UNITED STATES SENTENCING COMMISSION

Public Hearing

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Thurgood Marshall Federal Judiciary Building

Mecham Conference Center, Ground Level

One Columbus Circle, N.E.

Washington, D.C. 20002-8002

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JONATHAN J. WROBLEWSKI, Ex-Officio Commissioner
PANEL I: View from the Executive Branch

SALLY QUILLIAN YATES
United States Attorney, Northern District of Georgia
United States Department of Justice

PANEL II: View from Sentencing Practitioners

MICHAEL S. NACHMANOFF, Federal Public Defender
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PANEL III: VIEW FROM LAW ENFORCEMENT

JILES H. SHIP, Second Vice President
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DAVID HILLER, National Vice President
Fraternal Order of Police,
Grosse Point Park, Michigan

MAXWELL JACKSON, Harrisville City Utah
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PANEL IV: VIEW FROM ACADEMIA

LAURIE L. LEVENSON, Professor of Law
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PANEL V:  VIEW FROM PUBLIC POLICY ANALYSTS

CORY ANDREWS, Senior Litigator
Washington Legal Foundation, Washington, D.C.

DAVID B. MUHLHAUSEN, Senior Policy Analyst
The Heritage Foundation, Washington, D.C.

ERIK LUNA, Adjunct Scholar
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PANEL VI:  VIEW FROM ADVOCACY GROUPS

MARC MAUER, Executive Director,
The Sentencing Project, Washington, D.C.

JULIE STEWART, President
Families Against Mandatory Minimums, Washington, D.C.

JAY RORTY, Director of the Drug Law Reform Project,
American Civil Liberties Union, Santa Cruz, CA

THOMAS HILLIER II, Member of the
Sentencing Initiative's Blue-Ribbon Committee
The Constitution Project, Seattle, Washington
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
U.S.C. [3553(f)].

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

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

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

Second, an assessment of the effect of mandatory minimum sentencing provisions under federal law, on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing.
Third, an assessment of the impact of mandatory minimum sentencing provisions on the federal prison population.

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

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

Next, the piece of legislation calls for a detailed empirical research study of the effect of mandatory minimum penalties under federal law, and a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy.
The report may also include any other information that the Commission determines would contribute to a thorough assessment of mandatory minimum provisions under federal law.

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

The Commission has also conducted a survey of all federal district court judges with active sentencing dockets to gain further insight into the federal sentencing process and the judges' views on the current system. That survey was extraordinarily extensive, and in fact close to 70 percent of all of the judges of the United States actually complied and filled out that lengthy survey. And in fact it
represents well in excess of 80 percent of all of the sentences that were imposed by judges across the country.

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

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

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

VICE CHAIR CASTILLO: Who's counting?

CHAIR SESSIONS: But who's counting.

(Laughter.)

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

Next, to my left, is Will Carr who's
served as vice chair of the Commission since December
of 2008. He was an assistant U.S. attorney in the
Eastern District of Pennsylvania from 1981 until his
premature retirement in 2004.

Next is Ketanji Brown Jackson, to my left.

She became vice chair of the Commission in February
of this year. Previously she was a litigator at
Morrison & Foerster, was an assistant federal
defender in the Appellate Division of the Office of
Federal Defender in the District of Columbia.

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

COMMISSIONER HINOJOSA: To your left.

(Laughter.)

CHAIR SESSIONS: I'm sorry, to my left,

I'm sorry, to my left.

COMMISSIONER HINOJOSA: Not politically,
either.

(Laughter.)

CHAIR SESSIONS: -- is Judge Ricardo

Hinojosa. Judge Hinojosa served as chair of this
Commission, and subsequently acting chair from 2004
until 2009. He is the chief judge of the U.S. District Court for the Southern District of Texas.

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

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

And now, Jonathan Wroblewski is the ex-officio member of the Commission representing the Attorney General of the United States. Currently he Serves [as] the director of the Office of Policy and
Legislation in the Criminal Division of the Department of Justice.

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

(No response.)

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

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

She served as chief of the Fraud and Public Corruption Section of the office where she
supervised the prosecution of the office's white-collar matters from 1994 until 2002.

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

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

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

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

I want to thank you for the opportunity to testify on behalf of the Obama administration, the Department of Justice, and federal prosecutors across the country on the issue of mandatory minimum

sentencing.

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

I now find myself as a newly minted U.S. attorney in a district facing a number of significant law enforcement challenges in both the white collar area, the violent crime area, and in the drug arena. Just to hit a few of those highlights for you to give you some idea of the diversity of challenges that we face, in the Northern District of Georgia we have had more bank failures than any other district in the country.

In the Northern District of Georgia, we are the number one district that exports illegal firearms. In other words, more illegal firearms come from the Northern District of Georgia than any other
district in the country.

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

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

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

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

We look forward to working with you over the months to come on a comprehensive assessment of
mandatory minimum sentencing laws. We hope that this assessment will look not only at the data surrounding mandatory minimum sentencing but also their goal and their place in the goals of achieving sentencing and improving public safety, their evolving role in the post-Booker world, and their severity levels, any racial and ethnic disparities that result from these laws, and the impact of mandatory minimum sentencing statutes on the federal prison population.

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

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

The Attorney General's charge to the
working group is to review federal sentencing and corrections policy in light of the series of constitutional rulings issued by the Supreme Court in Booker and other cases, as well as the unsustainable growth of the federal inmate population, and the criticism of federal sentencing policy by many judges, academics, members of Congress, and practicing attorneys.

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

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

In studying the structure of federal sentencing, this includes mandatory minimum sentencing statutes, the federal cocaine sentencing...
policy and other perceived racial and ethnic disparities in sentencing, prisoner re-entry, alternatives to incarceration, and the Department's own charging and sentencing policy, and much more.

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

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

The Group visited several federal prisons. They spoke with incarcerated men and women and attended the Bureau of Prisons’s residential drug treatment program. They also attended a Federal Prison Industries work site, and other prison programming.
The results of the working group are beginning to guide the Department's policies regarding sentencing. To begin, the administration has been working hard with members of Congress to see the enactment this year of legislation to address the current disparity in sentencing between crack and powder cocaine offenses, including the existing 100-to-1 ratio.

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

We are also working on new ways to examine racial and ethnic disparities in sentencing beyond the federal cocaine sentencing policy to determine if the disparities are the result of a race-neutral application of statutes and charging decisions and are otherwise justified.
Finally, we are working on initiatives to promote more effective prisoner re-entry. These and other measures will be announced by the Department shortly.

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

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

Sentencing discretion is constrained by the Constitution, by maximum penalties set by Congress and state legislatures, and in many circumstances by minimum penalties set by legislatures, and often by minimum and maximum presumptive sentences set by a sentencing commission.

As Justice Kennedy recently wrote,
"Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society. The case-by-case approach to sentencing must, however, be confined by some boundaries."

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

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

Before the 1980s, the number of mandatory minimum sentencing laws in the federal criminal justice system was very small. Beginning as early as the 1960s, though, a movement to establish more mandatory minimum penalties began to sweep across the
country as a result of an historic increase in crime and illegal drug use in the United States.

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

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

The Act also called for the development and implementation of sentencing guidelines that
would carry the force of law. It also called for the abolition of parole, the creation of truth-in-sentencing practices, and the enactment of severe mandatory minimum sentencing laws for certain serious crimes -- primarily drug and firearms offenses, and for recidivist offenders.

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

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

Mandatory sentencing laws increase
deterrence and cooperation by those involved in
crime. It is not surprising then that every
administration and Congress since 1984 has supported,
in one way or another, determinate sentencing and
mandatory minimum sentencing statutes for serious
crimes.

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

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

The federal prison population, which was
about 25,000 at the time of the enactment of the
Sentencing Reform Act, is now over 210,000 and it
continues to grow. Much of that growth is the result
of long mandatory sentences for drug trafficking
offenders. While these and other mandatory sentences have been important factors in bringing down crime rates, we also believe that there are real and significant excesses in terms of the imprisonment being meted out for some offenders under the existing mandatory sentencing laws, especially for some nonviolent offenders.

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

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

We are concerned by, and continue to evaluate, research and data that indicate that sentencing practices, particularly those in lengthier incarcerations, are correlated with the demographics
of the offenders.

Further, with more and more sentences becoming unhinged from the sentencing guidelines, undue leniency has become common for certain offenders convicted of certain types of crimes. For example, some white collar offenses, including high-loss white collar offenses, and some child exploitation offenses, for both of these the sentences have become increasingly inconsistent.

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

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

We support the limited and judicious use
of mandatory minimum sentencing statutes, and a re-
examination of existing mandatories and their
severity levels.

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

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

Rather, acknowledging our current advisory
guideline system, and recognizing that mandatory
minimum penalties provide critical tools for
combatting serious crimes, we support mandatory
minimum sentencing statutes for certain serious

As we have stated before, since Booker we
are seeing decreasing uniformity and increasing
disparity in the imposition of federal sentences.
Because predictability in sentencing has been
diminished, the deterrent value of federal sentencing
similarly is beginning to erode.

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

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

However, in our review of sentencing over
the last year we have found little support from
Congress or from the federal judiciary for
reinstating the presumptive nature of sentencing
guidelines.
In the absence of such a change to the federal sentencing structure that might return presumptive sentencing guidelines, an overhaul that we are not now recommending, we believe that mandatory minimum sentencing statutes must go hand-in-hand with advisory sentencing guidelines.

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

While we recognize that mandatory minimum sentences are a critical tool in removing dangerous offenders from society, and in gaining cooperation from members of violent street gangs and drug distribution networks, we simultaneously recognize that mandatory minimum penalties should be used judiciously and only for serious offenses, and should
be set at severity levels that are not excessive.

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

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

We also believe that the Commission should identify crimes where there are excessive sentencing disparities, and where a new mandatory minimum sentence would significantly address this disparity and assist a law enforcement program and public safety.
We believe that no new mandatory minimums should be proposed unless there is substantial evidence that such a minimum would rectify a genuine problem with the imposition of sentences below the advisory guidelines; that it would not have an unwarranted adverse effect on any racial or ethnic group; would not substantially exacerbate prison crowding.

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

We believe the Commission should continue to review the current sentencing structure that it began with its regional hearings last year. We think it should explore various options for sentencing reform. At the same time, though, we see little support in Congress or across the federal criminal justice system for a structural change of federal sentencing.
In light of this, we support the continued but judicious use of mandatory minimum sentencing statutes. We urge the Commission to engage in a review of existing mandatory minimums to identify those statutes that are unnecessarily severe, and also to identify crimes for which the goals of sentencing and public safety suggest a new statutory minimum term may be appropriate.

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

Thank you.

CHAIR SESSIONS: Thank you, Ms. Yates.

Let me open it up for questions.

Judge Castillo.

