutional
9 role that requires that the bottom of every
10 sentencing range be set at probation.

11 Without a doubt, some offenses -- such as
12 forcible rape, or a premeditated murder -- should
13 always include a minimum period of imprisonment. For
14 example, Congress has mandated death or imprisonment
15 for life for those convicted of first degree murder
16 of the President of the United States or a member of
17 Congress.

18 These harsh sentences are justified
19 because they correspond to the gravity of the
20 offenses, including their dangerousness to American
21 society. Less serious offenses assigned harsh
22 mandatory minimum sentences are harder to justify

23

1 based on just deserts.

2 Mandatory minimum sentences are largely
3 incompatible with crimes where the relative severity
4 of the particular acts, and the relative culpability
5 of the individual offenders are difficult to assess.

6 My third point is that many mandatory
7 minimum sentence statutes are generally incompatible
8 with the operation of the sentencing guidelines.

9 While Congress has legitimate power to establish
10 mandatory minimum sentences, many of these sentences
11 are inconsistent or in conflict with the sentencing
12 guidelines.

13 In the opinion of Paul Cassell, a former
14 judge and current professor of law at the University
15 of Utah, the sentencing guidelines already stipulate
16 tough sentences, so mandatory minimum sentences are
17 largely redundant.

18 Further, the Constitution Project regards
19 mandatory minimum sentences as generally incompatible
20 with the operation of a structured guideline system.

21 My fourth point is that the Sentencing
22 Commission needs to conduct a study comparing the

23

1 public's views on punishment compared to current
2 federal sentencing outcomes.

3 The Sentencing Commission funded a similar
4 study during the 1990s. While the original study
5 found that the public substantially agreed with
6 sentences provided under the sentencing guidelines,
7 sentencing practices have changed over the years.

8 First, a new study should compare the
9 public's views on the appropriate levels of
10 punishment to those set forth under mandatory minimum
11 sentencing statutes.

12 Do various mandatory minimum sentencing
13 statutes correspond with public sentiment?

14 Are mandatory minimum sentences too
15 lenient, too harsh, or just right?

16 The answer to this question would be
17 informative to Congress and the Sentencing
18 Commission.

19 Second, the study should shed light on how
20 well the public's views match with the sentencing
21 practice of federal judges after the United States
22 Supreme Court's 2005 decision in *United States v.*

23

1 *Booker*.

2 This decision has allowed federal judges
3 to consider the sentencing guidelines in an advisory
4 role. So judges now have more discretion than they
5 have since the guidelines were established.

6 In order to evaluate the degree to which
7 the federal judiciary holds criminals accountable in
8 the post-*Booker* area, Congress and the Sentencing
9 Commission need to be aware of how the trend in
10 sentencing compares to the public sentiment on
11 appropriate levels of punishment.

12 I thank you for the opportunity to
13 testify.

14 CHAIR SESSIONS: Thank you, Doctor.

15 All right, Mr. Luna?

16 MR. LUNA: Thank you. Thank you, Judge
17 Sessions, and fellow members of the United States
18 Sentencing Commission.

19 I appreciate the opportunity to speak to
20 you today on this important topic. My name is Erik
21 Luna and I am a law professor at Washington & Lee
22 University School of Law, and an adjunct scholar with

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1 the Cato Institute.

2 In my brief comments today I won't go into
3 detail on all of the points raised in my written
4 testimony. I should just briefly note, though,
5 through no fault of the hardworking and extremely
6 conscientious Sentencing Commission staff, an earlier
7 version of my written testimony was written and
8 passed out today. I believe the final version is
9 online now and would refer the audience to that
10 version, or I would be happy to provide that version
11 to any interested party.

12 And of course I'd be happy to answer any
13 questions that the commissioners have about the
14 written testimony. But what I'd like to do is to get
15 to what seems to me to be the heart of the matter:
16 What accounts for the rise and persistence of
17 mandatory minimums? And what can be done about them?

18 Undoubtedly there are some in Congress who
19 genuinely believe that mandatory minimums serve the
20 goals of punishment; that they prevent sentencing
21 disparities among defendants; and provide law
22 enforcement the leverage needed to deal with major

23

1 offenses.

2 As you've heard today, there are good
3 reasons to question each argument that is made in
4 favor of mandatory minimums. Some suggest that the
5 use of mandatory minimums has done nothing to prevent
6 unwarranted disparities in punishment, as was just
7 discussed by Professor Schulhofer.

8 The claim of crime reduction has been
9 contested, as well, with most researchers finding no
10 meaningful deterrent effect from mandatory sentencing
11 laws.

12 The statistics also may belie categorical
13 assertions of government necessity. Most recipients
14 of federal drug mandatory minimums, for instance, are
15 drug couriers, mules, and street-level dealers, not
16 the folks who can provide a great deal of
17 information, and they are certainly not the prototype
18 defendants for whom mandatory minimums were enacted:
19 drug kingpins, leaders in international drug cartels,
20 and so on.

21 What's more, the rate of substantial
22 assistance in nonmandatory minimum cases is

23

1 comparable to the average in those types of federal
2 cases where mandatory minimums would be available.

3 This challenges one of the hidden
4 subtexts: namely, that federal judges can't be
5 trusted; that the bench is filled with bleeding-heart
6 set-'em-loose Bruces. For numerous reasons, this
7 argument is false.

8 The federal judiciary is the most credible
9 and competent government body in the nation, and
10 claims to the contrary offer refrains on the anti-
11 judge political rhetoric of the not-so-distant past.
12 But even if mandatory minimums were necessary to
13 induce pleas and cooperation, that would simply beg
14 the question:

15 Is this a good thing? Is it appropriate
16 to threaten grossly disproportionate and
17 penologically ineffective sentences, imposing what's
18 been called a trial tax on those who dare challenge
19 the government and exercise their constitutional
20 rights, all in order to extract information and
21 guilty pleas? Do these ends justify the means?

22 We might be able to reduce jaywalking, for
23

1 instance, by attaching a five-year mandatory minimum
2 to it, but that doesn't make that punishment just.

3 More generally, should it concern us that
4 the entire federal criminal justice system, indeed
5 criminal justice across America, has become a massive
6 exercise in plea bargaining?

7 It certainly concerns me that once again
8 we heard law enforcement use the words today,
9 "weapon" and "arsenal" in reference to mandatory
10 minimums, as though they were being used against
11 foreign soldiers in a real shooting war, not fellow
12 citizens of the United States.

13 It also concerns me that law enforcement
14 considers vast sentencing differentials between state
15 and federal systems as some type of unmitigated good,
16 essentially treating the states as the junior
17 varsity.

18 It also concerns me, although it was
19 refreshingly honest, that one witness positively
20 referenced the greater chance of being denied bail
21 under the federal system and the likelihood of being
22 sent out of state to serve a federal sentence as

23

1 providing extra leverage over defendants.

2 Again, this assumes that it's a good thing
3 that this type of banishment becomes part of forum-
4 shopping and serves as the basis of plea
5 negotiations.

6 Now again to be clear, there are
7 conscientious lawmakers and law enforcers who,
8 although agreeing that mandatory minimums can produce
9 miscarriages of justice in individual cases, will
10 still balk at explicit legislative repeal or any
11 large-scale reforms. But even those representatives
12 who would like to eliminate some or all mandatory
13 minimum sentencing laws -- and there are some -- face a
14 seemingly intractable problem in American democracy:
15 the dysfunctional relationship of politics, mass
16 media, and criminal justice.

17 To reiterate what the last panel touched
18 upon, sensationalistic news coverage tends to
19 increase the public salience of crime, generating
20 fear and attendant calls for action. Even in areas
21 where concern may be unfounded, populace pressures
22 create incentives to enact new crimes and harsher

23

1 punishments which give politicians the tough-on-crime
2 credentials that can fill campaign coffers and garner
3 votes at election time.

4 This general political dynamic has stymied
5 efforts to reform mandatory minimums in Congress in
6 the past, with any reform effort carrying the danger
7 of being labeled "soft on crime."

8 My preference would be for federal
9 lawmakers to eliminate mandatory minimums in one fell
10 swoop. To sum up my views I'll borrow a line from
11 former federal Judge John Martin:

12 Mandatory minimums are over-inclusive,
13 they're unfair, and they can even be draconian. They
14 transfer sentencing power from neutral judges to
15 partisans in the criminal process. They make for
16 poor criminal justice policy and raise all sorts of
17 constitutional problems. Other than that, they're a
18 great idea.

19 (Laughter.)

20 MR. LUNA: But given the real politic of
21 federal lawmaking, I fully recognize that every
22 journey must start with a first step.

23

1 In a forthcoming article co-authored with
2 former U.S. District Judge Paul Cassell, we propose
3 some reforms that are more minimalist in nature. In
4 a nutshell, the proposal has two parts:

5 First, an explicit legislative
6 authorization for the U.S. Sentencing Commission to
7 set guideline ranges where it deems them to be
8 appropriate, without automatically being required to
9 peg guidelines to existing mandatory minimums.

10 And second, a broader and more detailed
11 safety valve provision that would permit federal
12 judges to depart downward whenever the guidelines
13 provide for the possibility of a lower sentence than
14 the mandatory minimum.

15 This new safety valve provision would draw
16 upon the existing safety valve for low-level drug
17 offenders, but it expands the application to all
18 defendants, except those whose crimes result in death
19 or serious bodily injury; provides a series of
20 criteria to guide a court in its evaluations of the
21 issue, again drawing upon the existing safety valve
22 as well as the Supreme Court's own Eighth Amendment

23

1 jurisprudence that to my mind is too infrequently
2 used by the Court in analyzing terms of imprisonment;
3 but here all of these would be criteria. They would
4 be factors to be considered, rather than dispositive
5 rules.

6 It would limit the reduction under the
7 safety valve to the otherwise applicable guidelines
8 range. And, as we try to argue, all of these points
9 were intended to inspire a consensus based on
10 mutually agreed upon principles.

11 We also offer several changes that would
12 build upon these initial reforms, assuming that they
13 were successful, such as empowering judges to receive
14 input from juries in determining whether a given
15 mandatory minimum is unjustifiable, given the facts
16 of the case; eliminating the stacking function of 18
17 U.S.C. 924(c), converting it into a true recidivist
18 statute; and providing a limited revival of, although
19 people may not know this, the still-existing U.S.
20 Parole Commission, to revive sentences for inmates
21 serving extremely long terms.

22 Again, in general we tried to craft a set
23

1 of proposals that proceed from principles of
2 consensus and focus reform on the most extreme
3 situations of injustice, recognizing that Congress
4 has historically been reluctant to repeal mandatory
5 minimums.

6 Our hope is that by taking a minimalist
7 approach, the proposal might have some prospect of
8 passage in Congress and could serve as a useful
9 measure towards creating a federal criminal justice
10 system that is fair to all.

11 What is more, we hope that it would
12 inspire further reforms to the federal criminal
13 justice system.

14 I would be happy to discuss our proposal
15 in more detail, or any of the points that I make in
16 the written testimony, but let me conclude there and
17 thank you again very much for inviting me to testify
18 today.

19 CHAIR SESSIONS: Thank you, Mr. Luna. So,
20 any questions? Commissioner Wroblewski?

21 COMMISSIONER WROBLEWSKI: Thank you very
22 much. Is this on? Can you hear? Okay. This

23

1 question is for Professor Luna, but also I would
2 welcome any comments from the other panelists.

3 I don't know, Professor Luna, if you're
4 familiar with the work of Professor David Kennedy at
5 the John Jay College of Criminal Justice. He
6 testified in front of the Commission at one of the
7 seven regional hearings.

8 In addition, there was a deputy police
9 chief from High Point, North Carolina. And both of
10 them described and discussed the drug market
11 intervention strategy in Operation Ceasefire, and
12 those types of programs that Professor Kennedy has
13 studied for a long time. In very simple terms, those
14 programs are to identify at-risk individuals, people
15 who are either coming out of state prison, people who
16 have been involved in gangs, people who are at risk
17 to be involved in serious either drug activity, gang
18 activity, or violent crime, and to provide those
19 people basically with two options: support,
20 including federal support; or telling them that if
21 they go and commit another crime that they would be
22 prosecuted federally with very stiff penalties.

23

1 Professor Kennedy's research has suggested
2 that that strategy has worked, that it has reduced
3 crime dramatically in High Point, North Carolina, for
4 example, places in Chicago where it's been tried, in
5 Baltimore, Maryland, and elsewhere.

6 So I'm curious, because you suggested that
7 mandatory -- and part of that strategy is to have the
8 threat of a mandatory minimum penalty put right in
9 front of those at-risk folks, as well as the
10 resources available to give them the opportunity to
11 go straight and make something of their lives.