VICE CHAIR CASTILLO: As I understand your testimony, the Department of Justice is willing to agree that some change is necessary in terms of the current use of mandatory minimums, but at this point you are not willing to point out where that might be?
It really comes down to a definition of what is a serious crime, or what is a judicious use of mandatory minimums?

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

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

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

MS. YATES: Well certainly I think it's the position of the Department that this body, as the expert on sentencing law, and with the opportunity that you have of gathering data, is really the best body to put forth the specific statutes that should
be revised. That doesn't mean, though, that we're not willing to voice our opinion on that. We think that this is really the beginning of that process, though, and that we would want to work with you as we go through really a statute-by-statute examination of the existing mandatory minimums, to take a look at who are the offenders that are being impacted by these mandatory minimums.

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

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

For example, in the D.C. Circuit they're
used about 45 percent of the time. In the Fourth
Circuit, right around 45 percent of the time. But
then when you go to some of our larger circuits, the
Fifth, and the Fourth, it goes all the way down to
more, lesser use, or I should say the Fourth and the
D.C. Circuit it's up there like 45 percent; but when
you look at the Fifth and the Ninth, it's right
around 20 percent.

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

Should we be concerned about that?

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

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

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

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

I know, as I was mentioning earlier in my
testimony, in our district we are overrun with law
enforcement challenges. We have about 75 prosecutors
to handle a district of about 6.5 million people.

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

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

For example, in our district because we are now the East Coast hub for the Mexican cartels, we are not doing those small drug cases anymore. We're not doing really five-kilo, ten-kilo cases. The majority of our drug cases in our district, certainly with some exceptions, but the majority are in the hundreds of kilos. They are major organizations.
And so when you're making decisions about -- when you're making charging decisions, it may be that you don't pursue a mandatory minimum because if you do that that's going to be a trial, and you ultimately then end up taking a plea for example to a case to something other than a mandatory minimum because you simply don't have the resources to go forward on the mandatory minimums.

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

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

Now if you were to compare the percentage of drug defendants compared to the overall population in our district for Hispanics, you would see a gross
disparity in those numbers. But the reason for our numbers of Hispanic defendants is because those are our major offenders in our district. Those are the cases that are our highest priority.

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

VICE CHAIR CASTILLO: Thank you.

CHAIR SESSIONS: Commissioner Carr.

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

Yesterday we received a copy of the Attorney General's new charging and sentencing
memorandum, and one question I have is -- because clearly it is giving more flexibility to assistant U.S. attorneys' offices and what their policies are, although also setting forth the fact that through supervisory review the policies will be consistent within the district -- but do you know whether that new policy came in part from the fact that a lot of U.S. attorneys' offices were not in fact doing what ours did, and that they were not always following the memos that had been set out before?

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

One, you know we are now in a post-Booker world. Sentencing is different. And for the last five years, where we were operating under a policy that one could say required us to advocate for a guidelines' sentence in all but the most exceptional circumstances, we were essentially the only ones in the courtroom who were still acting like the
guidelines were mandatory. That had a real negative impact I think on the Department's ability to have a voice in sentencing. We essentially in some cases ended up being out of the conversation in sentencing because we would come in and some would say, somewhat robotically say, the government recommends a guidelines sentence. And then the conversation would proceed between the judge and the defense attorney as they went through the 3553 factors and considered various factors that might warrant a variance.

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

VICE CHAIR CARR: But it also seems like
there would be more flexibility in the determination
not to bring a mandatory minimum.

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

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

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

    So, yes, there is some increased
flexibility here. You know, I might say though that
even in the past with the Ashcroft Memo, the
definition of what is an extraordinary circumstance
that would warrant a deviation from the Ashcroft Memo
was by itself open to somewhat widely varying
interpretation. So it's not as though we had perfect
consistency under the Ashcroft Memo as well.

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

MS. YATES: That's right.

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

MS. YATES: It's a little bit of both. As
I mentioned, it reflects what we find in our
district. Certainly powder cocaine is huge in our
district. We have other drugs. There's heroin and
certainly marijuana, and some meth, but again we're
the hub for powder cocaine. It comes up from Mexico through Texas, and then comes to Atlanta and is kept there for distribution along the East Coast.

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

CHAIR SESSIONS: Commissioner Howell.

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

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

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

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

I mean, I looked at Georgia specifically and, while every Georgia district has defendants eligible for the 851 enhancement, none were filed in the Middle District of Georgia. Some were filed in your districts. Some were filed in the other districts, but none in the Middle District of
Georgia. Which raises, you know, in terms of our preliminary data analysis, just on the 851 enhancement, that there is totally inconsistent application of that particular sentencing enhancement that can double sentences in certain cases.

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

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

That's one area of questions. And then I
have another area of questions about the severity of
mandatory minimums, but I'll leave you to answer
that, first.

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

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

You know one of the problems with the
enhancement under 851, and one of the things that we
think that the Commission should study, is the fact
that a wide variety of offenses and conduct will qualify as a prior offense for the 851 enhancement. And so you may have a street-level drug dealer involved in a hand-to-hand, in a hand-to-hand transaction that has a prior offense, and you may have a drug kingpin that has a prior offense, and they both count. In the past I know in our district we have tried at times to look beneath the actual conviction and to see what the circumstances of that conviction were. And I think what the Holder Memo is counseling now is that you can look at specific circumstances. I think that this is an area again that the Commission should study, as well. When we say we think there are excesses, certainly one of the areas where there has been criticism that would be a fruitful area for the Commission to examine would be the 851 enhancements, and the doubling of penalties for one prior, or then for two priors.

COMMISSIONER HOWELL: But is this an area that the Department is also looking at to give more specific guidance to U.S. attorneys, that if you have
a less serious drug prior that should not prompt filing of an 851 notice?

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

MS. YATES: Well I think that the Attorney General memo is the starting point, again, not necessarily the ending point on this as well. And while right now the memo does not provide more specific guidance for the filing of 851s or any other sentencing enhancement beyond the general guidance it's given, which is you should ordinarily charge and pursue the most significant offense, which would include the enhancements, I think certainly as we go
forward and see how this practice plays out that it may very well be that additional guidance is appropriate.

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

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

Based on our preliminary data analysis, should we expand the safety valve to cover -- to make eligible not just defendants in Criminal History Category I, but expand that to Criminal History Category II and III? We would, based on our 2009 data set, cover about an additional 2500 defendants who might meet the other criteria for the safety valve as well.
Of those defendants, the vast majority have criminal history categories in II and III based on prior convictions that did not warrant a three-point increase, meaning their prior convictions were not ones that had imprisonment of more than a year and a month. Meaning that their prior convictions weren't probably all that serious.

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

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

The Department is currently examining what you're talking about right now, at least through Criminal History Category II. And I think, while they have not completed the study on this, it would
be important that we really get a handle on precisely who is in this category of offenders that we would be extending safety valve for. But it is certainly something that the Department is open to and think that the Commission should consider and continue to look at, as well, as to whether safety valves should be expanded to Criminal History Category II. We haven't talked about III, but that doesn't mean we won't.

CHAIR SESSIONS: Okay. Commissioner Friedrich?

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

As I understand DOJ's position is that you don't support mandatory minimum sentences -- any new mandatory minimum sentences unless there is substantial evidence that mandatory minimum would rectify a problem with sentences being imposed substantially below the guidelines.
And in your testimony you highlighted two areas in particular. One being high-loss white collar offenses; another being some child exploitation offenses, which you described as increasingly inconsistent and unhinged from the guidelines.

MS. YATES: Right.

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

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

And, you know, those are very significant
cases that have a significant impact on the district.
And I worry that we are devolving into sort of a two
systems of justice: one for one category or
socioeconomic group of offenders; and another for
another socioeconomic group.

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

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

Well, that's an area where, for deterrence
purposes and for also recognizing the importance and
severity of that crime, we believe that it may be
important for there to be a modest mandatory minimum.

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

CHAIR SESSIONS: Okay. Judge Hinojosa.

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

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

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

As you know, there's about 170 mandatory
minimums. Most of them don't get used. Ninety percent of the mandatory minimums used in the courtroom are drug trafficking and firearms offenses. And then there's a group of the others that make about the ten percent.

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

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

It sounds nice to say, well, we support them. We support them under serious cases, and we don't necessarily approve of large mandatory minimums as far as the years. But without an expression from
the Department, what does Congress do?

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

MS. YATES: Well --

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

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

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

COMMISSIONER HINOJOSA: But isn't that
what the working group should be doing, also, so that
you could make a recommendation to Congress, the
working groups within the Department? With your
experience -- and, you know, I empathize with your
district, just like our district on the border, with
the kind of cases that we have.

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

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

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

MS. YATES: Absolutely none. And that is
what -- I mean, I was stunned to find out there were
170 minimum mandatories. You know, I recognize
that -- and the Commission certainly recognizes that the vast majority are in the area of drugs and guns.

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

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

Now I will tell you that I'll highlight some of the statutes that I think deserve some particular examination. This does not say of course that it is the Department's view that this particular mandatory minimum should be changed, but certainly it is well known that there are criticisms and concerns about the stacking of 924(c)s, particularly in a
scenario where you have an individual who is charged
with multiple 924(c) counts in the same indictment.

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

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

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

Likewise in the area of armed career
criminals. In our district we have a situation
where, because of the overcrowding in the state court
system there, it is not unusual at all for a
defendant to be charged and convicted and plead
guilty of drug trafficking and never serve a day in
prison.

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

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

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

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

(Laughter.)

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

MS. YATES: The term "short straw" comes
to mind right now.
COMMISSIONER HINOJOSA: The other point that has been a discussion for a long time about lengthy sentences and what can be done once they've been imposed has been 3582(c)(1) with regards to the motions by the Bureau of Prisons made to the court after someone's served the length of their sentence under exceptional circumstances for consideration of a reduction of a sentence.

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

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

MS. YATES: I don't know the answer to that, I'm sorry. I'll be glad to get an answer for you.
COMMISSIONER HINOJOSA: Thank you.

CHAIR SESSIONS: Commissioner Jackson.

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

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

MS. YATES: I'm not aware of the Department having a central database for example that would provide that information. I know that going forward, for example, under the Holder Memo there will be some mechanism within each U.S. attorney's office to be able to review that data based on the pros memos that will require now a discussion of not just the charges that are proposed, but what the charging options are.
So for example if a prosecutor were recommending that an 851 not be charged, that would be memorialized now in a pros memo. In the past, though, various offices had different practices as to how they memorialized those decisions, and what level of supervisory review, if any, was required for those.

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

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

You know, oftentimes you can read a presentence report and you may have information in a presentence report for example that indicates that a gun was used, and consequently you may wonder, well,
why wasn't that 924(c) charged, then, in this instance?

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

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

VICE CHAIR JACKSON: Well I agree, but I mean I guess I would just encourage the Department to try to get a handle on what's happening. Because it seems to me that you do have an advantage over, you know, sort of in the debate between prosecutorial
discretion and judicial discretion, you have the
advantage of having sort of a more centralized system
to be able to, you know, at least monitor what's
going on nationally.

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

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

MS. YATES: Well I don't think that the
Department's current position is any kind of a
statement about past positions of the Sentencing Commission. We're just looking now at the world that we live in now. And that's really the basis of the Department's position now, is that we're in an advisory guidelines world now. And in that advisory guidelines world, that mandatory minimum sentences really are an important tool for us, not only in ensuring consistency for some offenses, but also for promoting deterrence, and encouraging cooperation, and other legitimate law enforcement functions.

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

VICE CHAIR JACKSON: I think so.

MS. YATES: Okay.

VICE CHAIR JACKSON: Thank you.

CHAIR SESSIONS: Well I have, like the other commissioners, a couple of questions. Literally they address what you're asking the Commission to do in light of the legislation that brought us here today. The first is in regard to essentially severity of mandatory minimums. You have expressed
in your pleadings -- or your papers, not your
pleadings, your papers --

(Laughter.)

MS. YATES: It felt like a pleading --

(Laughter.)

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

I mean is that, first of all, what you are
asking us to do in response to the congressional
directive?
MS. YATES: Well it sounds like a daunting task when you put it that way, but, yes, that is what we're asking you to do. And we think that that's what's really critically important to do in this situation.

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

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

MS. YATES: That's right.

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

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

Is that right?

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

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

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

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

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

CHAIR SESSIONS: Any other questions?

Yes, Ricardo.

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

(Laughter.)
COMMISSIONER HINOJOSA: Just one final --

MS. YATES: I'm about to receive some,

aren't I?

(Laughter.)

COMMISSIONER HINOJOSA: One final comment.

You identified the ones that you personally feel are
issues that are very serious with severe punishment,
the stacking of 924(c) and sometimes 851.

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

MS. YATES: Right.

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

MS. YATES: That's right. And I think
that going forward I am hopeful that, even without
necessarily changes in the minimum mandatories, that
the examples that I have no doubt that you'll hear
about later on today and which undeniably exist of situations where the result of the application of mandatory minimums certainly appears unjust, that hopefully going forward under the new Department policy those occasions will be fewer and farther between, if that's the right term. That there won't be as many of those.

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

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

Other offices did not. And so I think there was that variation. Although certainly it has never been an absolute system that you must always charge under any circumstances the most serious offense, or file all sentencing enhancements. And I
don't think any of us would advocate for such a system.

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

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

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

MS. YATES: Oh, God. Time flies.

CHAIR SESSIONS: Thank you very much for coming.

MS. YATES: Thank you.

CHAIR SESSIONS: We enjoyed very much your presentation.
MS. YATES: Thank you, very much.

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

(Pause.)

Good morning. Welcome. Let me introduce the panel: the "View from Sentencing Practitioners."

First, Michael Nachmanoff is the federal public defender from the Eastern District of Virginia. He has been with the office since it was established in 2001, including serving as the first assistant for three years, the acting federal public defender for two years, and then the federal public defender since the year 2007.

Mr. Nachmanoff previously practiced law in Arlington, Virginia, with Cohen, Gettings & Dunham. He also earned his J.D. from the University of Virginia School of Law where he served on the Virginia Law Review; a graduate of Wesleyan University; clerked with the Honorable Leonie Brinkema, and at the U.S. District Court for the Eastern District of Virginia; and you look about the same age as my daughter who graduated from Wesleyan,
so I'll have to ask about that in the future.

(Laughter.)

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

Next, a person known to all of us, James Felman. He is a partner in the firm of Kynes, Markman & Felman in Tampa, Florida. He serves as co-chair of the American Bar Association's Committee on Sentencing, and as a member of the ABA's Governing
Council. He also previously co-chaired the Commission's Practitioners Advisory Group for many years. He received his M.A. in philosophy and a J.D. from Duke, a B.A. from Wake Forest; and clerked for Judge Theodore McMillian of the U.S. Court of Appeals for the Eighth Circuit; and got his J.D. from Duke University. Welcome.

MR. FELMAN: Thank you.

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

All right, first Mr. Nachmanoff.

MR. NACHMANOFF: Thank you very much, Mr. Chairman, members of the Commission.
I want to thank you for holding this hearing and for providing me the opportunity to speak to you this morning on behalf of Federal Public and Community Defenders from across the country.

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

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

It was a pleasure to hear the Department
of Justice speak this morning, and I am delighted that at least there is a clear consensus on the elimination of the mandatory minimum for forging a notary seal.

(Laughter.)

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

For all of the reasons that we have set forth, and of the many other panelists that you'll
hear from today, I think the correct and only answer
is to urge the repeal of all mandatory minimums.

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

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

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

In 2009 there were over 24,000 drug cases.

Two-thirds of those cases involved mandatory
minimums: 16,000 cases. Of those cases, 83 percent
of the defendants had no weapon; 94 percent had no role adjustment; and more than 60 percent had only one, two, or three criminal history points.

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

And so the very fundamental purpose that Congress stated when passing these mandatory minimums is not being borne out in the courts today, and it is resulting in massive injustice. And that is why the Judicial Conference has opposed mandatory minimums. That is why so many academics have. And that is why I am pleased to see that the Department of Justice is recognizing that there is a problem and that there is a place for the repeal of at least some mandatory minimums.
In addition to all of those actors in the criminal justice system, though, I think it is important that the Commission consider and advise Congress that the general public is also concerned about this issue. And in our materials there are some statistics that reflect surveys that have been conducted, including one in which it showed that a sample of people polled, 78 percent, found that the courts and not Congress is best able to determine sentences.

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

And in polling jurors who were exposed to information, detailed information, about defendants and cases, and being asked what they thought an appropriate sentence was, overwhelmingly those jurors came back with sentences that, if they played a role in determining that sentence, would have been substantially lower than the mandatory minimums that
the judge was ultimately required to impose. In many cases, the sentences were substantially lower than the advisory guideline range that was determined. But what I think this tells us is that this process of mandatory minimums and this process of Congress passing them, which is supposed to reflect the will of the people who they have been elected to represent, does not in fact reflect the will of the people; that when their constituents go into courtrooms and learn what happens in a case, their determination of what just punishment is is totally at odds with the mandatory minimum scheme that Congress passes.

And so I think it is appropriate for this body, as an expert body on sentencing, to be able to tell Congress that this is not a political problem. This is a problem in which Congress has passed laws that they now find are difficult to undo, despite the fact that they are unjust and their very own constituents, when asked the question directly, with sufficient information, agree that they are unjust. We would ask the Commission to reiterate
its findings regarding the injustice of mandatory minimums. And part of those findings, going back to 1991, and that have been borne out over time, involve the negative racial impact of mandatory minimums.

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

But that information about the racial impact of the crack cocaine mandatory minimums is a critical part of what the Commission should be telling Congress in this report that comes out. It is not limited to crack cocaine. The disproportionate, unjustified impact on minorities,
particularly African Americans, can be seen in other areas, too. And the Commission has also spoken on that in the 15-year report. We see it in the imposition of 924(c)s, and we see it in the imposition of 851 enhancements.

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

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

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

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

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

The arguments in favor of mandatory minimums don't hold up. There is no empirical evidence to show that they have a deterrent effect. First, they cannot have a deterrent effect because of the notion of certainty or predictability because, as was discussed in the last panel, even under the
Ashcroft Memorandum there's always the possibility, depending on the district and depending on the prosecutor, that a mandatory minimum which could apply may not apply.

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

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

We certainly don't advocate that. That would be a gross injustice. But it literally would cause the system to collapse. And so there will always be disparity in the imposition of mandatory minimums, and therefore they can't serve the function of promoting uniformity.
CHAIR SESSIONS: Your red light has been on for awhile. Do you want to try to wrap up so we can make sure everybody has an opportunity?

MR. NACHMANOFF: Yes, absolutely.

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

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

Secondly, addressing the specific issues of 924(c)s, consecutive 924(c)s, 851 enhancements, and ACCA 924(e). I was very pleased to hear the Department of Justice identify those as areas in which they appreciate that the way they are written casts far, far too wide a net and we would urge the
Commission to focus on those specifically with regard to Congress taking action soon. In fact, the sooner they can do it, the better. I have five or six cases right now which are addressing those exact issues.

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

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

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

MR. STEINBACK: Yes. Good morning, Chair Sessions, distinguished members of the Commission.
Before I begin my remarks, I wish to make sure that I reiterate the things that I was well coached last evening to say, which were: repeal, repeal, and repeal. I don't want to be criticized by those far wiser than myself by having forgotten those words.

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

(Laughter.)

MR. STEINBACK: Thank you.

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

Judge Mathers was known as someone to impose a stiff sentence where warranted and never shirked the responsibility to do so. But this article described a case in which Judge Mathers was faced with a relatively young woman, four young
children, in a drug conspiracy where she had a very minor role, and yet was facing what was in that state a mandatory minimum six years without possibility of parole.

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

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

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

"A judge is either an automaton, rubber-stamping these sentences, or is driven by a sense of
justice." And the judge reflected in this article on the philosophy which guided his decision when he said, "Disobey the law in order to be just."

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

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

My colleagues have -- in their excellent submissions have written about the arbitrary and unwarranted disparities, placing far too much control in the hands of the prosecution, and removing it from the judiciary, and it too often distorts the sentencing process. And with the Commission's permission I want to talk about one particular illustration which I think reifies much of that.
It's the Brigham decision from the Seventh Circuit in 1992. The facts that I set forth in my submission are more extensive, but essentially they're these:

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

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

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

Now what happened in the Thompson case essentially was, one of his distributors, as they
oftentimes do, got caught. And when he got caught,
he did what most rational drug dealers do. They run
in and make a deal, telling the DEA everything that
they know about drug dealing, which included
Thompson.

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

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

Unfortunately, Brigham takes that offer
and, as what almost inevitably happens when you're dealing with undercover operations, they all got arrested. And when they did, the three of the four ran into the U.S. attorney's office -- Thompson, Carter, Amos.

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

For guys like Thompson, who I represented, I can tell you he had lots to negotiate. He could draw and lure and did in fact lure those Cali cartel members into Panama where the DEA could arrest them, and they were very pleased with Thompson. So much so that, not withstanding his millions of dollars and thousands of kilos, he [was given] a seven-year sentence.

Now for Amos's efforts, he got a six-year, three-month sentence, even though he was involved in all of these deals as well.
Incredibly, Carter -- and no one really quite understands why, and I was in this case and I couldn't understand it -- he was allowed to plead to a phone count. And as you all know under 843, I believe, phone counts do not carry mandatory minimums. They have a maximum statutory punishment of four years. And essentially what happened with Carter was he received probation and four months of community service and a stay in the local Salvation Army.

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

So what's happened is, in this case, Thompson winds up doing his six years in a camp, while Brigham does ten years in an FCI in Minnesota.
The question that is raised here, in addition to the obvious inversion of sentencing which was recognized by the Seventh Circuit in its opinion, is what prevented the government from offering Brigham, who was clearly the low man on the totem pole and the odd man out, that same deal, for a phone count.