12 So I'm curious. Your testimony was that
13 mandatory minimums are completely ineffectual, and
14 I'm curious if you think that this research and
15 experience contradicts that. And I'm also curious
16 from the others, because -- this is a federalism
17 question -- should the federal government, and should
18 this program, be in place?

19 MR. LUNA: A couple of points.

20 First, when it comes to drugs, you've got
21 to remember I'm from Cato. I don't approve of drug
22 criminalization. I also don't -- am not particularly

23

1 keen on federal involvement in the criminal justice
2 system for many of the reasons that Cory mentioned,
3 and for the reasons that I state in my written
4 testimony.

5 David Kennedy is a brilliant scholar. I
6 have not read the study. I don't know what the
7 answer is to that.

8 I would point you to another study just
9 recently completed, or was published by Michael
10 Tonry, which found that mandatory sentencing, across
11 the federal system but also across all jurisdictions,
12 did not provide effective deterrence or
13 incapacitation. And I also would say that that's not
14 the whole game, for other reasons, as Dave just
15 mentioned.

16 They're not consistent with any decent
17 conception of retribution. But if in fact -- I guess I
18 would have to look at the study itself. I think
19 there is still a normative question about the use of
20 plea bargaining and extremely hefty sentences as a
21 means to extract information. I think it's a
22 normative question, not an empirical question. It's

23

1 a normative question of the value judgment about
2 whether the government should be using these
3 sentences that are, most people would say are grossly
4 disproportionate.

5 COMMISSIONER WROBLEWSKI: Yes. This
6 program is not about a threat for cooperation. It's
7 saying, they're coming out of prison and saying: You
8 now have opportunities. You have a life to live in
9 front of you, and you have an opportunity to go
10 towards a law-abiding life, and we're going to assist
11 you with that. We're going to provide services. Or,
12 you have an opportunity to go back to a life of
13 crime. And we're telling you that if you go towards
14 a life of crime, we're going to next time send you to
15 the federal system, which has a mandatory penalty.
16 And if you go towards the life without crime, you
17 won't.

18 It's not coercing --

19 MR. LUNA: I apologize. I did not quite
20 understand how the system worked.

21 VICE CHAIR CARR: Actually, before you
22 answer, Professor Kennedy's research is that these

23

1 penalties provide no deterrence at all, no deterrent
2 effect; that the people out there don't know what the
3 penalties are until they're faced with them.

4 And actually I think in the High Point
5 situation what he said is we go, we find the 60 most
6 active gang members. We take the four of them who have
7 got to be taken off the street, and they get indicted
8 with substantial federal penalties -- 20, 30 years to
9 life.

10 The other 56 are invited into a room and
11 told: We have the evidence to indict, convict you,
12 and jail you right now. But no one in this
13 room -- police officers, community members, family
14 members, clergy, want to help you out and want you
15 not to get convicted and not to go to jail.

16 So part of his theory is that you can't
17 deter these people with these penalties at the
18 outset, but you can have the whole community involved
19 in trying to straighten them out; but that it only
20 works if they know that there's a substantial threat
21 that the next time we have you on videotape you won't
22 get a break.

23

1 I'm not trying to change your mind about
2 it; it's just that I think that's what the setting
3 is.

4 MR. LUNA: It seems to me it sounds like a
5 very interesting experiment.

6 VICE CHAIR CARR: And I understand that
7 you're not in favor of the drugs being illegal, and
8 you're not in favor of the coercive hammer, but I
9 just wanted to let you know --

10 MR. LUNA: -- to fully understand it. And
11 I'm glad to know about that. I get all my furniture
12 from High Point.

13 (Laughter.)

14 VICE CHAIR CARR: No longer made by
15 federal prisoners, by the way.

16 (Laughter.)

17 MR. LUNA: Good. That's good news.

18 I guess I have some concerns, but they are
19 not -- they will have a lot to do with the federalism
20 aspect of it. I still question the use of the
21 federal government as a means to deal with what I
22 perceive, and what many people perceive, as local

23

1 issues.

2 Can it be effective? Well it kind of
3 depends on what you mean by "effective." If it means
4 that this type of intervention will somehow convince
5 a certain percentage of individuals to go straight,
6 that's a fair argument.

7 But I can come up with counter arguments.
8 It sounds to me like it's a little bit similar to
9 using the hammer, although it doesn't sound like
10 they're threatening it, but it sounds a little bit
11 like the drug court threat. And that to me I have
12 some problems with, with individuals, many of whom
13 have some real addictive propensities, using the
14 threat of prison or jail time to try to get them
15 straight. And again you have to ask the question:
16 Is the means to that end, does that justify the
17 ends?

18 DR. MUHLHAUSEN: I'd like to follow up. I
19 am familiar with Operation Ceasefire. I would say
20 that the federal government has done some wonderful
21 things in the sense of testing innovative ideas. In
22 this case, Operation Ceasefire is one good example.

23

1 However, Operation Ceasefire is the type
2 of program where basically it leverages assets of
3 police departments and prosecutors. And it's a good
4 technique that other police departments and
5 communities should engage in, but doesn't necessarily
6 need to have federal involvement.

7 So I think the federal role, while it has
8 planted the seed and shown that it does work -- there
9 is some good evidence in Chicago -- I would say that
10 what is unique about this program is that it
11 recognizes that you have a small portion in the
12 community who engage in violent crime. And by
13 targeting them, and letting them know what the
14 consequences are, and not just passing a law or
15 passing new laws but going and meeting with them face
16 to face, can have a real deterrent effect.

17 So I think it is an innovative strategy
18 that communities should look at replicating.
19 However, they shouldn't be dependent on the federal
20 government to do it.

21 MR. LUNA: If I could just quickly follow
22 up on that because I think it was a fair point, this

23

1 all to a large extent -- and again it sounds like it
2 was, and I'll have to look at it and I probably
3 shouldn't comment since I don't know it -- but it
4 sounds like it's dependent on having a select group
5 handling this what might be called an intervention,
6 and it involves trust, the trust that the process is
7 picking out those individuals appropriately.

8 I come from a background where government
9 generally should be distrusted. That is, something
10 in which it's a kind of a first principle of mine.

11 And when you think about the way in which --

12 VICE CHAIR CARR: By the way, we all work
13 for the federal government.

14 (Laughter.)

15 MR. LUNA: I understand.

16 (Laughter.)

17 CHAIR SESSIONS: But we're an exception to
18 the rule.

19 (Laughter.)

20 MR. LUNA: That's right, that's right.

21 But I think we can come up with examples where trust
22 doesn't quite work.

23

1 There is, as you all know, a case where
2 the Supreme Court I think wrongly decided a discovery
3 issue, a case called *Armstrong*, where you had kind of
4 a forum-shopping issue. You had all the Black crack
5 cocaine defendants were going to the federal system.
6 All the White powder cocaine kids were going into the
7 state system.

8 Could it be based on good reasons? Maybe.
9 But the government wasn't willing to open up its
10 books, it's decisions as to how this process was
11 made. The federal courts, at least according to the
12 Supreme Court, were not willing to demand that
13 discovery. And so we're totally dependent on trust
14 that they in fact are doing what is just and what is
15 fair. And I generally rebel against that type of
16 assumption.

17 VICE CHAIR CASTILLO: Professor Luna, I
18 want to go back to your proposed solution with former
19 Judge Cassell. Why do you think we need legislation
20 that's explicit from Congress to de-link the
21 guidelines from the mandatory minimum? Would that be
22 part of Congress also then changing the mandatory
23

1 minimums? Or is that stand-alone legislation to just
2 do that?

3 MR. LUNA: I think the two come as a
4 package, I think. The key aspect is the
5 assumption -- and maybe well founded; Professor
6 Schulhofer just recently made, in the last panel made
7 some arguments as to why maybe Congress, this
8 Commission should not deviate from mandatory
9 minimums.

10 I think fair arguments can be made the
11 other way, that the Commission was in fact
12 specifically instructed to use its independent
13 judgment, and I can think of a whole variety of
14 political dysfunctions that lead to mandatory
15 minimums, and that this Commission was intended to
16 try to circumvent.

17 But putting that aside, I think the
18 easiest way to solve this would be for Congress to
19 say you do not have to link your guidelines to
20 mandatory minimums. That would solve all of the
21 constitutional issues, and also the very difficult
22 questions that you as commissioners would have to

23

1 resolve. And so that would be my opinion on that.
2 Not because I think it's necessary -- I think a fair
3 argument could be made that you don't have to -- but
4 because it would avoid all the questions and the
5 problems that might result.

6 VICE CHAIR CASTILLO: I understand. In
7 the absence of that, it seemed to me that in the last
8 panel Professor Saltzburg made a point of saying if
9 that didn't occur he was in favor of just a
10 de-linkage and some reduction in what seemed to be
11 unfair drug penalties.

12 MR. LUNA: It's a fair proposal. What
13 that would require for it to be meaningful is that,
14 for Congress to then reduce the mandatory minimums
15 that currently exist. And I just am less sanguine
16 about that possibility.

17 The whole idea behind -- again, my
18 preference, and I have to make this clear -- my
19 preference would be to eliminate mandatory minimums.
20 But absent that, and given the very interesting
21 dynamics that exist on the Hill, and given the
22 likelihood that they will -- and I hope that the Biden
23

1 bill goes through -- but the unlikelihood that very
2 many mandatory minimums will be eliminated, that that
3 would be political fodder for an incumbent's
4 opposition, that this provides a means where they
5 can, based on principles -- lay them out, talk about
6 federalism, equality, separation of powers -- where
7 they can provide this, a solution to some of the
8 worst examples of mandatory minimums without
9 explicitly repealing or reducing any mandatory
10 minimum.

11 VICE CHAIR JACKSON: I am interested in
12 Dr. Muhlhausen's position on public anger and public
13 response to various crimes. I am just wondering
14 whether or not, you say that the Commission should
15 survey the public's views and determine, you know,
16 what penalties are too harsh.

17 Do we need mandatory minimums to take that
18 into account? In other words, if the Commission were
19 to do such a survey and determine what the public
20 thinks about various crimes, would putting that
21 information out for judges who then operate within
22 the guidelines system be sufficient, so that judges

23

1 would then know what the public thinks about various
2 crimes when they're determining whether or not to
3 impose, or at what level to impose a sentence?

4 DR. MUHLHAUSEN: Well if I understand your
5 question correctly, I do not think that any sort of
6 survey should establish sentencing floors. I think
7 it should serve as a guide, because our laws should
8 reflect our common beliefs. And so I think that
9 setting of sentences shouldn't be poll-driven, in the
10 sense that it's changing year to year, but it should
11 reflect public sentiment overall.

12 VICE CHAIR JACKSON: And that sentiment
13 then should be taken into account with respect to the
14 setting of mandatory minimums? Because I understood
15 you to say that some mandatory minimums were
16 appropriate, and that we should determine that based
17 on public sentiments.

18 DR. MUHLHAUSEN: Well, I think some -- I
19 think the public will confirm some mandatory minimums
20 as being acceptable. And I think they may find some
21 being too harsh, or too lenient. I think it is good
22 to know which mandatory minimums are out of step, or

23

1 in-step with public opinion. I think that would be a
2 good thing for the Commission to know.

3 VICE CHAIR JACKSON: And are there other
4 factors that should be taken into account --

5 DR. MUHLHAUSEN: Oh, definitely.
6 Definitely. It shouldn't be -- that shouldn't be the
7 exclusive, sole method for establishing what
8 sentences are. I think it should help enlighten and
9 inform the Commission and Congress, but it shouldn't
10 be, you know, in 2010 the Commission commissioned a
11 service and therefore for the next 30 years we're
12 locked into what the public viewed sentencing policy
13 should be for that year. I don't think it should be
14 that. But I think it would be informative.

15 MR. ANDREWS: If I may, I would just like
16 to add, I think part of the problem is that we've
17 reduced our understanding of crime in this country to
18 very simplistic principles and slogans. "It's always
19 better to be tougher on crime than softer on crime."
20 "Adult time for adult crime." And if we can't get
21 the job done with a criminal sanction, then we need
22 an even broader criminal sanction, and we need to

23

1 throw in a minimum mandatory on top of it.

2 It's always easy for politicians, which
3 after all is who we're here to try to influence
4 through the Commission, to get elected by getting
5 tough on whatever or whoever is the villain du jour.
6 And I am mortified by what's taking place in the
7 Gulf, and I'm very heartened to know that the leak
8 has been successfully stopped, but how long do
9 you think it will be before a bevy of crimes and
10 criminal laws are put in the hopper on the Hill to
11 address this latest villain du jour?

12 And this is how this happens. It happens
13 slowly. It doesn't happen gradually. And at the end
14 of the day you're left with 4500 crimes. What we
15 desperately need at bottom I think is a more engaged
16 and more informed public that is willing to listen
17 and analyze before demanding a quick fix, and just
18 being swayed by a 15-second sound bite.