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

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

The prosecutors weren't willing to do that, and obviously honesty and truth in sentencing is a very important policy, but who could blame a defense lawyer for asking for that. Or even, for that matter, some prosecutor for acquiescing to it. And if that happened, no judge would be in a position to question whether there was a phone count or not.
And I'm not so sure how many judges would really want to pursue that inquiry.

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

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

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

At that point, Brigham was so desperate that he would of said anything, including making
himself look far more culpable than he was, just to be able to get a deal. And the irony of that has to just crash into everybody, because it's just overwhelming.

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

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

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

And the truth of the matter is that there is nothing consistent about mandatory minimums. All
of the language we have seen come out of Gall and
Kimbrough and Rita, and for that matter the
guidelines which as I understand them always were a
work in progress, something that was done to give
judges ranges based on empirical data and continuing
ongoing reconsideration so that they could treat like
offenders in like fashion.

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

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

CHAIR SESSIONS: Okay. Thank you,
Mr. Steinback.
I just want to clarify one thing. I thought in your written submissions you had indicated that you in fact represented Mr. Thompson, was at his debriefing, not Mr. Brigham? Is that --

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

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

MR. STEINBACK: My apologies.

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

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

It is an honor to appear before you this morning on behalf of the American Bar Association. The American Bar Association is the world's largest voluntary professional membership organization, with
almost 400,000 lawyers, including a broad cross-section of prosecuting attorneys, criminal defense counsel, judges, and law students worldwide as members.

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

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

As I said the last time, the time has come to reverse this course of over-incarceration. The
Commission's recent amendment submitted to the Congress represent modest but very positive steps in this direction. The elimination of mandatory minimum sentences would be a dramatic further step.

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

Mandatory minimum sentencing reflects a deliberate election to jettison this entire array of undisputedly relevant considerations in favor of a single, solitary fact: usually a quantity of drugs, or possession of a firearm that may bear no
relationship to the defendant's particular culpability.

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

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

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

The critical flaws of mandatory minimum sentencing are not newly discovered. They were well documented by the Sentencing Commission in its 1991 report which found that the lack of the uniform application of them creates unwarranted disparity; that honesty and truth in sentencing is compromised because the charging and plea negotiations are not
open to the public and not generally reviewable by
the courts; that disparate application of them
appears to be related to the race of the defendant;
offenders seemingly not similar, nonetheless receive
similar sentences thus creating unwarranted
sentencing uniformity; and of course they transfer
sentencing power from the courts to the prosecution.

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

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

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

As the Commission drafts its latest report
for Congress, the arguments for repeal have only grown stronger.

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

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

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

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

I am pleased to see that the chair of that commission, Professor Saltzburg, will be here to address you this afternoon, but suffice it to say
that that commission again called for the repeal of mandatory minimum sentencing.

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

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

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

The fact that there is a disparity in sentencing does not necessarily reflect an inappropriate or unwarranted disparity; it may
reflect that for the first time judges are able to consider the wide range and the rich mix of relevant sentencing criteria. It may mean for the first time we have more adherence to the purposes that underlie the Sentencing Reform Act.

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

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

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

Prosecutors sometimes claim that mandatory minimums are necessary to induce defendants to
cooperate and to plead guilty. There does not appear
to be any sound empirical basis for this claim.

Defendants appear to cooperate in roughly the same
numbers in cases for which there are no mandatory
minimum sentencing.

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

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

A number of ideologically diverse
individuals and groups have come out in opposition to
mandatory minimums. Those include the late Chief
Justice Rehnquinst, the former chair of the Commission,
Judge Wilkins, and Justice Breyer. And Justice
Breyer I thought had a particularly good analogy,
although I wish to improve on it. He said that, "In
sum, Congress in simultaneously requiring guideline
sentencing and mandatory minimum sentencing, is riding
two different horses." As an amateur horseman, I wish
to speak for the defense of horses because I think
he's done them an injustice. I think it's a fair
analogy to guideline sentencing. Horses can be
troublesome and you can get hurt, but for the most
part they will go where you tell them to go, and you
can change their course in mid-direction.

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

(Laughter.)

MR. FELMAN: Others who oppose mandatory
minimums include the American Law Institute in its
Model Penal Code; the federal -- I mentioned the
Federal Judicial Center; Senator Orrin Hatch; the
Constitution Project's Sentencing Initiative; and
again I'm pleased to see that Tom Hillier will be
here this afternoon on behalf of that group; the
United States Conference of Mayors; the RAND
Corporation; a panel of the National Academy of
Sciences; of course Families Against Mandatory
Minimums, and you'll hear from Julie Stewart I see; numerous judges and academics, including Stephen Schulhofer, who I was pleased to see will be here today as well who has written some very early ground-breaking information about the flaws of mandatory minimum sentencing.

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

(Laughter.)

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

Unduly long and punitive sentences are counterproductive and many of our mandatory minimums approach the cruel and unusual level, as compared to that of other countries and past practices of our
I found very poignant the statement of Judge Wald, the former chief judge of the D.C. Circuit, before the Inter-American Commission on Human Rights, where she said:

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

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

Thank you.

CHAIR SESSIONS: Thank you, Mr. Felman.
Ms. Orr?

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

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

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

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

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

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

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

A judge can recognize and determine under
evidentiary hearings when a person is just sitting at a computer looking at photos but never having contact with a child when determining a sentence variance is appropriate in such a case.

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

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

Perhaps in Georgia the smaller drug cases don't make it to the federal court, but in the border states -- and I will tell you that I come from the Western District of Texas, San Antonio, and I know also in the Southern District of Texas where they have the heaviest criminal dockets in the nation -- in these states, and at least in Texas, federal courts
routinely handle small-level drug cases, as well as the large cases, because the financial burden on the state and the counties is too burdensome for them to handle all these low-level offenders.

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

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

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

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

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

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

Guidelines' manipulation takes form at the back end as well, hidden in unfettered prosecutorial
charging and plea negotiation, and in 5K1 motions. They have -- statistically they are in the light of day a demonstrable effect on guideline sentencing. We can tell that it affects it substantially. How much more so would be revealed if we could keep statistics on the charging decisions and plea negotiations, decisions that occur in prosecutors' offices.

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

(Laughter.)

MS. ORR: -- but at the sentencing, it was a pre-guidelines case, and we had the unique circumstances where we were allowed to speak to the
jurors. And they said they had convicted my client's wife, who was really very out of the loop, because she was wearing a new outfit to the trial every day. Fortunately, the judge was able to fashion a sentence not tied by mandatory minimums -- the amounts of drugs were off the charts in that case, measuring in the tons -- that allowed this woman to remain home with her children, even though she'd been convicted.

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

The reason I bring it to your attention is not because the report delves into how sentencing legislation makes it through Congress, but it does focus on how criminal legislation does. How
oftentimes these measures do not go through the appropriate congressional committee for study.

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

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

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

Thank you very much for allowing NACDL to present its views on mandatory minimums, and I
appreciate your attention to our submitted written
remarks and hope you look forward to receiving our
report that was prepared for the Heritage Foundation.

CHAIR SESSIONS: Okay. Thank you, Ms. Orr.

We did start 15 minutes late with this panel. We
want to give this panel full opportunity for that
full hour-and-a-quarter period, so we will extend the
period for questions till eleven o'clock.

So, Commissioner Howell?

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

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

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

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

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

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

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

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

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

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

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

So our statistics are showing that the rates are about two or three times higher -- the substantial assistance rates are about two or three times higher in cases with mandatory minimums than
without. So how would you suggest, as we're basing
our research and our analysis of cooperation, putting
aside the policy debate -- and I understand, Mr.
Felman, the ABA's position that no matter what the
statistics show you do not think as a policy matter
it is appropriate to consider mandatory minimums as
leverage -- but statistically, our statistics are
showing different results than the ones that you
mentioned in your testimony. And how would you
suggest we deal with that? Just ignore them and just
opt for the policy debate? Or what would your
suggestion be?

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

But I think what you've just suggested
underscores exactly the importance of why sharing
data is important. Which is, for me, obviously it's
hard to respond as to what your research has shown
without knowing exactly what methodology was used and what you were looking at and to compare it to see whether or not it can be replicated. I think this is true across the board.

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

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

But in white collar cases, there's a tremendous amount of cooperation. In antitrust cases, which albeit is a fairly narrow area, the rate of cooperation is 85 percent. In money-laundering
and in bribery, it's 30 percent, it's 25 percent. And so I think it is without a doubt empirically true that people are motivated to cooperate when they face jail. It may be that when they face more jail they worry even more, but I've represented countless clients who have not had mandatory minimums who want to do whatever they can to minimize the damage. And I think that is true as a matter of common sense, and I think it is true as a matter of what the numbers reflect.

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

I would also note that in the Holder Memo -- and I'm not sure, because I haven't compared it
to the Ashcroft Memo -- there's a sentence that I think is extremely relevant to this discussion. Which is, that it says, "Charges should not be filed simply to exert leverage to induce a plea."

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

And then they have a structural problem. They've been given a tool, and they use it; and if someone, for whether a good reason or a bad reason, irrational or rational, decides to take their chances and go to trial, the prosecutor feels obliged to follow through and pursue what will inevitably be an unjust sentence -- not because they think that's what
the person deserves, but because they don't want to
send a message that if they threaten this leverage
and the person calls their bluff, they won't suffer
this consequence.

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

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

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

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

MR. NACHMANOFF: Let me also note -- and I think this issue has been raised before because it's particularly relevant to the Eastern District of Virginia, which is that we have a very, very low rate of substantial assistance motions under 5K1.1. We have a very high rate of Rule 35s. This has been a very serious problem in terms of analyzing what sentences are actually being received. And it's probably particularly relevant to this issue in particular in measuring the rate of cooperation.

In these oxy cases, which have no mandatory minimum and in which we see high rates of cooperation, the Eastern District of Virginia has had
several cases involving 20, 30, 50 defendants, all of
whom cooperated, all of whom got Rule 35s, none of
whom would be reflected in this data, so far as I
know, and that's another issue.

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

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

It's a bad combination from the defense
perspective.

CHAIR SESSIONS: Vice Chair?

VICE CHAIR JACKSON: I appreciate that
practitioners want all mandatory minimums to be
eliminated, and I'm just wondering whether or not
there is a distinction to be drawn between the
existence of a mandatory minimum penalty and the
level of the punishment that's being prescribed?

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

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

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

But the problem is this: Congress has determined in many, many cases -- including some of the examples the Department of Justice gave regarding what I think everyone would agree are the most
serious crimes, murder and rape and things like
that -- that there is a wide range of punishments based
on the fact that crimes can be committed, and people
can have backgrounds in which the culpability can
vary greatly. And those ranges have included
historically everything from probation to many, many
years in jail.

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

And that is why the principled stance is
the right one. Which is, that Congress should be
told that giving that freedom to consider the least
punishment for the least culpable defendant would
include something that doesn't involve jail.

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

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

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

First of all, there's a constitutional problem. It's not even as simple as saying, well, if it could be done with a magic wand that would be better, or that would be acceptable. So to address the constitutional problem, if it could be overcome it would require a wholesale revision of the entire
Criminal Code. There is no other way to do it.

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

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

And so the short answer is: No.

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

One of the proposals that's been floated about is to set up a presumptive guidelines system with many fewer offense levels, broader ranges, discretion within the broader ranges, fold a lot of the enhancements within these broader ranges --
suggesting at the high end or the low end based upon those factors; leave out some of the factors which are key to a jury trial right -- that's loss amount, drug quantity.

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

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

CHAIR SESSIONS: Sure.

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

In fact, I can quote for you from one of your colleagues, Ms. Baron-Evans who said, we support, the PAG supports what Jim Felman has submitted to the Commission and that he calls "codified guidelines." This would involve decreasing the number of ranges, widening them accordingly. She says: We support this approach for a number of
reasons, one of which is that it honors the letter and spirit of the constitutional right to have facts that are essential to punishment charged in the indictment submitted to a jury and proved beyond a reasonable doubt.

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

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

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

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

(Laughter.)

MR. NACHMANOFF: Number two, if Jim Felman agreed with her, it must be right.
MR. NACHMANOFF: No, in all seriousness, I don't know when that was said, but my guess is that perhaps it was either before Booker, after Blakely but before Booker, or certainly before we've had the five years or more of understanding how the advisory system works.

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

And what we know is that the advisory guideline system is working very well. And in fact it is resulting in more fairness and more discretion for judges; and that if this Commission can urge Congress to act in the direction that even the Department of Justice appears to be going in terms of repealing at least some mandatory minimums, expanding
the safety valve, and doing other things to remove
and eliminate the conflict between mandatory minimums
which have no relation to the purposes of sentencing,
are not based on empirical evidence or the product of
political efforts that may not be subject to reasoned
thinking, that this is a system that works better
than we've had before.

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

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

Some districts are up -- 60, 70 percent of
their cases are mandatory minimums cases; other
districts are, you know, more in the 20 percent
range. It seems to me that defendants are being
treated differently.

Yes, Jeff.

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

But what has happened is, in addition to
punishing across the board everyone who could
potentially be eligible for an 851 notice -- even the
Johnson case that I submit in my papers -- it has
another indirect effect, whether conscious or
subconscious. Judges who are in the process on a
daily basis of having to make these evaluations will
take an individual with a couple of prior, relatively
minor drug offenses, and be forced to give that
individual 20 years in prison.
And perhaps that individual made a few thousand dollars in his or her role in this particular conspiracy, and there they are. And there that judge is forced to give a 20-year mandatory sentence with no parole.

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

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

And that updraft is creating part of the problems which the ABA has very poignantly pointed out that creates a 1-in-100 statistic ratio of people incarcerated in this country in a Bureau of Prisons.
system I can tell you is already overburdened. And so the fact that that happens in some districts is a, I think, kneejerk response to the frustration over the blind plea, and I think that explains it in Chicago. It also maybe explains why the regional differences exist. But they also underscore one other very important point which has been touched upon.

That is, no matter how much prosecutorial internal review there is, no matter how much supervisory review over a line assistant's judgment there may be, it is still internal. It is still behind closed doors. It is unreviewable. And that is the main difference between what happens in a courtroom and what happens in the judgment making that goes on in a prosecutor's office. No matter what kind of good faith or well-meaning intentions are behind it, you cannot understand, review or determine what went on that gave rise to Jeffrey Carter's probation, and Anthony Brigham's ten years. And the only other thing I would add is that when you look at guidelines, first of all in my
travels they are the benchmark. And everywhere I go, federal district courts are beginning by calculating what are the advisory guideline range. And they really become the benchmark. They have not been disregarded. They have not, I think, removed the prosecution and left it simply as a dialogue between defense counsel and the court with respect to 3553(a).

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

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

I just had a case in which an individual was looking at 324 to 405 months. The mandatory minimum had nothing to do with it. He was never
going to get that much of a departure. He didn't
need a mandatory minimum to get him to go into the
U.S. attorney's office and proffer.

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

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

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

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

(Laughter.)

COMMISSIONER HINOJOSA: However, I have to
make a correction, Mr. Felman. There have been
others who have expressed their support in writing
for mandatory minimums -- namely, Congress and the
Presidents who have signed them into law, and
therefore put their support in writing. Just to
clear the air here.

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

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

(Laughter.)

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

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

(Whereupon, a recess was taken.)

CHAIR SESSIONS: Let's call the next panel
to order. Okay, good morning and welcome. Can we
have people's attention at this point?
Good morning, and thank you very much for your attendance and participation today. Let me introduce the law enforcement panel.

First, Jiles Ship is the national second vice president of the National Organization of Black Law Enforcement Executives, and administrator of investigations in the State of New Jersey Attorney General's Office in the Division of Criminal Justice. He also serves as a governing board member of the New Jersey Regional Community Policing Institute. Previously he served as director of public safety for the City of Plainfield; as an officer on the Edison Police Department; and as a United States Marine.

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

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

Next, David Hiller is national vice president of the Fraternal Order of Police, and has
been a member of the FOP for over 38 years, serving
in various capacities, including the national trustee
for the State of Michigan for 12 years. Mr. Hiller
earned his bachelor of arts degree in criminal
justice from Wayne State University in Detroit, and a
master’s degree in public administration from Central
Michigan University.

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

MR. HILLER: My pleasure.

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

Previously he served as the elected
sheriff of Kane County, Utah; deputy sheriff for
Kane, Garfield, and Wayne counties also in Utah; and
chief of police at Snow College in Ephraim, Utah.
Chief Jackson is also a commander of the Kane/
Garfield Counties Narcotics Strike Force.
Chief Jackson majored in police science and industrial arts at Southern Utah State College.

And thank you for being with us, Chief Jackson.

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

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

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

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

They exchanged views about the critical
high rate of crime in Black urban communities, and
the socioeconomic conditions that led to crime and
violence.

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

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

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

Again, thank you for being here.
I, as was noted earlier, have been in law
enforcement for approximately 25 years, starting at a
patrol rank and achieving the rank of chief
executive. I have been involved in many court cases,
representing the state for people that we have
arrested for a variety of crimes -- everything from
homicides down to disorderly person offenses.
An extensive amount of research has been
done on this subject area. NOBLEE's position is
quite frankly that although mandatory minimums were
put in place with good intent, along the way we think
that we have not really -- it has not served its
purpose. By that, I mean that it totally takes all
the discretion away from the people who are charged
with being the trier of the facts.
We believe that that discretion needs to
go back to those individuals charged with that
responsibility. Also, our judicial system is set so
that if we feel that the trier of the facts have been
wrong on the law, or something else, then we have
court of appeals that those cases could be taken to
at that time.
So we firmly believe that that discretion needs to go back to that proper authority. Mitigating factors, aggravating factors, cannot be taken into account if a trier of the facts just has to rule on the specific law. You know, it's been concluded that the most efficient and effective way for the Congress to exercise its powers to direct sentencing policies is through the established process of sentencing guidelines, permitting the sophistication of the guidelines structured to work, rather than through mandatory minimums.

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

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

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

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

Thank you.

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

Mr. Hiller?

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

As the worthy chairman indicated, my name
is Dave Hiller. I am representing the National Fraternal Order of Police. We represent 327,000 rank-and-file officers from across this country. We're the largest labor organization for police in the United States.

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

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

Number one is to deter future offenders; Number two, to provide a defined period of separation of the offender from society; and Three, to ensure consistency throughout the criminal justice system so that individuals convicted of specific crimes receive similar sentencing. I would like to take a few minutes just
to touch on those three points in order.

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

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

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

Secondly, sentencing of a specific length
separates the offender from the public for that time period. That protects the public and functions as an absolute deterrent against that particular individual while he or she is incarcerated. The greater the offense, the more serious the punishment.

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

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

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

In fact, the establishment of this worthy body, the United States Sentencing Commission, in
1984 was done in large part to achieve that goal. The adoption of the Comprehensive Crime Control Act of 1984 established mandatory minimum sentences in an effort to combat the growing problem of drug trafficking and violence associated with those operations.

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

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

These acts, along with the renewed emphasis on community policing and federal programs to allow us to deploy 100,000 additional law enforcement officers in our nation's communities,
turned the tide in our crime -- in our efforts to
conduct and reduce crime.

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

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

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

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

Additionally, Congress has implemented a safety valve
which provides for additional protection for first-
time offenders who, without a prior criminal history, did not employ firearms or violence in furtherance of the commission of the underlying offense, and who are not significant components of a large criminal enterprise. These individuals are not and should not be the target of our nation's crime-fighting strategy, of which the use of mandatory minimums is an integral part.

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

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

CHAIR SESSIONS: Thank you, Mr. Hiller.
Chief Jackson?

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

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

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

The majority of my testimony will be
circumstanced around that. So the rise of methamphetamine use and abuse since the 1990s has become an enormous concern for rural communities nationwide.

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

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

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

Often referred to as "meth orphans," some
3000 children are removed annually from toxic homes that are being used to produce and sell methamphetamine. These removals are overwhelming our rural family service agencies and foster care systems.

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

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

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

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

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

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

Probation is usually offered in lieu of
incarceration. Repeat offenders are generally incarcerated if these other programs fail.

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

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

One, are there large quantities of drugs involved?

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

In other words, federal prosecutions in rural America are rare and are usually reserved for the worst of the worst offenders. These are the people who are locally producing or transporting methamphetamine in large quantities throughout our jurisdictions. Firearms and boobytraps are often found in their associated makeshift labs and transport vehicles.
There are two major advantages in prosecuting these types of offenders federally. One is incapacitation. Minimum mandatory sentences remove these most extreme offenders from society for long periods of time. Two, the threat of minimum mandatory sentences often lead to plea bargain agreements at the state level wherein the offenders, in exchange for a lighter state sentence, can lead law enforcement up the food chain to higher level and even international organized crime figures. These are the people who truly need to be prosecuted and incarcerated under the federal mandatory minimum guidelines.

In closing, may I express on behalf of both the National Center for Rural Law Enforcement and rural law enforcement executives across the country, our gratitude to the United States Sentencing Commission for including us in this discussion, for the concern you have shown to the rural states and communities for doing their level best to combat this ever-increasing menace.
We would like to go on record acknowledging that we realize that there have been some problems with the minimum sentencing guidelines in the past, and that perhaps some reforms are in order. We also welcome this seldom-used weapon into our arsenal as a means to remove the worst of the worst from society, and to pursue those who profit from this drug numbering in the billions of dollars.