19 But unfortunately that's not what's
20 happening. And in part there's an interesting
21 disconnect, if you will. If you think about it, most
22 people see America as an overly permissive society,

23

1 right, in which people are getting away with bloody
2 murder every day on the nightly news. And yet, we
3 also happen to have the largest prison population in
4 the world.

5 And as I said earlier, the amount of
6 federal crimes on the books has doubled just in my
7 lifetime, and I like to think I'm still a relatively
8 young man. And so I would just add that interesting
9 disconnect to the conversation.

10 CHAIR SESSIONS: Okay. Judge Hinojosa?

11 COMMISSIONER HINOJOSA: Yes. It seems
12 clear that there's a reluctance on the part of this
13 panel for the federal government to have much
14 involvement in criminal law, other than in treason,
15 piracy, and counterfeiting. And so my question is:
16 Other than those three, which if any other criminal
17 acts do you think that the federal government should
18 be involved in? And do you think that the federal
19 government should have any kind of more involvement
20 with acts that involve our borders? Whether they be
21 drug trafficking, or immigration, or anything that
22 involves the border areas on the Northern border or

23

1 the Southern border, or coming in through the oceans?

2 And if you would identify which crimes, if any, you

3 think we should expand from the original three.

4 MR. ANDREWS: Well first of all, I only

5 hope that you're being in jest. Of course I think

6 that there's a much larger role than piracy,

7 counterfeiting and treason for the federal

8 government, but it was just an example to illustrate

9 how far we've come.

10 I certainly think the federal government

11 has a proper role in all sorts of areas, including

12 regulating the airways through the FAA, and making

13 criminal offenses that occur on airplanes -- I didn't

14 come today prepared with a full list, but I mean I

15 think we have a system that's intended to both have a

16 decentralized federal government that has clearly

17 enumerated roles, and when possible the federal

18 government has a great role in cooperating with the

19 states.

20 And, you know, it's interesting that you

21 bring up immigration, but I mean I certainly think

22 that's an area where the federal government has -- and

23

1 we may not all agree on this -- but where the federal
2 government, although the laws are on the books, they
3 have not been vigorously enforced, and now you're
4 seeing states try to fill that gap. And I think the
5 best solution is for the states and for the federal
6 government to work together collaboratively.

7 And go to back to an earlier, the problem
8 with the federal role occurs when it begins to
9 completely usurp the authority and to absorb the
10 function of the deliberative bodies of the states.
11 Where it just sort of completely trumps the states,
12 and trumps the input of the state deliberative
13 process.

14 The High Point experiment is exactly the
15 sort of experimentation that I think is positive and
16 that should be encouraged. And that's an area where
17 the federal government was cooperating and
18 collaborating with the state. And I think good
19 things come when that happens. And I would like to
20 see more of this.

21 MR. LUNA: I would just add, it's a fair
22 question by Judge Hinojosa. I could come up with a

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1 lot of crimes, as long as it has some kind of federal
2 interest. Attacks on a federal agent, all of the
3 District of Columbia, threats against a federal
4 judge -- I think that's a fine one. We can go on with
5 many others, but the problem -- and again this is, the
6 horse is already out of the barn, it's the
7 presumption of federal jurisdiction. That
8 jurisdiction's assumed, the wire, using the mail, the
9 Commerce Clause, federal is assumed. It's very hard
10 to find things where the federal government cannot be
11 involved.

12 And it's that presumption that is
13 troubling. And, you know, you can compare it to what
14 was said by -- although there may be people who
15 disagree, but the most important jurist in America's
16 history, Chief Justice John Marshall, that Congress
17 has no general right to punish murder committed
18 within any of the states. And it is clear that
19 Congress cannot punish felonies generally.

20 Well that is clearly not true today. And
21 I think that should be of concern to us, that
22 Congress just inherently assumes that power. And

23

1 again, it frankly doesn't matter because they've
2 assumed it and the Supreme Court is not going to
3 strike down, except *Lopez*, and the Violence Against
4 Women Act. There's going to be very few situations
5 where they're going to strike a federal statute down.

6 But should it be of concern that the
7 federal government has assumed a general police power
8 when the constitutional text clearly states that they
9 do not? I think it should be of concern.

10 DR. MUHLHAUSEN: I would like to add that
11 the federal government is way too far involved with
12 the prosecution of ordinary street crimes. This
13 diminishes the role of state and local governments in
14 handling crime themselves.

15 And so I think the federal government
16 should focus on truly national crimes, or crimes that
17 are of national importance, and less on ordinary
18 street crime. So I think that's a sort of just a
19 broad general guide.

20 CHAIR SESSIONS: Okay. Dabney?

21 COMMISSIONER FRIEDRICH: Mr. Andrews,
22 you've talked about the states being laboratories for
23

1 democracy, and unfortunately we on the Commission
2 can't do a great deal about the over-federalization
3 of our criminal laws. But with respect to the
4 guidelines themselves, are there state sentencing
5 systems which you're familiar with which you would
6 recommend that this Commission take a close look at?

7 MR. ANDREWS: I think great strides have
8 been made in New York State, for one, in which you're
9 seeing less reliance on things such as mandatory
10 minimums and more contextualized analysis of
11 individual criminals where you're sentencing not, you
12 know, indictments and charges, but you're sentencing
13 people.

14 And that of course will take into account
15 all of the various factors in 3553(a). And I think I
16 would be happy to supplement my testimony by looking
17 more into all of the various approaches of the
18 states, but unfortunately today I didn't come with
19 particular state solutions in mind.

20 COMMISSIONER FRIEDRICH: Well one of the
21 statutory recommendations you made in your testimony
22 was that the Commission consider recommending to

23

1 Congress that the safety valve be expanded to give
2 judges the discretion to depart from a mandatory
3 minimum in a nonviolent felony case in which the
4 goals for purposes of 3553(a) are not being
5 fulfilled.

6 And I'm wondering whether you would also
7 recommend that the Commission consider, if it were to
8 make any such recommendation, that Congress also
9 consider whether the standard of appellate review,
10 which would apply to those sorts of discretionary
11 sentences, would be any more rigorous than that that
12 exists right now under the Supreme Court case law?

13 MR. ANDREWS: Well it's interesting that
14 you bring that up, because that of course is a whole
15 bag of tricks of course, the question of appellate
16 review.

17 In this regard I just finished a law review
18 article that will be coming out in the next issue of the
19 -- I just finished reading a law review article that
20 will be coming out in the next issue of the [*University*
21 *of*] *Chicago Law Review* by Professor Frank Bowman. I
22 would commend it to you. But he points out basically

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1 what a mess we've made of things, which of course no
2 one on the Commission needs anyone to explain that to
3 them, but he described it as a doctrinal incoherence
4 that's resulted in a nationwide festival of
5 confusion.

6 And he rightly reminds us that reining in
7 unduly harsh sentences, promoting sentences that are
8 proportional to the gravity of the offense, and
9 reducing disparity in sentences were precisely the
10 objectives of the structured guideline sentence that
11 was largely voided by the Supreme Court in *Blakely*
12 and *Booker*.

13 And he argues that -- and this is I think
14 his contribution, is he says we've gotten away from
15 talking about what the elements -- we've confused the
16 elements of a crime versus things that enhance the
17 sentence, that these are all facts that need to be
18 proven. And he suggests this, and I think this is
19 probably right. He says that any fact which when
20 proven alone or in combination with other facts
21 increases the defendant's punishment by increasing
22 either the penalty a court may impose, or the penalty

23

1 a court must impose, must be proven beyond a
2 reasonable doubt to a jury, or if the jury trial is
3 waived beyond a reasonable doubt to a judge, or
4 admitted by the defendant.

5 And we know that because the Supreme Court
6 establishes the constitutional floor but not the
7 ceiling for protections Congress could adopt this
8 proposal and enact it into sentencing law.

9 CHAIR SESSIONS: Can I just ask you about
10 what you read in Frank Bowman's law review article,
11 because I was on a panel with him just a little while
12 ago and -- that "festival" language that you just used?
13 I must have missed it. I didn't think he brought
14 that up. But is he essentially suggesting that if
15 there is a factor listed within a guideline range
16 which a judge considers is relevant in determining
17 what the sentence within that guideline range is to
18 be, it may increase it a little bit or may decrease
19 it a little bit -- increase it is the important
20 point -- that in that kind of situation, even within a
21 guideline range, that there would be a right to a
22 jury trial, and that you'd have to prove that beyond
23

1 a reasonable doubt?

2 Is that what he is suggesting?

3 MR. ANDREWS: I would defer to him to
4 better explain to you his article, but his precise
5 calculation is that any fact which, if proven as true
6 on its own or in combination with other facts -- and I
7 think perhaps "in combination with other facts" would
8 be the ones that you're referring to -- but it would be
9 in some instances more than merely the elements of a
10 crime.

11 So that's --

12 VICE CHAIR CARR: But it was the balance
13 of the language, "would affect the sentence that the
14 judge may or must impose"?

15 MR. ANDREWS: It would.

16 COMMISSIONER HINOJOSA: Could --

17 CHAIR SESSIONS: Yes -- we're going to
18 debate this one for awhile I can tell.

19 (Laughter.)

20 MR. ANDREWS: It's a very -- it's a very
21 provocative argument. But it's a very thoughtful
22 piece, and it traces the history going all the way

23

1 back.

2 COMMISSIONER HINOJOSA: Well I almost go
3 all the way back, being on the bench 27 years and
4 having done sentencing five years without any
5 guidelines, and so my question is: Why is it
6 constitutionally okay for those five years that I didn't
7 have guidelines, and somebody got convicted and there
8 was a maximum of 20 years, for me to be able to use
9 any factors that I wanted to, which a lot of times
10 turned around some of these same factors that are in
11 the book, mostly the factors that are in the book,
12 but without the book because that's what's common
13 sense, that you were going to take role into account,
14 and this may be astounding to some but if it was a
15 drug case you did take the amount of drugs into
16 account, or whether there was a gun involved, or all
17 those other factors, why is that constitutional, that
18 I can pick anything within the 20 years without
19 having anybody prove anything, or even discuss it for
20 that matter?

21 Once there's been a conviction and you
22 have a statutory maximum, do you think that system

23

1 should have a constitutional problem?

2 MR. ANDREWS: That's really -- I mean,
3 honestly, at the end of the day, the Supreme Court
4 has created some of the problem. And, you know,
5 *Apprendi* and its progeny, I don't know if any of the
6 other panelists have any thoughts about it.

7 MR. LUNA: It's just, I think, Judge,
8 you've laid your hand on a -- your finger on the
9 perverse logic of *Booker/Blakely/Apprendi*, and it's
10 just that by being more broad, and with less
11 guidance, it becomes constitutional.

12 And so -- but I take this from a fairly
13 pragmatic standpoint. I'm not so sure I agree with
14 that line of cases, but it was the vehicle by which
15 mandatory guidelines became advisory guidelines, and
16 that's good enough for me.

17 Do I believe that -- do I believe that --

18 COMMISSIONER HINOJOSA: Even though it was
19 the federal Supreme Court that did this, I guess?

20 (Laughter.)

21 MR. LUNA: They have some role in *U.S. v.*
22 *Booker*, and it seems to me that it was a vehicle

23

1 toward that end. I'm not -- this is why the discussion
2 about the case that was just decided, and about these
3 other cases, I'm not so sure that that has the
4 *O'Brien* case and others, I don't know what relevance
5 in the long term it's going to have for mandatory
6 minimums. 924(c): Guns, drugs. Jury's going to
7 find it. Whether you submit it to a jury or you
8 submit it to a judge, they find it.

9 The problem is, it's too broad. And, that
10 you have cases like the one that Judge Cassell
11 handled, and that I handled on appeal, *Angelos*, where
12 that equals 55 years.

13 So the fact-finding aspect of it, whether
14 it's a judge or a jury, they still come to the same
15 conclusions. Five grams of crack cocaine equals five
16 years. Unless you're going to engage in jury
17 nullification, or judicial nullification, it is not
18 going to change that.

19 So I just think that that is a red herring
20 to the problem of mandatory minimums.

21 CHAIR SESSIONS: Any others?

22 (No response.)

23

1 CHAIR SESSIONS: Well thank you very much.
2 Thank you, very much, for contributing a very
3 interesting discussion, and I guess we'll close the
4 panel at this point.

5 We will take a break for 15 minutes and be
6 back at a little after five after.

7 (Whereupon, a recess was taken.)

8 CHAIR SESSIONS: Good afternoon. Should I
9 say "last but not least"? No.

10 (Laughter.)

11 CHAIR SESSIONS: Well, this is the "View
12 from [the] Advocacy Groups," although you're wearing a
13 different hat, or a different coat, or a different
14 responsibility.

15 MR. HILLIER: I checked the audience, Your
16 Honor, and I don't see any Constitution Project here,
17 so...

18 CHAIR SESSIONS: You're all set.

19 (Laughter.)