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

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

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

CHAIR SESSIONS: Okay. Thank you, Chief Jackson. So let's open it up for questions. Judge
VICE CHAIR CASTILLO: I want to thank you all for the day-to-day work that you do in your communities. We are exploring potential reforms, obviously, so you can tell me if you disagree with this. I think you might agree, but I'm not sure. Do you agree that long mandatory minimum sentences are inappropriate for nonviolent first-time offenders who have no real connection to large criminal conspiracies?

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

CHIEF JACKSON: I would just like to say that when they're initially arrested, if they're
willing to cooperate and lead up the food chain, that threat of a long sentence is very helpful in leading us to the ones that really need it.

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

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

VICE CHAIR CASTILLO: Um-hmm.

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

VICE CHAIR CASTILLO: I agree with that.

MR. HILLER: I can give you --
VICE CHAIR CASTILLO: You and I can disagree as to what is too long --

MR. HILLER: Correct.

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

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

VICE CHAIR CASTILLO: Okay.

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

So "certainty" to me is the key word.

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

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

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

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

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

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

VICE CHAIR JACKSON: Right.

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

But some of the social scientists that we've heard from have said it's not because of mandatory minimum sentences, it's because if they are brought federally they're going to be serving their sentence in unfamiliar areas, there's less flexibility, they know, once they've been sentenced to actually get out early, and that there's a whole host...
of other reasons associated with federal enforcement having nothing to do with mandatory minimum sentences that makes -- that helps induce that cooperation without a mandatory minimum.

Is that consistent with your experience?

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

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

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

CHIEF JACKSON: I think the fact that they realize they may be going to Minnesota, or Arizona to
a federal penitentiary rather than staying locally,
separated from family and friends, that type of thing
alone is a deterrent.

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

CHIEF JACKSON: Right.

COMMISSIONER HOWELL: Thank you.

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

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

CHIEF JACKSON: It's kind of unique to
whoever's the U.S. attorney operating in the state.
They vary. They'll come. They'll talk to the chiefs and the sheriffs and say, I want as many of these types of cases, firearms cases, meth cases, send them. And then some of them are very selective in the ones they want. So a lot of federal prosecution hinge on the philosophy of each individual U.S. attorney for that state. And if they want them, if we have a case that meets the criteria for a federal prosecution, we'll typically send it up and let a USA review it, and they ultimately decide whether they want to take it or not. So --

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

MR. HILLER: The Eastern State of Michigan, I don't have a number that I can swear to, but there is an increase in federal prosecution. And they have taken, like the chief said, it's an
aggressiveness on the part of the U.S. attorney. So that is probably the key factor.

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

CHAIR SESSIONS: Vice Chair.

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

MR. HILLER: The initial investigation will be the initial investigation. The direction we go from there will be predicated on what we determine, what evidence comes forward.
As the vice chair indicated, someone indicates, I don't know anything. It's not going to go anywhere. I mean, we have enough common sense as a background as investigators to realize he doesn't have any information. There's no sense taking it to another level. We know. But there are also those that swear they don't know anything, but when they're suddenly charged in a federal court and there's a mandatory minimum, the recollection comes back quickly for some reason; I don't understand how that happens.

(Laughter.)

MR. HILLER: It's like children.

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

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

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

MR. HILLER: Oh, yes.

VICE CHAIR JACKSON: I mean, if you know
that this case could implicate a mandatory minimum,
then you bring that out in the context --

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

VICE CHAIR JACKSON: Thank you.

CHAIR SESSIONS: Ricardo.

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

That you not have more than one criminal history point;

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

There was no death or serious bodily injury to anyone;

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

And that prior to the sentencing hearing the defendant stated what his role in the offense was
as far as giving the factual involvement in the case.

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

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

(Laughter.)

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

My policy, and I think the chief's policy, if we've done our job and we've dotted the "i"s and crossed the "t"s and given it to the prosecution, that's their job, and I trust their judgment.
COMMISSIONER HINOJOSA: Well let's put it on the level of would you extend this to other crimes? Or would you limit it to drug trafficking crimes, as far as having this --

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

COMMISSIONER HINOJOSA: Thank you.

CHAIR SESSIONS: Yes, Commissioner Howell.

COMMISSIONER HOWELL: I just wanted to ask one last question. We're going to hear later on this afternoon from Professor Schulhofer who talks about something he calls "the cooperation backlash."

Perhaps it's a more widely known term, but I first learned of it when I read his testimony.

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

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

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

CHIEF JACKSON: As a general rule, John Q Citizen is just, they just like to see somebody arrested. They don't really know where it goes to
from there. The thoughts of whether it's going to go federal with still penalties, or state, it just doesn't cross their mind. They're happy to give the information and see that arrests are made, and it generally ends there.

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

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

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

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

CHAIR SESSIONS: Can I just follow up with that? There's a real concern that mandatory minimums may be applied in unfair ways. For instance, African
Americans make up 24 percent of the docket of the federal courts, and yet 35 percent, roughly, 35.7 precisely I think, of mandatory minimums apply to African Americans.

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

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

CHAIR SESSIONS: Any other comments?

(No response.)

CHAIR SESSIONS: Any other questions at all?

(No response.)

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

MR. HILLER: Thank you.

MR. SHIP: Thank you.

CHIEF JACKSON: Thank you.

CHAIR SESSIONS: So I just have one matter to put on the record. I've had a long conversation with U.S. District Judge Julie Carnes, Chair of the Criminal Law Committee, and she is offering her written testimony concerning mandatory minimum statutory sentencing provisions. Judge Carnes testified, or the testimony was given before the Subcommittee on Crime, Terrorism, and Homeland
Security of the Committee of the Judiciary of the U.S. House of Representatives on July 14, 2009, on behalf of the Criminal Law Committee.

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

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

(Whereupon, at 11:59 a.m., the hearing was recessed, to reconvene at 1:15 p.m., this same day.)
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.
MS. LEVENSON: Thank you, Your Honor.

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

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

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

MR. SCHULHOFER: I saw you, Judge.

CHAIR SESSIONS: Oh, you were there?

MR. SCHULHOFER: You were terrific.

CHAIR SESSIONS: I was terrific?

MR. SCHULHOFER: Yes.
CHAIR SESSIONS: That's a great way to start.
(Laughter.)
CHAIR SESSIONS: It's just a great way to start your discussion here.
(Laughter.)
MR. SCHULHOFER: Thanks.
CHAIR SESSIONS: -- where he has taught since 2000. Prior to joining the faculty at NYU, he was a professor of law and director for Studies in Criminal Justice at the University of Chicago Law School, and a professor of law at the University of Pennsylvania Law School. He received his A.B. degree from Princeton, and his L.L.B -- which goes back aways, I assume -- from Harvard.
So, Professor Levenson, can we start with you?
MS. LEVENSON: Yes. Thank you, Your Honor. First let me thank all of the commissioners for inviting me to testify here today. I am particularly honored to be here with my colleagues, giants in this area of the law, Professor Schulhofer
and Professor Saltzburg.

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

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

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

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

I notice that the discontent with the guidelines is really across the board, but right now quite a bit with the judges themselves. And all of
us might have noted last week Judge Jack Weinstein's comments regarding his case where he referred to mandatory minimums in a phrase that resonates with me, quote, "The unnecessary cruelty of the law."

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

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

There are numerous studies that have been submitted to this Commission -- and I know that there will be others as well -- that demonstrate how the mandatory sentences work and how they don't work. I don't plan to replow that ground. I just want to focus on some highlights.
First of all, the question of whether they actually make us safer. Because when you go out to the American public, that's what they want to know. And there really is no evidence to support the claim that at this point, as opposed to when some earlier mandatory minimums individually might have been selected, that at this point our overall system of mandatory minimums makes us safer.

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

They are also not fair. They can be grossly excessive, particularly when you get to certain types of crimes where they've been overplayed. And that would be, in my opinion, the narcotics offenses, the possession of pornography offenses, the 924 offenses, and sometimes in the immigration -- and I'm sure I'm forgetting another one
as well, but I'll get to it -- in those types of offenses, we've had gross excess in use of the mandatory minimums. I think it's because the courts can't find a way out.

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

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

We know of course that it has a grossly disparate impact on defendants of color, as opposed to white defendants; and most significantly, I think we've been stymied by saying that the problem is so huge, if we do anything we might make a mistake; let's not do anything at all.
And that's what I want to overcome with the suggestion in my testimony. On an absolute, theoretical level I would urge this Commission to urge Congress to eliminate mandatory minimums. I think that they are philosophically inconsistent with our current federal approach to sentencing.

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

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

That would be my hope. But I'm not sure that we can accomplish that, given that back in 1991
we have similar presentations of recommendations being made to Congress and everything stayed the same, or went the other direction.

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

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

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

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

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

Which is, that for those crimes -- and you'd
have to study carefully which ones you're that
concerned about -- that if there was a showing that the
elements of that crime, which now of course under the
Supreme Court law would have to include and my suggestion would be only crimes of violence, then you would limit the discretion for the sentencing judge. And, that there would be a closer review by the appellate court as to what reasonableness is. Those are two suggestions that I offer at this time. Once again I reiterate, I probably join in the camp of others that if we could get rid of mandatory minimums we should. But until we can, I would like to make myself available to this Commission to explore other alternatives.

Thank you.

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

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

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

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

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

And so the way it worked in the Northern District of California was, six-sevenths of all defendants charged with refusing induction got
probation; and one-seventh, it was like one day of
the week, ended up with three years in prison.

That was a system no one thought was fair.

Either it was unfair to those who were getting
probation, unfair to the community; or it was unfair
to those who happened to hit Judge Conti on the one-
seventh of the time.

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

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

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

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

One of the reasons sentences are so harsh was the Commission, I think rightly at the time, believed that it had to tailor all the sentences so that what Congress said was severe enough to get a mandatory minimum; other sentences had to be adjusted accordingly, and they all got adjusted upward. And I
think we've suffered from that ever since. That's number one.

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

And that's what mandatory minimums do. You take a drug crime. Somebody has 49 grams of a particular drug, they get one sentence. Somebody has 50, and they get a mandatory minimum. The mandatory minimums in my judgment end up being more perverse actually in a system that is not binding, when the
guidelines don't actually bind the judges, for this reason:

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

But now you have the cliff, which is still there, and you have a judge free to give a lower sentence under 3553(a) so that you can have one defendant who will go to prison for the mandatory number of years, and another defendant who can get probation. And that didn't exist before.

I think that anyone looking at this would say, whether you're from the Department of Justice or on the defense side, you'd say this doesn't make sense in a system that is supposed to be fair, that is supposed to be trying to cut the tradeoffs to get them right, to have like crimes and like individuals treated alike to the right extent, and recognizing individual differences to the right extent. I think this is really a problem.
Now I was pleased to see that the Department this morning for the first time in my recollection has sort of conceded that maybe the mandatory minimums have driven sentences in some areas too high. I think Professor Levenson has given you a pretty good summary of where most of the problems are. And I think that's really quite healthy in terms of telling you that the defense side and the academics are not alone here in identifying the problem.

At some point people will talk about whether there should be stronger presumptions built into guidelines than we currently have. My own view about that is that anybody who, as I do, looks at the sentencing system we have, we really have a kind of presumptive sentencing system right now. A judge is required to do the sentencing guideline calculation in every case. Then the judge is required, as I think he or she should be, to do the 3553(a) factors and to consider them.

And the judges do give deference to the expertise of this Commission. I believe, by the way,
if we ever got rid of the mandatory minimums, and if
you were free to go back and lower some of these
sentences, you would find even greater compliance
once the judges did the guideline calculation.

One of the reasons that judges don't give
guideline sentences is they're too high. And you ask
how do I know they're too high? Again, it's not like
God speaks to anyone and says I know these are too
high, but when judges feel that, based on their
experience and what they see in a particular case,
that's unfair to impose a certain sentence, and
judges do that routinely East and West, North and
South, we get some clue that some of these sentences
are just simply too high.

And so I would urge you to support, as
Professor Levenson said, to the extent it's possible,
getting rid of mandatory minimums, promising
Congress that one of the things that exists in the
system, that will continue to exist, and she's right
about this, is we have appellate review.

Back in 1971 when Judge Conti gave people
three years for draft resistance, that was it. There
was no appeal. It didn't matter whether he was doing justice or not. He was the last word.

The last thing I would say is, I think we don't want to read too much right now into our appellate review standards and assume that the way appellate courts approach their function right now is going to remain constant.

You know, Booker is relatively new. It's 2005. We're just five years out, and we've had a fair number of appellate cases. And I think if you look carefully you see in some of the circuits that some of the appellate courts are actually taking a slightly more rigorous view, despite the abuse of discretion standard that's there.

I think there may be what's already existing, what Professor Levenson might build into the system, a sense that, despite what the Supreme Court has said, that when there is a real outlier sentence, I think the appellate courts take a really hard look at that.

And when there's an outlier sentence that is too low, the Department takes it up. And I think
that the indications are they have a very good chance
of prevailing, when it's a really unreasonable
sentence.

And so what we have is a system that has a
lot of elements that could work, and work really
effectively. It may be too late in the game, but
I've said this before. If Congress would just
change the statute and permit you to get rid of some
of the levels, those 43 levels, I think you could
have a system that was clearer, that was easier for
judges to follow, that would permit them to give
guideline sentences most of the time, as well as
taking into account the individual characteristics
under 3553(a).

And I, like Professor Levenson, am for the
first time in a long time, I'm kind of encouraged
that the system which has become so technical and
made me feel as though we'll never be able to change
it, that that system may in fact be more malleable
than I thought. And I thank you for the opportunity
to be here today.

CHAIR SESSIONS: Thank you, Professor
Saltzburg. Professor Schulhofer.

MR. SCHULHOFER: Thank you, Mr. Chairman, Commissioners.

Is this [microphone] on?

CHAIR SESSIONS: It is.

MR. SCHULHOFER: Thank you. Like my co-panelists, I've been studying sentencing for many years. One focus of my work has been on how sentencing laws actually operate in practice.

Right after the Commission adopted its initial set of guidelines, it authorized a very extensive study of actual sentencing practices on the ground. Commissioner Ilene Nagel and I led that research, which continued for nearly six years, and we studied confidential case files. We held candid discussions with prosecutors, judges, probation officers. Most of them had made very crucial decisions in problematic cases that we wanted to explore.

We reviewed sentencing practices in large districts and small districts, all regions of the country, and this continued over the course of three
presidential administrations.

Our principal conclusion goes right to the heart of today's hearing. Because what we found is that there's virtually no such thing as a mandatory minimum sentence.

In practice, the so-called "mandatories" are almost never compulsory. They are discretionary punishments.

Now what I just said sounds like it must be an over -- you must be thinking that surely I'm overstating for purposes of catchy phrase in a hearing, but I want to make clear why I'm not exaggerating about this.

In the analysis that the Commission conducted in 1991, the mandatories usually were not evaded at the charging stage; 74 percent of defendants were charged at the highest mandatory indicated by their conduct. That's not perfect compliance by any means, but the mandatories were charged in most cases.

The place where the mandatories stopped being mandatory is after indictment. In the
Commission's 1991 data, more than half the defendants who pled guilty were sentenced below the mandatory level for which they appeared eligible.

In the study that I conducted with Commissioner Nagel, we took a more conservative approach. And even so, we estimated that statutory requirements had been evaded in at least 30 to 50 percent of all guilty plea cases. And that was in a regime, as now, where the Main Justice instructed prosecutors to charge all readily provable conduct.

In many districts we found the problem was far worse. If you look at the tools that we found prosecutors were using to avoid the mandatories such as the so-called "telephone count," we found, and we still find today, that in some districts these means of evasion account for more than two-thirds of all guilty pleas in drug cases, more than two-thirds.

Nationally, the tools of evasion now show up in more than 50 percent of the non-safety valve drug convictions, more than 50 percent nationally, and much higher in many districts.

Now these are very disconcerting numbers,
but even by themselves they don't fully support the claim I made a few minutes ago, which was that the mandates are almost never mandatory. Mandatories are imposed in almost half, or roughly half of the appropriate cases.

The problem is that where a mandatory sentence is imposed, that usually happens only because the prosecutor made a choice, a discretionary choice, to enforce it.

So when a drug defendant gets what we call a "mandatory" ten-year term, that sentence results from the fact that the front-line decision makers chose to trigger that statute, when they could have chosen some other sentencing option instead.

In other words, the mandatory minimum is a discretionary choice in any guilty plea situations. And guilty pleas account for over 95 percent of convictions in cases that are subject to the mandatory minimums.

So the so-called mandatory is really mandatory only in the four to five percent of cases where you have a conviction in a contested trial.
So we're talking here about discretion when we talk about mandatories. Some prosecutors and judges feel obliged to apply them, and we heard that in our research. They feel obliged to apply them even when they think the resulting sentence is unjust. But other times prosecutors tinker with the charges to produce a sentence that they consider fair. Either way, there is no uniformity and the inconsistency undercuts any severity gains that we might think we would be getting.

So in operation, the mandatories actually dis-serve Congress's own goals. They are applied haphazardly, with very little oversight, and with no transparency at all.

Since the time is limited, I want to just touch briefly on three other points: excessive uniformity; the cooperation paradox; and the cooperation backlash.

Uniformity: Uniform punishments obviously aren't appropriate when offenders aren't similarly situated, but that's what mandatories require. We all understand that.
The problem is especially severe in drug cases because the rules of co-conspirator liability hold the low-level offenders accountable to the same conduct as the ring leaders.

Congress assumed that larger drug quantities would mark the more important players, but the accountability rules under the *Pinkerton* case, for example, mean that street-level sellers get tied to the same quantities as their bosses.

Now critics of the mandatories often attack Congress for what they consider its overly punitive attitudes, but in this instance I think Congress itself never contemplated these kinds of results. Congress used drug quantity as a proxy for culpability. And Congress clearly did not realize that the co-conspirator liability rules would produce sentences that are antithetical to its own judgments about grading and proportionality.

Then, that problem is compounded by what I call "the cooperation paradox." Co-conspirator liability puts the big fish and the small fry at the same punishment level, but typically it's only the
important players who can get big breaks from substantial assistance.

So as a result, uniformity is replaced by what I'd call "inverse proportionality." The smallfry wind up with the more severe sentences than the supervisors and kingpins. Now I've given some really shocking examples of that in my prepared testimony, but all judges know that there are many, many examples of this.

My third concern is the cooperation backlash. That's something that's almost always overlooked. One of the major supposed advantages of mandatories is their ability to elicit cooperation, but the research indicates that when criminal justice policies are considered overly harsh many people become reluctant to cooperate with law enforcement.

So any additional offender cooperation can easily be offset by the increased difficulty of getting cooperation from law-abiding citizens, which is equally important, sometimes more important.

In the New York City data that I discussed in my prepared testimony, willingness to work with
the police increased 20 percent, and willingness to
report suspicious activity doubled when the
respondents believed that law enforcement practices
weren't unfair.

Now obviously co-conspirator cooperation
is crucial. I don't minimize that for a minute. But
we can get it with the more flexible 5K departure
without having mandatories that chill cooperation by
law-abiding citizens, and chill it very substantially
as far as the data indicates.

Now on next steps, I just want to take a
minute to look forward. Personally I don't believe
that the Commission should question the overall
severity levels that are set by mandatories. That
may put me a little bit out on one end of the
spectrum, at least among academics, but I think that
punishment levels are a matter that Congress sees as
its own prerogative. It is not going to be persuaded
to leave that issue to the Commission's expertise.

But the issue of how mandatories actually
work, that is an issue on which Congress really needs
some help. And that's an issue that is within this
Commission's expertise.

So I think the most important point that the Commission can clarify for Congress is that the mandatories are almost entirely discretionary. They actually undercut Congress's own goals, and they aggravate devices of the pre-guideline sentencing system because they provide almost no transparency or accountability, even less than the system that Professor Saltzburg just described, because we knew what was going on in that district in California.

The remedy I would recommend is simply to ask Congress whether it supports truth-in-sentencing or not. Congress has pushed that principle on the states very vigorously. It abolished federal parole for the same reason. But most voters and most [congressional] members probably don't understand that mandatory minimums are a flagrant violation of the truth-in-sentencing principle.

So the truth-in-labeling would mean transforming mandatory minimums into laws that instruct the Commission on how high certain base offense levels should be. I know that's not popular
among commissioners and academics, but I think that
would be a solution that would be honest, and it
would respect Congress's appropriate role in setting
severity levels.

In the absence of that step, I think
there's one important option that is worth
considering. And again it's something that's not
often discussed, but it's something very specifically
within the Commission's expertise.

That is, that I think the Commission
should urge Congress to clarify that mandatory
minimums should never be triggered by conduct for
which the defendant is accountable only on a
foreseeability theory.

Sentencing courts should apply mandatories
only on the basis of conduct in which the defendant
had a personal role, not conduct of co-conspirators
that's reasonably foreseeable.

Finally, the Commission can take one very
important step on its own, whether or not Congress
chooses to act. And I don't mean dropping base
offense levels in a way that would flout
congressional preferences. As I've said, I don't support that, and it's not politically feasible in any case.

But what the Commission can do, while fully respecting Congress's preferences, is to fix the definition of "relevant conduct" under [USSG] §1B1.3. The co-conspirator foreseeability test that causes so much havoc in mandatory minimum cases is not something that Congress itself ever dictated. You did that. You, the Commission, did that in [USSG] §1B1.3. And you have the power to change that without in any way flouting congressional intent.

In fact, that change would bring the concept of drug quantity back into line with the idea that Congress had in mind all along. So the fix would be to limit "relevant conduct" to acts in which the defendant had some personal role.