20 MR. HILLIER: Free rein.

21 CHAIR SESSIONS: All right, well let me
22 introduce you all.

23

1 First, Marc Mauer. We've had the
2 privilege of having him before us before. He is the
3 executive director of the Sentencing Project. He has
4 been with the Sentencing Project since 1987. He is
5 also an adjunct faculty member at George Washington
6 University. Mr. Mauer began his work in the criminal
7 justice field with the American Friends Service
8 Committee in 1975, where he served as the
9 organization's national justice communications
10 coordinator. Mr. Mauer received a bachelor's degree
11 from Stony Brook University, and a master of social
12 work from the University of Michigan.

13 Thank you again for coming here today.

14 Next, Julie Stewart, who has been here
15 many a time, is president of Families Against
16 Mandatory Minimums, which she founded in 1991. Prior
17 to founding FAMM, she worked at the Cato Institute
18 for three years as director of public affairs.
19 Ms. Stewart earned a B.A. in international affairs
20 from Mills College in Oakland, California.

21 Jay Rorty is the director of the American
22 Civil Liberties Union's Drug Law Reform Project.

23

1 Before joining ACLU, Mr. Rorty was an assistant
2 federal public defender in the Northern District of
3 California for 11 years. Mr. Rorty has also been a
4 staff director and senior trial attorney at the
5 Bayview Hunters Point Community Defender in San
6 Francisco; and is a former board chair of the Center
7 on Juvenile and Criminal Justice. Mr. Rorty earned a
8 J.D. from New College of California School of Law,
9 and an undergraduate degree from the University of
10 Michigan. And thank you for traveling a long way to
11 be here.

12 MR. RORTY: Glad to be here.

13 CHAIR SESSIONS: And I'll thank you, as
14 well, for traveling from Spokane -- it is Spokane,
15 isn't it?

16 MR. HILLIER: That's where I was born, but
17 I'm working in Seattle.

18 CHAIR SESSIONS: Oh, in Seattle? All
19 right.

20 VICE CHAIR CARR: Thank him, anyway.

21 CHAIR SESSIONS: Hmmm?

22 VICE CHAIR CARR: Thank him, anyway.

23

1 (Laughter.)

2 MR. HILLIER: It's even further than
3 Spokane.

4 (Laughter.)

5 CHAIR SESSIONS: Yes, it is, unless you
6 started heading West and came that way. Yes.

7 (Laughter.)

8 CHAIR SESSIONS: Mr. Hillier is a member
9 of the Constitution Project's Sentencing Initiative's
10 Blue-Ribbon Committee. He also serves as the federal
11 public defender for the Western District of
12 Washington, and has worked in various capacities in
13 the Seattle public defender's office since it was
14 created in 1975. He is also an adjunct professor at
15 the University of Washington, and is a fellow of the
16 American College of Trial Lawyers. Mr. Hillier is
17 the former chair and present member of the Federal
18 Defender's Sentencing Guidelines Committee. He
19 graduated from St. Martin's College and Gonzaga
20 University School of Law, and I clear knew that you
21 were from Seattle not Spokane.

22 So, Mr. Mauer, can we begin with you?

23

1 MR. MAUER: Certainly. Well first of all,
2 thank you so much for inviting me here, and thank you
3 for your stamina in putting up with a full day of
4 testimony, but I think it's a wonderful opportunity
5 to air a range of perspectives on this.

6 We've heard a variety of ideas generated
7 about the issue of mandatory sentencing. I want to
8 focus my comments on two issues in particular.

9 The first is the question of what impact
10 have mandatory sentences had on public safety?
11 Presumably one of their key objectives.

12 And the second is, what impact have they
13 had on racial disparity within the criminal justice
14 system?

15 Now on the public safety issue, there are
16 many people who have suggested in congressional
17 testimony and testimony before this Commission that
18 mandatory sentences have been effective in reducing
19 crime.

20 The story that they tell generally is one
21 where we hear that mandatory sentences began to be
22 adopted by Congress in the 1980s. In the early '90s

23

1 crime rates start to go down. And that's all you
2 need to know about things. We had mandatory
3 sentences and not long after, crime rates were going
4 down.

5 Unfortunately, I think that's a far too
6 simplistic story about the relationship between these
7 factors. For a start, we do have some good research
8 in the field now about the crime decline since the
9 1990s. And while we don't have all the answers, I
10 think the general answer is that it's complicated, as
11 these things often are. That most of the leading
12 criminologists would suggest that part of this was
13 due to rising incarceration; part of it was due to
14 changes in the drug trade; some of it was changes in
15 community policing, the general economic climate; a
16 number of factors coming together.

17 The role of incarceration in particular,
18 the most optimistic studies suggest that maybe 25
19 percent of the decline in violent crime was due to
20 rising incarceration. Other equally strong studies
21 suggest it was as little as ten percent was due to
22 rising incarceration.

23

1 So we shouldn't discount this completely,
2 but it tells us essentially that at least 75 percent
3 of the decline in crime had nothing to do with
4 incarceration.

5 Beyond that, we're looking at
6 incarceration here and not necessarily mandatory
7 sentencing. The rise in incarcerations are due to a
8 number of factors, mandatory sentencing being just
9 one of them.

10 Another problem with the sort of simple
11 assumption that federal mandatories have reduced
12 crime is, as you well know, the federal court system
13 handles less than ten percent of all the crime in the
14 country. The vast majority obviously is prosecuted
15 in state and local courts.

16 And so if we wanted to determine what is
17 the specific impact of federal mandatory penalties on
18 reducing crime rates, when virtually every state has
19 its own set of mandatory penalties and variety of
20 sentencing structures, I haven't seen any research
21 that suggests we can somehow isolate the impact of
22 federal mandatories in particular.

23

1 Another confounding problem here is that,
2 because federal mandatories have been applied so
3 heavily against drug offenses, if you think about how
4 mandatory penalties might work, and might they have a
5 deterrent effect on potential offenders, well if
6 somebody is considering engaging in a drug crime, he
7 or she might be subject to federal penalties, might
8 be subject to state penalties because drug crimes are
9 prosecuted very aggressively in both systems.

10 So once again, assuming a person is
11 actually thinking about being deterred, how do they
12 weigh the impact of federal mandatories against state
13 mandatories, or indeterminant systems for that
14 matter.

15 So there are a lot of theoretical problems
16 and a lot of practical problems in making any quick
17 assumptions about how federal mandatory penalties may
18 have affected crime rates.

19 Thinking more broadly about this and how
20 do mandatory penalties work, essentially if we are
21 going to have a deterrent effect mandatory penalties
22 have by and large increased the severity of penalties

23

1 that potential offenders face. And in this regard I
2 think they also clash with what a lot of research has
3 told us over a long period of time. And that is, to
4 the extent that the criminal justice system has some
5 deterrent effect -- and it does have some deterrent
6 effect -- that this effect is more a function of the
7 certainty of punishment rather than the severity of
8 punishment.

9 And so if we can somehow increase the odds
10 that a given offender may be caught, at least some
11 people may be thinking about the consequences of
12 being caught. If we're merely increasing the
13 severity, if we raise the penalties from five years
14 to ten years, most offenders unfortunately are not
15 thinking about being caught and therefore they're not
16 thinking very much about the penalties that they're
17 subject to.

18 And if they were thinking about it, in the
19 vast majority of cases one would imagine five years
20 would be enough to get their attention. It's not
21 clear that ten years gets that much more of their
22 attention.

23

1 The other problematic part about mandatory
2 penalties, and again particularly with drug offenses,
3 is, unlike some other crimes, unlike many murders or
4 rape, sexual assaults, where it's a given offender in
5 a given situation committing a very serious crime,
6 drug crimes are very widespread, as we well know, and
7 are very much subject to what the criminologists
8 would call "the replacement effect."

9 So we have somebody on the street corner
10 selling drugs. The police come along and arrest that
11 person, haul that person off to prison, and if we go
12 back to that street corner in almost any neighborhood
13 in the country that person has been replaced by
14 another young man or woman who is looking to fill
15 what you almost might think of as a job vacancy or
16 so. As long as we've got a demand for drugs in a
17 given neighborhood, there is a virtually endless
18 supply of people willing to step up and try to meet
19 that demand with the idea that somehow this is a
20 lucrative opportunity -- which most of time it turns
21 out not to be the case anyway. So we get this
22 virtually endless supply of replacement offenders

23

1 coming into it.

2 So I think both theoretically and in
3 practical ways there's very little to suggest or to
4 demonstrate that mandatory penalties have contributed
5 to public safety certainly over the last 20 years,
6 and going back further than that many scholars have
7 looked at that as well.

8 The other issue is the question of how
9 have mandatory penalties affected racial disparities
10 in the criminal justice system. Certainly this
11 Commission has done very sophisticated work over
12 nearly 20 years now looking at this question in
13 particular, and demonstrated certainly in crack
14 cocaine but also your 1991 report on mandatories as
15 well. But I think in terms of general framework for
16 thinking about this question -- you know, will
17 mandatories have a particular impact on exacerbating
18 racial disparities? -- and I think the answer almost
19 always inevitably has to be: Yes. Over and above
20 what other disparities we see in the system,
21 mandatories will aggravate our existing flow of
22 people in the system.

23

1 And that comes about I think for two
2 reasons in particular.

3 The first, again, is getting back to the
4 drug war. The drug war is not just a function of
5 mandatory penalties, but because of the complicated
6 racial dynamics of policing and prosecution, there's
7 been a fairly broad critique of how that's been
8 carried out. But I think it is undeniable,
9 regardless of where a person sits on that issue, that
10 the drug war itself, the policing and prosecution
11 function, has had a very disproportionate effect on
12 communities of color; and then mandatory sentences
13 essentially exacerbate that effect over and above
14 what we might otherwise see.

15 The other reason why I think it's
16 virtually inevitable that we will see a racial effect
17 has to do with the fact that mandatories are often
18 premised, or exaggerate the impact of a prior record
19 in making a person subject to mandatories or very
20 excessive mandatories.

21 And the reason that this becomes an issue
22 I think is that, on average people of color coming
23

1 into the court system are more likely to have a prior
2 record than are White defendants.

3 Now some people would say this is because
4 of greater involvement in crime. Some people would
5 say this is due to racial profiling. It's again a
6 complicated picture, but I think the fact is that
7 people of color are more likely to have a prior
8 record than are White defendants coming into the
9 court, which means a couple of things.

10 First, there's been a good deal of
11 discussion about the safety valve. We know from your
12 research and others that it means that White
13 defendants are more likely to be eligible for safety
14 valve consideration in part because of the impact of
15 prior record.

16 And secondly, we see that there's now
17 essentially a very excessive effect of mandatory
18 sentencing. We look at a state like California. The
19 three-strikes-and-you're-out policies in that state
20 are currently about 29 percent of the prison
21 population is African American. When you look at the
22 three-strikes' prison population, it's 45 percent.

23

1 Now just to be clear, I don't think it's
2 necessarily inappropriate to consider prior record at
3 sentencing, either by an individual in an individual
4 case or in a sentencing structure; this has been the
5 way it's been done for a very long time. What's
6 changed now is just the excessive nature of the
7 penalties that come along with many of these habitual
8 offender statutes' mandatory penalties. So that in
9 California you can get 25-to-life for a third strike
10 that is certainly not a very serious crime.

11 So the degree to which we sort of
12 exacerbate the problem has now been magnified. And
13 certainly in the federal system *Weldon Angelos* and
14 the other cases like that illustrate that, as well.

15 So again I think we're seeing the impact
16 of a prior record. People of color are more likely
17 to have a prior record. And then mandatorics,
18 excessive mandatorics coming on top of that all
19 combine in ways that may or may not have been
20 intended, may be viewed as race-neutral on the
21 surface, and yet have an effect that I think could
22 have been predicted at the time. Certainly we have

23

1 many years of data now to look at to show us that
2 this is essentially a very likely outcome once we
3 have a structure like this.

4 So I think these are very problematic
5 questions here. Certainly what we want to do in a
6 sentencing structure is to not exacerbate racial
7 disparity, and we also want to promote public safety
8 and not do things that are counterproductive. And
9 unfortunately I think mandatory penalties have fallen
10 short on both those counts.

11 Thank you.

12 CHAIR SESSIONS: Thank you, Mr. Mauer.

13 Ms. Stewart?

14 MS. STEWART: Good afternoon. Thank you,
15 Chairman Sessions, and the members of the Commission
16 for inviting me to testify today.

17 I am testifying on behalf of Families
18 Against Mandatory Minimums. So, as our name
19 suggests, the subject of today's hearing is of
20 existential importance to our organization.

21 I first became aware of the U.S.
22 Sentencing Commission in 1991 when you published your

23

1 first report on mandatory minimums. It was just one
2 year after my brother had been arrested and sentenced
3 to five years in federal prison for growing
4 marijuana, and it was about one month before I was to
5 launch FAMM.

6 I knew from my own family's experience how
7 devastating mandatory sentences were and how wrong
8 they were, but as I prepared to launch a national
9 organization to expose the laws I really needed hard
10 data and solid evidence, and the 1991 report that you
11 produced provided that.

12 That report also served I think as the
13 intellectual foundation upon which the safety valve
14 was built three years later. I don't think that
15 Congress would ever have gone as far as to scale back
16 mandatory minimums even for the lowest level
17 defendants if the report from 1991 had not been
18 produced.

19 Nineteen years later I am eager for this
20 Commission's new report in October. I am hopeful
21 that it will be as bold and as uncompromising as the
22 original.

23

1 I expect that the Commission will find
2 that after 19 years of mandatory minimums not much
3 has changed, and that the original report's
4 conclusions are still unfortunately the same.

5 That is why I urge you to continue to play
6 the same leadership role in opposing mandatory
7 minimums now that the previous Commissions have done
8 in the past.

9 You have the bully pulpit. You should
10 continue to use it to say loudly and clearly that
11 mandatory minimums were wrong before there were
12 sentencing guidelines, mandatory minimums were wrong
13 when the guidelines were enforceable, and mandatory
14 minimums are wrong now that the guidelines are
15 advisory.

16 The second point I want to make is that
17 the number of stories we collect of people
18 receiving absurdly long sentences continues to grow,
19 demonstrating that these sentences are not
20 anomalies.

21 Beginning with my brother's case, I have
22 always believed that it was important to show the

23

1 faces of these mindless mandatory minimum sentences
2 and how they affect real people. And in fact many of
3 those real people have testified before this
4 Commission in the past.

5 Today in this room we have FAMM members
6 from around this area, and one who has traveled as
7 far as from South Carolina, and I would like to just
8 take a second to ask them to stand up and be
9 recognized, please.

10 (FAMM members stand.)

11 MS. STEWART: Thank you. They are the
12 reminder both to me, and I know to you as well, that
13 everything that you do here in fact impacts real
14 people. It's not just politics. It's not just
15 theoretical. It's personal.

16 Because Weldon Angelos has been mentioned
17 about six times, and I've only been here for the last
18 hour or so, I will only briefly describe his case as
19 one of the examples of sentencing gone awry. He's
20 really become a poster child I think for what's wrong
21 with 924(c).

22 He is now 30 years old. He was 25 when he
23

1 was sentenced to 55 years and a day in prison for
2 having a gun present at two drug transactions
3 involving half a pound of marijuana.

4 The first time the gun was present, a five-
5 year sentence was triggered. The second time, a 25-
6 year sentence. When a gun was found in Angelos's
7 home, another 25-year sentence was required. All of
8 these of course to run consecutively, for a total of
9 55 years.

10 As you know, Paul Cassell, Judge Cassell,
11 tried very hard not to apply that mandatory sentence.
12 He noted that an airplane hijacker receives a shorter
13 sentence than Weldon Angelos would were he to impose
14 that sentence. In the end, Judge Cassell followed
15 the law and sentenced Weldon to 55 years for the
16 guns, and one day for the marijuana conviction.

17 In the past five years, FAMM has received
18 an increasing number of letters from individuals who
19 are serving crimes[sic] for child pornography. Among
20 them is a 36-year-old named Eric Rinehart who is
21 serving 15 years in a federal prison for downloading
22 sexually explicit photos and a video that were taken
23

1 by him and his 16-year-old girlfriend, and his 17-
2 year-old girlfriend, who did not know about each
3 other.

4 Although both girls were of the legal age
5 of sexual consent in the State of Indiana,
6 downloading the photos violated federal law and
7 Rinehart was charged and convicted of producing and
8 possessing child pornography.

9 The charges carried a mandatory minimum
10 sentence of 15 years. The sentencing judge, David
11 Hamilton, wrote a strongly worded sentencing memo for
12 the express purpose of helping Rinehart get a
13 Presidential commutation. He wrote:

14 The mandatory minimum 15-year sentence is
15 far greater than necessary to serve the statutory
16 purposes of sentencing.

17 If we had collected only a handful of
18 these horrible stories over the past 20 years, I
19 would understand Congress's reluctance and this
20 Commission's reluctance to pay much attention. But
21 in fact we have collected thousands of cases, and it
22 really is an epidemic of injustice.

23

1 Mandatory minimums do not simply result in
2 sentences that are too long, they don't just wreak
3 havoc on individuals and their families, they destroy
4 faith in the criminal justice system -- one sentencing
5 hearing at a time.

6 American citizens believe that courts and
7 judges should sentence individual offenders. They
8 are shocked, dismayed, and angered, as I was, when
9 they find out that that is not the case.

10 They feel that their rights have been
11 violated and there's no remedy for them. And this
12 anger leads to disrespect for and distrust of the
13 justice system.

14 That brings me to the final point I want
15 to make today, which is related but not limited to
16 mandatory minimums, and it is this:

17 That individualized sentencing where
18 judges, guided by this Commission, are free to judge
19 is not the enemy of uniformity. To the contrary,
20 individualized sentencing complements both uniformity
21 and proportionality.

22 The biggest change that has taken place
23

1 since the Commission released its report in 1991 is
2 that the guidelines are no longer enforceable. I
3 have heard it said that in an advisory guideline
4 world mandatory minimums are more important than ever
5 to ensure uniformity of sentences. I believe that is
6 flawed logic.

7 Congress has commanded that sentences
8 should be sufficient but not greater than necessary
9 to ensure the purposes of sentencing. In the shadow
10 of this directive, uniformity simply cannot mean
11 issuing the same sentence to every person who commits
12 Crime A. That is because hypothetical violators of
13 Crime A are certain to have varying levels of
14 culpability, different criminal backgrounds, and
15 divergent potentials for rehabilitation.

16 To uphold the congressional command to
17 sentence sufficiently but not greater than necessary,
18 the courts need more discretion. At a minimum, this
19 Commission should endorse an expanded safety valve to
20 give the courts the ability to meet that command.

21 You should also call on Congress to repeal
22 all mandatory minimums. They may not do it, but it

1 can't hurt to ask.

2 And, short of repealing all mandatory
3 minimums, I urge this Commission to tell Congress to
4 pass the Ramos-Compean bill in the House, which is a
5 broad safety valve.

6 I would also like to urge the Commission
7 to de-link the drug guidelines from drug statutes.
8 This was done by previous Commissions with LSD and
9 marijuana. And as far as I have seen in the past 15
10 years or so since that was done, that has caused
11 absolutely no problems for the courts.

12 There is no reason that the Sentencing
13 Commission cannot act independently to make the drug
14 guideline sentences more realistic.

15 Further, I would urge the Commission not
16 to see every variance from the guidelines as evidence
17 of wayward judging. In many cases, what is called
18 disparity is simply a healthy rejection of
19 unwarranted uniformity and a guideline system that
20 has become, partly as a result of mandatory minimums,
21 a one-way ratchet toward ever higher sentences.

22 Guideline variances can be addressed by

23

1 either ignoring the message sent by the district
2 courts, or by heeding it. To paraphrase: Best yet,
3 the safest way to make the guidelines respected is to
4 make them respectable.

5 Members of the Commission, for those of us
6 who have made mandatory minimum reform their mission,
7 this hearing comes at an exciting time. States
8 across the country -- those laboratories of democracy
9 as we've heard earlier -- are turning away from
10 mandatory minimums. In the past year alone, New York
11 and Rhode Island have both repealed or severely
12 reformed their mandatory drug laws.

13 In January, we culminated a year's long
14 effort in New Jersey to enact a law limiting the
15 reach of one of the state's worst mandatory
16 minimums.

17 Marc Mauer and his group have produced
18 some excellent reports detailing the sweeping changes
19 taking place across the country in the states. These
20 studies reveal that states have not gone lax on
21 public safety, but rather that they have chosen to
22 replace their reliance on long prison sentences with

23

1 new evidence-based sentences, and programs that have
2 been effective at less cost to taxpayers.

3 We also meet at a time when Congress
4 stands on the verge of repealing a mandatory minimum
5 for the first time since the Nixon administration.
6 The Senate has already voted unanimously to eliminate
7 the mandatory minimum for crack possession, and
8 dramatically reduced the disparity between crack and
9 powder cocaine sentences. We are hopeful that the
10 House will follow suit.

11 It is fitting that I close my remarks on
12 the issue of crack, because I remember very clearly
13 the day in 2007 in this very room when you voted to
14 apply the new crack guidelines retroactively -- crack-
15 minus-two.

16 The hugs and the calls and the letters
17 that I got following that day from our members
18 reminded me of why we are in this fight. But what I
19 also recall is the leadership role played by this
20 Commission.

21 It was not simply a final vote for reform,
22 it was the intellectual and moral leadership shown by
23

1 the members of the Commission leading up to and
2 making that final vote possible. That strong, smart,
3 and moral leadership is what we need now from this
4 Commission on the issue of federal mandatory minimum
5 sentences.

6 I look forward to your support and to
7 working with you to make our federal sentencing laws
8 worthy of respect again. Thank you.

9 CHAIR SESSIONS: Thank you, Ms. Stewart.

10 Mr. Rorty?

11 MR. RORTY: Thank you, Chairman Sessions,
12 members of the Commission.

13 I am honored to be here today to represent
14 the American Civil Liberties Union, a nonpartisan
15 organization with more than 500,000 members,
16 countless activists, and 53 affiliates.

17 As you heard, my background is also as a
18 federal public defender, where I was in the trenches,
19 a phrase many people have used here, of the federal
20 sentencing system for 11 years. So much of my
21 testimony is informed by that experience, as well as
22 my time with the ACLU.

23

1 Mandatory minimum sentences defeat the
2 purposes of sentencing, create unwarranted racial
3 disparities, and overcrowd our prison system. They
4 take discretion away from judges and give it to
5 prosecutors who too often use the threat of these
6 sentences to frustrate constitutional rights.

7 We cannot continue to use a one-size-fits-
8 all approach to sentencing. Instead, we must balance
9 public safety with a need to assist individuals on
10 the path to health and rehabilitation.

11 This Commission is an expert body and will
12 employ its knowledge and resources to craft fair and
13 effective sentences. This Commission should tell
14 Congress to abolish all mandatory minimums, to
15 abandon that mandatory sentencing structure, and to
16 instead rely on the advisory guidelines to set public
17 policy.

18 My comments today will touch on a variety
19 of the themes that we've heard through the day. I've
20 been here since 8:30 this morning and heard all the
21 experts testify. You've got my written submission,
22 so I am glad to take the opportunity to talk about
23

1 some of the threads we have heard in the
2 conversations that you've had with these experts, and
3 to follow up on some of your questions.

4 Let's start with the Department of
5 Justice. I was glad to find some agreement with the
6 Department of Justice today. I was glad to hear them
7 say that the federal prison population has reached a
8 period of unsustainable growth.

9 I was glad to see that the Holder Memo, as
10 we've called it, of May 19th provides greater
11 flexibility to line and supervising United States
12 attorneys in charging and sentencing advocacy.
13 That's a welcome change from the Thornburgh and
14 Ashcroft positions.

15 I was glad to hear, too, that at least the
16 Department agrees that 924(e), career criminal
17 predicates; 851, drug priors; and 924(c) stacking
18 provisions are excellent starting points for the
19 elimination of unjust mandatory minimums. I
20 certainly hope they'll extend those recommendations
21 further than that.

22 I am also glad to hear that the Department
23

1 does not recommend any return to mandatory guidelines
2 and does not endorse any tradeoff between an exchange
3 of reduced mandatory minimums for a more mandatory
4 guideline system.

5 And lastly, I think I heard the Department
6 asking this Commission to reassess the harms of drug
7 crimes. I'm unclear if the Department agrees with me
8 that that should lead to this Commission de-linking
9 offense levels from the mandatory minimums, but I did
10 hear them call for a reassessment of the harms posed
11 by drugs, and I welcome that.

12 Now some of the areas in which I have
13 perhaps less agreement with the Department:

14 I heard the Department say that it favors
15 limited judicious use of mandatory minimums in
16 serious cases. It remains to be seen what the
17 Department consider to be "serious" and what it means
18 to exercise "judicious use of mandatory minimums."
19 Hopefully the Department will continue an open
20 dialogue not only with the Commission but all the
21 experts who have testified here today and elaborate on
22 their position as to the extent to which mandatory

23

1 minimums should be eliminated or reduced.

2 I hope that any conclusions of the
3 Department will be subject to an open debate between
4 the experts and the Commission between now and
5 October.

6 I certainly hope and trust that the
7 Department will acknowledge that drug sentences are
8 excessive, and that at least those mandatory minimum
9 sentences in drug offenses be eliminated.

10 I was particularly struck by Commissioner
11 Castillo's example, used a couple of times today, of
12 a drug mule and hope the Department acknowledges that
13 it's extremely important to achieve proportionate
14 sentencing in drug conspiracies.

15 One of the themes we have heard about all
16 day is disparity: what it means, what are different
17 kinds of disparity, how should the Commission and
18 Congress account for and be concerned about
19 disparity.

20 Certainly many of you have expressed
21 concerns about disparity in the federal system. I
22 heard that the Department supports retaining some

23

1 mandatory minimums in the interests of uniformity.
2 We should question the notion that any disparity is
3 bad.

4 Certainly disparity that is based on race
5 or other inappropriate factors must be eliminated;
6 however, any disparity arising from appropriate
7 consideration of individual factors as mandated by
8 3553(a) is entirely warranted and appropriate
9 disparity and should not serve as an argument for
10 retaining mandatory minimums.

11 I would urge that the Commission not lump
12 together all types of disparity, and to use them as a
13 basis for maintaining the status quo, but rather to
14 think carefully about the kinds of disparity which
15 may arise from the application of individual
16 sentences to individuals in a wide range of
17 circumstances.

18 Another theme that we've talked about
19 today is the impact on cooperation and plea
20 bargaining. I think that the Department is wrong,
21 the Department of Justice is wrong to tout
22 cooperation as a benefit of mandatory minimums.

23

1 They are wrong for a couple of reasons:

2 First, none of the statutory purposes of
3 sentencing are designed to make prosecutors' jobs
4 easier by threatening defendants with unjust prison
5 terms. Those threats force defendants into
6 relinquishing constitutional rights, even punishing
7 them for asking for bail.

8 Any benefit that is perceived or real
9 benefit derived from coerced cooperation by using
10 mandatory minimums is not worth the tradeoff.
11 Certainly as a representative of the American Civil
12 Liberties [Union] I am concerned that meritorious
13 constitutional claims are not being made because
14 defendants are scared to make them and threatened by
15 mandatory minimums, and as a result don't make those
16 motions.

17 Second, using mandatory minimums leads
18 desperate defendants to fabricate false testimony
19 leading to the conviction of innocents. We have seen
20 that in a number of cases around the country -- Jerrell
21 Bray in Cleveland is one example. I believe there
22 are 26 persons released from custody based on his

23

1 fabricated testimony, after he was threatened with a
2 mandatory minimum.

3 On a similar issue of deterrence from
4 mandatory minimums, I want to refer to a conversation
5 that occurred in the previous panel in the discussion
6 of David Kennedy's research.

7 I think it's an important point that my
8 own understanding of Professor Kennedy's research is
9 not that it was the threat of a particular lengthy
10 sentence that was an effective deterrent, it was the
11 certainty of consequence that was the deterrent.

12 Mr. Mauer referred to this in his own
13 testimony, and I think that is an important
14 distinction; that there is a deterrent effect from
15 the certainty of some kind of consequence from
16 criminal conduct. And the difference between some
17 punishment and ten, 20, or 50 years is very
18 significant.

19 Let me now turn to the ACLU's
20 recommendations to this Commission.

21 First and most importantly, we ask that
22 you reaffirm your excellent 1991 report and recommend
23

1 that Congress entirely abolish mandatory minimum
2 sentences.

3 We recommend, as well, that you expand the
4 safety valve. We have had significant discussion
5 about that today, and I agree with many of the
6 experts who have testified here today, particularly
7 my federal defender colleagues, that you should apply
8 the safety valve to all mandatory minimum offenses
9 and, as necessary, craft safety valve guidelines
10 appropriate to each type of offense, just as there
11 are with drug offenses. But they can be applied
12 across the board.

13 Lastly, and another area we've had a lot
14 of talk about here today, de-linking the offense
15 levels from mandatory minimums.

16 Let me first address the question that
17 Chairman Sessions asked to the earlier panel about
18 whether it is possible, legal for the Commission to
19 do so. It certainly is. I think the Commission
20 should be guided and instructed by the Supreme Court
21 on this matter. The *Neal* and *Kimbrough* cases speak
22 directly to this issue and authorize the Commission

23

1 to de-link from the mandatory minimums.

2 And as I believe Ms. Stewart noted, the
3 Commission has done so in the past in the LSD and
4 marijuana context. I know the Commission has had
5 some concern about this in the past, but you should
6 not shackle yourselves from taking appropriate steps
7 to step away from these unjust policies and to
8 exercise your role to assess the appropriate harms
9 connected particularly with drug offenses.

10 I say "drug offense," and I address them
11 particularly because we know from Justice Breyer's
12 comment in *Gall* that none of the drug offense levels
13 exemplify the Commission's characteristic
14 institutional role, and the Commission should
15 undertake a careful, close assessment of the harms
16 posed by drug offenses in order to set appropriate
17 levels, whether or not they connect with the
18 mandatory minimum.

19 If the Commission does de-link offense
20 levels for mandatory minimum, then you should also
21 develop a metric for culpability that accurately
22 assesses the role in the offense.

23

1 You should begin by turning away from
2 quantity as a proxy for culpability. Too often
3 sentences are imposed based on a gross amount that
4 has no relationship whatsoever to the individual's
5 connection to the conspiracy or to that amount of
6 drugs.

7 Again, as Commissioner Castillo's example
8 of the drug mule illustrates, drug quantity is simply
9 a poor substitute for culpability, and this
10 Commission should again give careful thought as to
11 how you might best set up a metric which reasonably
12 and carefully assesses the role in the offense,
13 including quantity as just one of those measures.

14 I am going to close with another personal
15 instance, because as Ms. Stewart acknowledges it is
16 so important that we think about the individuals
17 affected by all of our work.

18 I represent Hamedah Hasan, who is serving
19 now 27 years in federal prison. Hamedah Hasan was a
20 young African American mother fleeing a physically
21 abusive relationship when she was caught up in her
22 cousin's crack-dealing conspiracy.

23

1 Although she never used any violence, did
2 not possess a weapon, had no criminal record, and
3 functioned as little more than an errand person in
4 the operation, she was sentenced to life in prison.

5 This sentence was a combination of
6 mandatory minimum sentence and the then-mandatory
7 guidelines. The sentence had such an impact on Judge
8 Richard Kopf, who was her original sentencing judge,
9 that Judge Kopf took the unprecedented step of
10 writing President Bush and requesting that the
11 President commute Hamedah's sentence.

12 Subsequent judges have all tried, everyone
13 who has attempted to re-sentence Ms. Hasan, has
14 recommended that she be released, or her sentence
15 dramatically reduced. And in each instance,
16 appellate courts have reversed them, finding that
17 either 3582(c), the Commission's 1B1.10 guideline, or
18 other strictures prevent the imposition of a just and
19 fair sentence in her case.

20 We have now reached a point in Ms. Hasan's
21 case -- and I think it illustrates everything we are
22 here today to talk about -- that this combination of

23

1 mandatory minimums and guidelines set in accordance
2 with or higher than the mandatory minimums has
3 resulted in the imposition of an unjust sentence
4 which is now reversible only through the exercise of
5 Presidential commutation power. We are certainly
6 hopeful that President Obama will exercise that power
7 for Ms. Hasan.

8 Thank you very much. I appreciate the
9 chance to speak with you.

10 CHAIR SESSIONS: Okay. Thank you, Mr.
11 Rorty. Mr. Hillier?

12 MR. HILLIER: Thank you, Chairman
13 Sessions, and distinguished members of the United
14 States Sentencing Commission.

15 Good afternoon and thank you for the
16 opportunity to testify on behalf of the Constitution
17 Project. And with that comment, my written notes are
18 corrected. I began there with "good morning," and
19 thank you. But much else of what I have written
20 could probably be simply eliminated at this point.
21 And as this mishmash of the typed and freshly
22 scribbled notes suggests, a lot has been, because

23

1 much of what is in our written testimony has been
2 said again and again by the previous distinguished
3 panelists that you have invited here today, and said
4 much better than I could possibly hope to do.

5 But I do want to start by recognizing the
6 Constitution Project, and how grateful I am that I
7 was invited to be a participant on the Sentencing
8 Initiative, which was called a Blue-Ribbon Committee
9 designed to look into our sentencing guidelines
10 system and make thoughtful recommendations about how
11 it might be improved.

12 The Constitution Project, as you know, is
13 an independent think tank that specializes in
14 bringing diverse groups together to try to solve
15 complex legal solutions. And it would be an
16 understatement to say that this was a diverse group
17 of individuals.

18 It was remarkable in terms of the breadth
19 of its membership, and breath-taking in terms of the
20 range of opinions and ideas that came out of that
21 group. We had then Judge Alito, and Judge Nancy
22 Gertner, Attorney General Meese, myself, and others

23

1 all in the same room hashing out our thoughts about
2 sentencing in the United States.

3 And it was as a result of that mishmash of
4 people, or actually a very thoughtful cobbling
5 together of people involved in the criminal justice
6 system, that we put together the report that we did.
7 And the report is really, as you would expect, a lot
8 of compromises, a lot of collaboration and consensus
9 building. And in some ways, somewhat superficial
10 compared to many of the provocative ideas that have
11 been spun out here this morning and this afternoon.

12 We did, as it relates to this topic,
13 mandatory minimums, have clear consensus and did
14 determine in our own view that mandatory minimum
15 sentences are generally incompatible with the
16 operation of a guideline system, and thus should be
17 enacted in only the most extraordinary circumstances.

18 So you hear words like "generally
19 incompatible," and "except in extraordinary
20 circumstances" suggesting that there was a lot of
21 give-and-take in our conversation.

22 We identified the same problems with
23

1 mandatory minimums that have been discussed in depth
2 here today. Primarily, that mandatory minimums
3 deprive sentencing judges of imposing fair sentences
4 that take into consideration individual circumstances
5 that ought to shape the final result.

6 We found also that mandatory minimums
7 punish too severely too many people. And finally,
8 and I think importantly, we found that mandatory
9 minimums suggest a legislative disregard for you and
10 your opinion, your advice, your guidance in the
11 sentencing function and thereby create an
12 institutional imbalance which is at the heart of many
13 of the difficulties that we face here in the federal
14 sentencing system.

15 As I indicated in my written submission, I
16 think this is really one of the key problems and
17 certainly one that I focused on in the written
18 comments that were submitted to you: That is to say,
19 that the mandatory minimums create an imbalance.

20 We expressed it this way: It was our
21 conclusion that a system that concentrates sentencing
22 authority disproportionately in the hands of one or

23

1 even two institutional sentencing actors may be prone
2 to difficulty.

3 That understatement is the result of
4 consensus-building. But we went on to say:

5 Mandatory minimums in fact are a blunt
6 instrument that is used by government prosecutors to
7 coerce guilty pleas and to effect unjust results when
8 those guilty pleas are not obtained.

9 An even more problem -- well, in addition,
10 as Judge Castillo recognized this morning and again
11 this afternoon, the use of mandatory minimums is
12 erratic from district to district throughout the
13 country, contributing mightily of course to
14 unwarranted disparity and gross unfairness.

15 I am encouraged by the Holder Memo. It is
16 brand-new. It is fresh information I saw for the
17 first time last night. As Commissioner Wroblewski
18 knows, the last two sections of my paper -- or our
19 submission reflect thoughts that I submitted to the
20 Attorney General late last year in hope that he would
21 do exactly what happened with the Holder Memo.

22 So I am happy for that change. Cynics

23

1 say, what good is it going to do if mandatory
2 minimums are still out there as a bludgeon, a blunt
3 instrument for prosecutors, practices are ingrained
4 in some districts, and nothing's going to happen.

5 I disagree. I believe that with this
6 memorandum what we will do and can do is to go to our
7 individual U.S. attorney's offices and try to breathe
8 that document into policies that are extant in the
9 various districts throughout the country -- even the
10 ones that are the most difficult.

11 In that respect, I disagree entirely with
12 Professor Schulhofer's observation -- it's completely
13 wrong -- that the Thornburgh Memo was more severe than
14 the Ashcroft Memo. We all remember when the Ashcroft
15 Memo came out and the effect of that Ashcroft Memo in
16 the trenches. It may be -- I don't know that -- I didn't
17 parse the sentences. What I know is that it was used
18 in my district, and it was used throughout the
19 country to say, hey, we've got to do this. We must.
20 We were encouraged to use mandatory minimums as a
21 plea bargaining chip. And if we don't do it,
22 somebody's looking over our shoulder and we've got to

23

1 report it, and all that stuff.

2 So there was a lot of fear in the trenches
3 because of the Ashcroft Memo; whereas, the Thornburgh
4 Memo had an exception large enough to drive any fair
5 sentence through.

6 So I believe the Holder Memo is a gigantic
7 step forward. It brings us back to a period where
8 prosecutors can, consistent with the principles of
9 federal prosecution, take into account a vast range
10 of circumstances and charging decisions that
11 hopefully will ameliorate some of the harm of
12 mandatory minimums at the front end.

13 And in that respect, I think when a
14 prosecutor makes a decision that a mandatory minimum
15 shouldn't be used because of fairness concerns, we're
16 talking about warranted disparity to the extent that
17 that is at odds with something that happens somewhere
18 else, and even more importantly what we're hopeful of
19 is that we'll drag those other districts back into
20 the realm of fairness as a result of the Holder Memo.

21 When I wrote that paper and provided it to
22 the Attorney General, it was recognizing that the

23

1 legislation that would repeal mandatory minimums will
2 be more difficult to obtain, and that this policy
3 change is a necessary and helpful fix in the interim.

4 I was interested in the testimony of
5 United States Attorney Sally Yates earlier this
6 morning who talked about the practice in Georgia
7 where in Georgia they turn away cases because they're
8 too small and let the states handle them, and the
9 federalists only deal with the larger issues.

10 And this is important because that's not
11 the way it is everywhere. And it's certainly not the
12 way it is in the Western District of Washington where
13 we are theoretically progressive, you know, end-of-
14 the-road, hug-tree kind of people.

15 (Laughter.)

16 MR. HILLIER: In my district, unlike
17 Georgia -- I'm sort of embarrassed to say -- the United
18 States attorney employs special AUSAs whose job it is
19 to review the charges in the state system, all of our
20 major county jails, for gun and drug cases to decide
21 whether there's somebody there who ought to be drug
22 into the federal system where they're going to be

23

1 facing harsher charges.

2 And they've been doing that now for years.

3 And as you might expect, they've run out of what
4 these inexperienced SAUSAs consider to be worthy
5 suspects, and now we're getting pretty much the
6 dredges, low-level drug dealers who by some
7 happenstance may have had a gun with them and may not
8 have. And the next thing they know -- basically
9 they're nuisance defendants in some county or
10 another, and the county prosecutor says, hey, this
11 guy's been here again and again, please take him out
12 for awhile.

13 And the case that is in our materials, one
14 of the cases, is *United States v. Nanquilada*, which
15 is a Western Washington case, and it really I think
16 hits a lot of the points that have been discussed
17 here today and on this panel.

18 That was one of our clients in my office,
19 in the liberal Western District of Washington. He
20 was taken out of the state system because he was
21 going to win there. He had a legitimate search and
22 seizure issue that would have required suppression of

23

1 the evidence because the State of Washington rejects
2 much of the jurisprudence of the Supreme Court as it
3 relates to limiting the Fourth Amendment.

4 So he came into the federal system, and he
5 had guns with him during some drug transaction, so he
6 faced harsh penalties. Nonetheless, we all got
7 together -- we have a process in Western District where
8 sometimes judges will mediate where we can't come to
9 agreement, and everybody decided that a 12-year
10 sentence would be a good sentence for this gentleman.

11 He disagreed. He wanted to fight it, and
12 he did fight it. He decided to fight it and as a
13 result of that the prosecutor upped the ante and
14 stacked 924(c)s and he was facing 60 years of
15 mandatory minimums because he decided -- because he
16 decided he wanted to exercise his constitutional
17 rights.

18 So the penalty that the government decided
19 was appropriate for that exercise of his
20 constitutional right, that crime of exercising his
21 constitutional right, was 48 years.

22 He won in the federal court because the
23

1 district judge found that, even with our more limited
2 Fourth Amendment protections, the evidence should be
3 suppressed. And the reason he did that is because he
4 found, accurately, that the cop was lying. Which is
5 another byproduct of mandatory minimums, and what has
6 been talked about here, that people are being
7 threatened with these penalties and are giving up
8 legitimate claims of both, this is over-punishment,
9 or it's a violation of my constitutional rights, or
10 I'm innocent, because of their fear of the mandatory
11 minimum.

12 In other words, mandatory minimums
13 threaten and actually harm the truth-seeking function
14 of the criminal justice system.

15 The Constitution Project has recommended
16 repeal except in extraordinary circumstances. We
17 didn't offer you our definition of what that meant,
18 or any idea on what that might mean. It wasn't
19 really our role at that point in time.

20 I would submit that drugs never should be
21 a part of that equation, as has been discussed again
22 and again here. It is a single factor that overrides
23

1 many others that are much more relevant. And in fact
2 sometimes drugs can be an unreliable proxy for
3 culpability, as has been demonstrated. Sometimes
4 people are just puffing; there aren't really those
5 drugs out there; sometimes the amount of drugs is a
6 result of what we call "sentencing entrapment" where
7 the police ask for drugs again and again and again,
8 and then there's of course the Pinkerton theory that
9 Professor Schulhofer talked about earlier today.

10 So I would respectfully hope that,
11 consistent with the Constitution Project, that you
12 recognize that mandatory minimums, again recognize
13 that they are not consistent with your system,
14 recommend that they be repealed in the context of
15 drugs at least. That would make a huge -- would have a
16 huge impact, as we all know, on the sentencing system
17 in the United States, given the amount, or the
18 numbers of defendants who are in prison today because
19 of that.

20 I will stop there, with the hope that we
21 have time for some robust questioning and answering.

22 CHAIR SESSIONS: Well let me begin with

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1 some robust questioning. It is a bifurcated robust
2 question -- and it's essentially to define terms.

3 We talk about mandatory minimums, and I
4 think those of us who deal with mandatory minimums on
5 a regular basis think about mandatory minimums in
6 terms of five, and ten, and 20 years, and up to life
7 imprisonment.

8 So much of the comments that we heard
9 today subtlety relate to the severity of the
10 mandatory minimum. And my question is,
11 philosophically, just from a philosophical point of
12 view, when you talk about -- Mr. Rorty, you talk about
13 certainty of punishment. Is there a justification
14 for Congress to say, let us say six months is a
15 mandatory minimum, is there justification to say we
16 really are concerned about certainty of punishment,
17 as opposed to length of punishment, and therefore a
18 mandatory minimum in terms of six months, or three
19 months, or a relatively short period philosophically
20 is justified?

21 And then the second question, the broader
22 question is -- and I don't want to put you in a
23

1 position of having to say that you're going to vacate
2 your position in regard to eliminating mandatory
3 minimums -- but you heard the Department of Justice
4 this morning invite us to engage in discussion about
5 certain mandatory minimums. They didn't identify
6 them. But they basically said that perhaps there
7 were penalties which were too severe. And they
8 invited us to, I suppose, sit down around a table, or
9 in some particular forum, and study those particular
10 mandatory minimums to actually address the level of
11 severity of those penalties.

12 And I'm not asking you to say, give up on
13 your point of eliminating all mandatory minimum
14 penalties, but would you, if you were on the
15 Commission, take up that opportunity to sit down with
16 them and, theoretically, with other stakeholders in
17 the process to review the severity of the penalties
18 that exist? Or would you just say no?

19 MR. RORTY: Everyone may speak to it, but
20 let me address your questions first.

21 As to my philosophical position on the
22 certainty of say consequence as well as punishment,
23

1 because I think that really is the direction of
2 Professor Kennedy's research, it's the certainty that
3 there is some consequence for criminal conduct that
4 matters.

5 And it's important to remember that even
6 sanctions such as probation are a consequence that
7 severely limit people's lives. It need not be a jail
8 or a prison sentence that is deterrent to folks.

9 So, no, I think that your proposal that it
10 might be wise for the Commission or Congress to
11 simply reduce mandatory minimums significantly, even
12 to the level of six months, is inappropriate and I do
13 have a philosophical disagreement with it.

14 CHAIR SESSIONS: Not "my proposal," --

15 MR. RORTY: Your hypothetical.

16 CHAIR SESSIONS: For the purposes of
17 discussion.

18 MR. RORTY: Yes. Any proposal that
19 suggests that is inappropriate for all the reasons
20 we've discussed today, and I discussed in my
21 testimony.

22 There are so many flaws to mandatory
23

1 minimums that, as a philosophical matter, reducing
2 them to lesser levels will not cure those problems.

3 And as to your second question, I mean I
4 certainly think it's always appropriate for the
5 Commission to engage in discussion with the
6 Department and with other stakeholders, but any
7 discussion which begins with the premise that the
8 Commission will back away from its 1991 report and
9 recommend the reduction of mandatory minimums rather
10 than their abolition I think is inappropriate. I
11 mean, certainly I'd like to see them reduced as an
12 incremental step if this Commission feels that it
13 cannot recommend abolition to Congress, but the 1991
14 report was so well founded, its principles remain
15 true and the Commission should adhere to it.

16 CHAIR SESSIONS: So, alternatively, you
17 would not engage in discussions with the Department,
18 or anyone else to reduce the severity of the five-
19 and ten- and 20-year mandatory minimums?

20 MR. RORTY: No, I mean in my own written
21 submission I suggested that as a potential
22 alternative, incremental approach. I think it's

23

1 totally appropriate to sit down and for this
2 Commission to assess appropriate penalties, as it
3 does as its everyday work. And if it needs to do
4 that in the context of mandatory minimums, fine. But
5 I think that the first position should be the one
6 that so many people have articulated here today, that
7 that discussion is unnecessary because you were right
8 in 1991, you've been right all along, and mandatory
9 minimums should be abolished.

10 MR. MAUER: If I could respond briefly, I
11 mean you raise a very interesting philosophical and
12 practical point.

13 It seems to me if we took a certain set of
14 mandatory penalties that currently call for five or ten
15 years and reduce them to let's say six months or so, it
16 probably would eliminate a very substantial portion
17 of the problem in that if you incorporate that in an
18 advisory guideline system chances are the bulk of
19 defendants falling in that category under any
20 sentencing regime would get at least six months, and
21 therefore there's no sort of additional penalty
22 that's being attached.

23

1 At the same time, as we've seen in the
2 history of mandatory sentencing, there are always
3 cases that we can imagine whenever we set very rigid
4 structures, and maybe it is only one in 100 rather than
5 one in five that would be problematic, but it would be
6 very nice to leave open some possibility to deal with
7 that one in 100 cases that any person on the street
8 would think is problematic.

9 On the second issue, I think those of us
10 on the panel, as well as many of us in the room,
11 confront that issue from a somewhat different
12 perspective than you have. And on the very subject
13 of the crack cocaine panel days, I think it's fair to
14 say that many of us in the room believe, as the
15 Commission has documented for a long time, that the
16 penalties should be equalized at the level of powder
17 cocaine. And yet many of us are very vigorously
18 trying to work to have the sentencing quantity
19 reduction reduced from 100-to-1 to 18-to-1, and we
20 view that as a compromise.

21 We view that as not providing full
22 justice, but at the same time we view it as a very

23

1 significant step that needs to be taken. And we
2 won't rest after that's adopted, as well.

3 I personally don't have any problem with
4 your negotiating and working with the Department. I
5 think you can come up, and I hope you will, with some
6 very broad statements. At the same time, the
7 political world we live in is one of compromise, and
8 if we can achieve some short-term compromise that
9 doesn't affect our long-term objectives, that is all
10 to the good, it seems to me.

11 CHAIR SESSIONS: Do others agree with
12 that?

13 MS. STEWART: Well, yes, I suppose so. I
14 mean, I've been doing this a very long time, almost
15 19 years, and I know that the perfect is the enemy of
16 the good. I do believe that the Commission should --

17 CHAIR SESSIONS: I've heard that
18 expression before.

19 MS. STEWART: Yes, a little bit famous.

20 I do believe that the Commission should
21 ask and urge Congress to repeal all mandatory
22 minimums. However, the likelihood of that is

23

1 probably low. And I do feel, because FARM has over
2 20,000 members whose lives are affected by these
3 laws, that we are always interested in seeing what we
4 can do sooner rather than later to ensure that no
5 more people -- fewer people suffer in the future, or
6 those who are already there have their sentences
7 shortened.

8 So it is not my first choice, but I
9 definitely think you should talk to the Justice
10 Department. I see no harm in that. I wouldn't, you
11 know, make a devil's deal with them, but I think that
12 it's a good idea to talk to them.

13 MR. HILLIER: I always believe that
14 talking is a good thing. I don't agree that that is
15 a good approach.

16 VICE CHAIR CARR: That's why we have these
17 lights.

18 (Laughter.)

19 MR. HILLIER: Beg your pardon?

20 VICE CHAIR CARR: That's why we have these
21 lights.

22 (Laughter.)

23

1 MR. HILLIER: You should have one of those
2 hatch things where you can just get rid of me
3 entirely.

4 (Laughter.)

5 MR. HILLIER: But I think our idea of an
6 extraordinary case isn't embraced by any of the
7 mandatory minimums that are on the books today. All
8 of them, in my view, should be abolished. I think it
9 was Michael Nachmanoff who mentioned earlier today
10 that, sort of ironically almost, the most serious
11 crimes we have, like murder, don't have mandatory
12 minimums, but we know judges aren't going to sentence
13 those people to probation. If it does happen, then
14 it's going to be done in an open way where the
15 rationale is going to be laid out there, and it's
16 probably going to be agreed to by everybody. And if
17 it's not, it's going to be appealed.

18 But so I think the mandatory minimums we
19 seem to -- I haven't read all 170-plus, but the ones we
20 experience day in and day out in my view should be
21 repealed.

22 CHAIR SESSIONS: Well thank you for your

23

1 patience. I had to ask that question. Go ahead.

2 COMMISSIONER HINOJOSA: This question is
3 to Mr. Hillier. When you spoke about General
4 Ashcroft's Memo --

5 MR. HILLIER: Right.

6 COMMISSIONER HINOJOSA: -- I think you may
7 have been thinking about the one that was required of
8 him by statute by the PROTECT Act that he had to
9 within six months set up a written policy as to
10 reporting to Washington with regards to what was
11 going on in the field basically on the part of the
12 courts with regards to sentencing.

13 And that's the one that he came up with
14 with regards to reporting requirements, not
15 individual offices of the U.S. attorneys, and frankly
16 I think there was a big sigh of relief when he
17 finally came up with it because people felt that he
18 had taken the statute and done the best that could be
19 done with regards to what was required of him by the
20 statute.

21 In reviewing this Holder Memorandum,
22 there's a lot of quoting of present manual policies

23

1 that are already in effect. And most of it actually
2 cites the present manual policies that are already in
3 effect. So I don't see much change in that, other
4 than now there is a requirement that you actually
5 have to visit with a supervisor within that office in
6 order to get approval with regards to anything that
7 an AUSA does. And then there does have to be a
8 reporting to Washington with regards to this.

9 One of the things that it does also is to
10 say that you are no longer bound to argue the
11 guideline sentence, and that's it. And that
12 generally that's what you should do, but you have the
13 discretion on an individual case.

14 And what I suspect I will see, based on
15 the facial expressions that I've seen in the
16 courtroom in the past from the U.S. attorneys, is
17 that now more of them will feel that they can
18 actually ask for higher than guideline sentences in
19 certain cases where they have felt that they've been
20 constrained with regards to have to argue for a
21 guideline sentence.

22 Do you think that's a possibility as to
23

1 what may come as a result of this memo?

2 MR. HILLIER: Well, I hope not, but I
3 don't know. It's not going to happen, I trust, in
4 our district where that's never happened
5 historically, and I see no evidence that --

6 COMMISSIONER HINOJOSA: Yours is a
7 slightly different district than some other
8 districts.

9 MR. HILLIER: I understand that. And, you
10 know, all of these problems tend to be regional at
11 some level because of the discretion that the
12 prosecutors enjoy.

13 I would say, Your Honor, just to go back a
14 bit, I tend to disagree with your analysis of the
15 Ashcroft Memo. My recollection of this so-called
16 legislative history giving rise to the PROTECT Act is
17 that it was something that was championed by a couple
18 of DOJ lawyers, and --

19 COMMISSIONER HINOJOSA: It was
20 congressionally passed, and it was giving a
21 direction, a requirement under the statute, and he
22 had to come up with a policy of reporting. And when

23

1 it was done, the sense of the courts and others in
2 the system was this is about the best that could be
3 done based on the legislation as it was written.

4 So I think it's unfair to characterize his
5 memo as setting up on his own some kind of reporting
6 requirement.

7 MR. HILLIER: Well, you know, again I
8 disagree. I think the reporting requirement was
9 initiated in the proposed legislation which was
10 drafted by the DOJ, in essence.

11 COMMISSIONER HINOJOSA: Well I don't know
12 that any of us really know that that's true. It was
13 passed by Congress.

14 MR. HILLIER: Right, it was passed by
15 Congress. And its passage, or potential passage, in
16 its initial iteration was protested mightily by
17 even --

18 COMMISSIONER HINOJOSA: My only point is I
19 don't think that there should be misrepresentations
20 as to what the Ashcroft Memo did. It was not his
21 sentencing memo that had the reporting requirements;
22 it was his response to a statutory requirement.

23

1 And whether they had anything to do, or
2 the Justice Department had anything to do with the
3 statute, it was the statute and he was required by
4 law to do that. And I do recall that when it was
5 done the view of many in the system was that was the
6 best that could be done based on the way the statute
7 was written.

8 MR. HILLIER: Well, Your Honor, I just
9 respectfully have a different take on all of that,
10 and I'm certainly not misrepresenting anything by
11 offering you my observations. I appreciate what you
12 have to say.

13 (Pause.)

14 COMMISSIONER HINOJOSA: I didn't mean for
15 us all to get quiet.

16 (Laughter.)

17 CHAIR SESSIONS: Well actually I got
18 caught pouring water.

19 (Laughter.)

20 CHAIR SESSIONS: Commissioner Wroblewski?

21 COMMISSIONER WROBLEWSKI: Thank you very
22 much.

23

1 First of all let me thank all of you for
2 being here. I've known many of you, most of you, for
3 a long, long time. It reminds me that my work on
4 policy, I was a defense lawyer and a prosecutor
5 first, but my work on policy was forged on the issue
6 of crack/power cocaine.

7 And I remember in this very room, about
8 now 15 years ago, Judge Conaboy and three other
9 commissioners voting to completely eliminate the
10 disparity. And of course I've lived through, as you
11 all have, the subsequent 15 years and, frankly,
12 80,000 defendants being sentenced under the law as it
13 existed in 1994 and as it existed all since.

14 And that has had an effect on me and my
15 perspective on how to move forward. And so from all
16 of that, I am intrigued by projects like the
17 Constitution Project that brings together people of
18 different points of view and tries to come up with
19 some consensus.

20 Because I think especially in criminal
21 justice policy and legislation at the federal level,
22 it seems to me, or at least one of the takeaways I

23

1 have from this last 15 years, is that consensus is
2 pretty important. And even unanimity in the Senate
3 may not be enough.

4 So that's my takeaway. And it brings me
5 back to the Constitution Project again. I read
6 through the Project back in 2003 or 2004 when it was
7 first, and I pulled it out again, and of course the
8 Project has a vision of guidelines that are simpler
9 but that are presumptive that has much stronger
10 appellate review, meaningful appellate review --
11 something different from the current advisory
12 guideline system.

13 And frankly what's distressed me most over
14 the past couple of years is that, as the Supreme
15 Court has moved us from a mandatory system to an
16 advisory system, the consensus has disappeared. And
17 a lot of people who signed on to this consensus have
18 now run away from it. And so consensus is now
19 elusive.

20 So I am curious whether you all could
21 comment just a little bit on whether we should try to
22 forge consensus; and, if consensus means there may be

23

1 either some mandatory minimums or mandatory
2 guidelines that you all don't agree with, whether
3 that's something worth pursuing. And whether, also,
4 I'm getting the wrong lesson from the last 15 years.
5 Am I just getting it wrong, and we should not go for
6 consensus but go for some other strategy?

7 MS. STEWART: Well since I was here in the
8 room with you 15 years ago when Chairman Conaboy led
9 the Commission on that vote to equalize crack and
10 power cocaine, I'll take a first stab at it.

11 I don't know that consensus -- I'm not sure
12 who you're trying to get. The right and the left, I
13 guess? I mean, you say the Senate's unanimity
14 doesn't guarantee it in the House; that's correct.
15 But that was bipartisan, unanimous consent in the
16 Senate.

17 I am not sure we ever get consensus on
18 everything we want; and that it may be unrealistic to
19 wait for it. My takeaway from the past 15 years
20 isn't that we need to wait until we get consensus;
21 it's that we need to do what's right. And, that if
22 there are people like this body who are the
23

1 sentencing experts and are supposed to tell Congress
2 and tell the public what the right thing to do is,
3 that you all are entrusted with that role and that
4 responsibility. And I just urge you to do it.

5 And I think that from 15 years ago, what I
6 saw is that the Commission was slapped down and a
7 little bit cowed by what Congress did, and hasn't
8 been willing to come back with quite the strength of
9 consciousness and certainty that what you all are
10 doing is right. And I realize the politics of it,
11 believe me, but I think that a lot can be done
12 without full consensus that we have everybody checked
13 and signed off. We're never going to get that.

14 So I look to this body to do the right
15 thing because that's what you are assigned to do
16 here, and I don't think we have to wait until
17 everyone has agreed.

18 MR. HILLIER: I think it's important to
19 recognize that back then we had both a mandatory
20 sentencing guideline system and mandatory minimum.
21 So all of the players in this room were looking for
22 ways to ameliorate what we saw to be both its

23

1 complexity and severity, the combination of those
2 matters.

3 So consensus on trying to do that, as was
4 the case with the Constitution Project when we
5 started, was perhaps easier to find because of that
6 combination. With the advent of the advisory
7 guideline system, there's a strong belief among many
8 of the players -- myself included of course, and as I
9 read the testimony from your regional hearings all
10 the district judges who testified before you -- that
11 this system is working, and we should allow it to
12 play out.

13 So the idea of all of us now revisiting,
14 bringing in -- I don't know the difference between a
15 presumptive guideline system and a mandatory
16 guideline system, I think they're pretty similar -- is
17 something we don't want to have happen now. We'd
18 prefer to see if we can improve upon what everybody
19 agrees is a system that's working rather well.

20 MR. MAUER: I guess I would just add,
21 quickly, it seems to me it's partly which arena we're
22 talking about. When it's developing policy in
23

1 Congress, for example, if things are not done in a
2 bipartisan way I don't think anything is going to go
3 very far these days. And that's been the case for a
4 long time. And so that's been very important.

5 I think it behooves all of us to make sure
6 we try to forge whatever consensus we can on that,
7 even though it may be viewed as compromise sometimes.
8 We need to do that.

9 When it comes to federal sentencing in
10 particular in the post-*Booker* period, it seems to me
11 it is still relatively early in that new era. I
12 mean, we have some data and we have some anecdotal
13 experience about what's going on. I don't know that
14 we know all the range of experience yet. To the
15 extent that there are more departures, I don't know
16 that we have -- I think each of us has our own sense of
17 what's going on there, but I don't know that we have
18 as thorough an analysis as we might have in a few
19 years or so.

20 And it seems to me we do know that there
21 certainly haven't been any what we might think of as
22 very extreme cases, or consistently extreme cases.

23

1 You know, we heard examples this morning, well,
2 shouldn't we have mandatorics for treason and using
3 nuclear weapons?

4 Well, that's not very significant, or day-
5 to-day issues, but the day-to-day cases go through
6 the courts and, yes, some judges are viewed as more
7 liberal or conservative than others, but, you know,
8 it seems to me it's reasonably defensible on all
9 parts of it. And as we get more data and more
10 understanding it will tell us if we need to jiggle
11 with the structure a little bit within what the Court
12 says is permissible.

13 I don't think it's a major problem at the
14 moment.

15 MR. RORTY: It's a bit hard to know how to
16 answer your question when you talk about consensus
17 because, as Mr. Mauer says, consensus between whom
18 about what, and in what context is very important.

19 If you mean whether or not this Commission
20 should take steps without the agreement of Congress,
21 or attempt to move Congress through discussion over
22 time, unfortunately I think the 20 years of crack

23

1 cocaine advocacy on the part of the Commission and
2 others is a hard lesson in what happens when you try
3 to build consensus.

4 The modest bill we have before us and hope
5 will pass, but aren't sure will pass, is a harsh
6 lesson in that. Certainly, as Mr. Hillier said,
7 conversation is good. We should all be engaging with
8 decision makers about how to reach common ground on
9 these issues.

10 But this takes me back to an issue I had
11 with Professor Schulhofer, I believe who, in talking
12 about de-linking, said, I think I heard him say that
13 this Commission should defer to Congress. And if
14 Congress has determined that these mandatory minimum
15 sentences are appropriate, I forget his metaphor, but
16 the Commission shouldn't step away from or thumb its
17 nose at Congress.

18 On the contrary. This is the expert body
19 created by Congress to develop knowledge and
20 expertise in sentencing, and it should lead and not
21 wait for consensus of that type.

22 CHAIR SESSIONS: Any other questions?

23

1 (No response.)

2 CHAIR SESSIONS: Well, thank you very much
3 for coming. This was a fascinating panel. We
4 appreciate very much your contribution.

5 And I also want to thank, by the way, the
6 staff who put together a full day of excellent
7 panels. Those of us who were here the whole day can
8 testify that these panels have been absolutely
9 terrific.

10 So thank you, staff, for doing all of this
11 hard work, and we'll call it a day.

12 (Whereupon, at 5:18 p.m., Thursday, May
13 27, 2010, the hearing of the United States Sentencing
14 Committee was adjourned.)

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