That fix would have its most direct effect in cases not governed by mandatory minimums. That alone would be a huge achievement. But if Congress won't make changes, fixing the definition of "relevant conduct" would also open the door for
courts to reinterpret the existing statutes. Because without 1B1.3 in the way, courts can hold that mandatories apply only to acts in which the defendant was involved personally. There's nothing in the statute that prevents that. In fact, properly interpreted that is what the statute should have been understood to mean all along.

I have covered other possible remedies in my prepared statement, so I don't want to take further time with that. But I would be happy to answer questions. Again, I thank you very, very much for this chance to be here today.

CHAIR SESSIONS: Okay, thank you, Professor. Let's open it up for questions. Ricardo.

COMMISSIONER HINOJOSA: As all of you know, at some point in our history we've had a mandatory minimum in some case or another that Congress has passed through the years that goes way back.

In 1970, Congress did away with mandatory minimums with regards to drug cases. But by 1986, they were right back. And so my question to you is:
What happened during that 16-year period that made Congress go back to the mandatory minimums on drug trafficking offenses when they had just made this decision in 1970 to do away with a lot of the mandatory minimums in drug trafficking, and then 16 years later came back and did it again?

What happened during that 16-year period that caused Congress as a policy matter to change its mind? And the President, obviously, to agree to it?

MS. LEVENSON: Well I think some of it was the rhetoric of the "War On Drugs." Literally, that we took a political agenda and put it into our criminal justice system, and from there they took off.

In terms of whether there was an actual problem that had increased, I think we would have to go back and study that. But I don't think that we were in a similar situation today. Because when that happened, you had a complete discretionary system, as Professor Saltzburg had described.

We're not really at that anymore. With the advent of the guidelines, with or without
mandatory minimums, we have much greater guidance than we had at that time. So when they brought in the mandatory minimums, you did not have the type of very detailed guidance that there is today for district judges.

COMMISSIONER HINOJOSA: The guidelines had already been passed. They were going to go into effect --

MS. LEVENSON: Right, they weren't in effect yet.

COMMISSIONER HINOJOSA: But the Sentencing Reform Act was already two years old when they came back and came up with the mandatory minimums. So they had just passed 3553(a), the enabling statute for the Commission, and obviously thought the guidelines would be mandatory with possibilities of departures. And so what is it that caused Congress, as a policy matter, to come [26] years after the Sentencing Reform Act back to the mandatory minimums?

MS. LEVENSON: Well I'll defer to others, but I will say the War on Drugs, and the second thing is that the guidelines had not been given an
opportunity to actually be used. And so I think that there was a concern about will guidelines be enough.

COMMISSIONER HINOJOSA: So are we back to that system where Congress would feel, now that they're advisory, that we're back to the system pre-1984?

MS. LEVENSON: No. I think we're in a much better situation now precisely because of what this Commission does; by collecting the information, we have indications that we do not have that broad of the use of discretion.

Frankly, when you look at the statistics, you don't have that many judges who are going that far afield from the guidelines. So I don't think we're in the same situation today.

COMMISSIONER HINOJOSA: Does it make a difference that it depends on what part of the country we're talking about?

MS. LEVENSON: Well I think that that is the concern, which is, you know, do we have parts of the country. But even then, I don't know that we have the type of disparity that you had before you
had the guidelines in operation, as we have today.

MR. SALTZBURG: I think there are three short answers, and they're overly simplistic but they have some accuracy to them.

Number one, that crime rates soared in the '70s and the early part of the '80s. And we'd be kidding ourselves if we thought that no matter how perfect the system is that Congress or any legislative body is not going to respond to increasing crime rates. That's number one.

Number two, the Justice Department, before I got there, and then even while I was there, the Justice Department took a very hard line with respect to a number of criminal justice issues, including, some of you will remember, there were people in the Department pushing to overrule *Miranda* and blaming Supreme Court decisions for this large rise in crime.

COMMISSIONER HINOJOSA: Sounds like today.

(Laughter.)

MR. SALTZBURG: Well I think it was probably worse then. And there was a lot of
campaigning that focused on crime at the time. And I think the last thing that was really true is there were clearly disparities in sentencing not only in different parts of the country, but in particular courts, and they got headlines.

And one of the things I learned when I chaired the Kennedy Commission is, one headline, one sentence that strikes the public as being out of proportion often gets a legislative reaction that is a kneejerk reaction, but it's very powerful. And I think you had some of that.

MR. SCHULHOFER: I largely second what my co-panelists have said. I would particularly underline the point that Professor Saltzburg just made, which is that crime rates were absolutely soaring in the 1970s.

We now know that it was mostly the result of demographics. It was a result of baby boomers after the parents of the World War II generation -- of "the greatest generation," their children were a huge cohort that was coming into the high crime years.

Then we had the crack epidemic on top of
that. Both of those things created tremendous public preoccupation with crime. The media during the period of the late ’70s and early ’80s, the media made crime a federal issue in a way that it had never been before. So both of those were playing a role.

And I think that crime and drugs both were at the very center of the political agenda. So I think all three of those things are no longer true today. I'm not an expert on politics, and Congress will do what it wants to do. We in many ways can't predict it. But crime is trending the opposite way from what it was then.

The crack epidemic has burned itself out and is not preoccupation in the way it was. I don't minimize the dangers of drugs, but it's not a preoccupation.

And the other point that Judge Hinojosa just made about *Miranda*, that's being raised in the context of terrorism, which I think underscores the point. The public is preoccupied with terrorism, much more so than drug mandatories.

So I think all three of those factors
create an opportunity.

CHAIR SESSIONS: Vice Chair Jackson.

VICE CHAIR JACKSON: Yes.

Professor Schulhofer, you were speaking about charge-tinkering, and adjustments that are made that make it so that the mandatory minimums are not necessarily mandatory. And I'm just wondering whether your research has shown that there is more or less tinkering in various geographical areas, or with respect to certain crimes that would explain the application of mandatory minimums in some areas and not others?

MR. SCHULHOFER: Yes. First of all, the tinkering that we found was certainly much more acute with respect to certain crimes, particularly drugs and 924(c) weapons possession cases. That's where you would most particularly see it.

And --

VICE CHAIR JACKSON: And can I just interrupt? Is that because the mandatory minimum levels are so high in those cases? Or what would account for that?
MR. SCHULHOFER: Well our study, which started right on the day that the guidelines went into effect, was focused as much on guideline compliance as it was with mandatory minimum compliance. And back in those days, the guidelines were much more binding than they are today. And also I think the Commission was somewhat inappropriately focused on policing compliance with the guidelines to an extent that I think we learned created some backlash in the judiciary.

But our focus was on guidelines generally. And what we saw was evasion of the guidelines -- I don't mean departures. Departures are not an indication of noncompliance. Departures are contemplated.

But we found evasion of the guideline system throughout. And where it was most acute was in cases covered by mandatory minimums.

Now there was some variation regionally. We found in one district in the Southwest people thought the bank robbery guidelines were too lenient, which would have amazed anybody from a district in
the Northeast, but there was some variation. But generally we saw this everywhere.

And the variation was much less significant than the fact that it was everywhere.

VICE CHAIR JACKSON: Thank you.

CHAIR SESSIONS: Okay, Beryl.

COMMISSIONER HOWELL: Did you want to go?

VICE CHAIR CASTILLO: Go ahead. No, go ahead.

COMMISSIONER HOWELL: I sort of wanted to follow up on one of Commissioner Jackson's questions about this, because I think that, although we talked earlier about inconsistent application, or bringing of mandatory minimum charges by prosecutors, but one way to look at it is inconsistent application.

Another way to look at this interesting research that you did with former Commissioner Nagel is as an indication of where prosecutors themselves across the country view certain mandatory minimum charges as too high, and therefore use what you called the tools of evasion.

And so this research can sort of be viewed
in two ways. Do you -- and one of the things that
we're dealing with in part of this report is figuring
out what research foci we should have.

And so I invite you to sort of give us,
you know, any suggestions you have for how we can be
looking at, you know, some of those similar areas
today, and under an advisory system.

MR. SCHULHOFER: Yes. Thank you.

The kind of -- the ideal approach would be
to replicate in some way the kind of research that
Commissioner Nagel and I did. That research required
tremendous support from the Commission itself, and
from the Department of Justice.

We couldn't have done it as academics. We
never went anywhere without having the Attorney
General tell the U.S. attorney to open all doors for
us.

And it was also very time-consuming. So
between now and the time that your report is due in
October, I don't think it would be feasible to do
that, unless you had a couple of commissioners who
were willing to do this full time.
We went to a district, you know, two days a month. I suppose of somebody wanted to do that hands-on for the next month, they could get it done by the end of the summer. That would be a possibility.

Other than that, one thing that I think is very feasible to do is to look at the data that's reported.

Together with my research assistant we looked at the data on what I called the tools of evasion. And as I said in my prepared testimony, I don't want to imply that these are always nefarious or inappropriate in some way. The 5K motion is perfectly appropriate, but you have to wonder when you see 5K motions in 40 to 50 percent of the drug cases.

So what you can do is look at tools of evasion broken down by districts. We were able to do that from data that's on your web site, but we weren't able to take out the safety valve cases, because those aren't broken down by districts, or at least we didn't find it.
If you were to break down the safety valve -- this is one example, and I think maybe I should end my response there because it could take too long to develop the whole methodology -- but I think if you were to take safety valve cases and take them out, district by district, and see what's left, we certainly -- we found that nationally if you take out the safety valve cases you find the tools of evasion being used in more than 40 percent -- I'm sorry, more than 50 percent of all drug cases. And I bet you could find districts where that's up to in the 80 percent.

VICE CHAIR CASTILLO: I have sort of two optional questions, and so don't feel like you have to answer them, because they're going to cover just recent events.

One of them is Attorney General Holder's memo of May 19th. I don't know if any of the three of you have seen that memo as it affects prosecutorial charging for sentencing practices. Have you seen that?

And do you think that's going to have any
effect on the disparities that occur with regard to the charging of mandatory minimums?

MS. LEVENSON: I've only heard second hand that it unties from the Ashcroft Memorandum and gives more flexibility to the charging assistant to pick the appropriate charges, which seems to me I applaud an effort in that direction.

And the problem again is an issue of timing. Will that take care of the problem? Well, we're not likely to know by October whether it will. Will it help? I think it will help, and that's why I think it was a good idea. I don't know that it will help enough.

VICE CHAIR CASTILLO: So your sense as a former prosecutor is it may help?

MS. LEVENSON: Yes.

VICE CHAIR CASTILLO: Okay. The other question is: This Monday the Supreme Court decided U.S. v. O'Brien where I saw that Justice Stevens, as one of his last acts -- who knows how many are left -- but sought to really overturn Harris v. United States, which is the fundamental legal underpinning
of all of the mandatory minimums after Booker.

And there's been a lot of question as to whether or not Harris v. U.S., which after all is a 2002 case, is still viable after Booker was decided in 2005.

Do any of you want to comment on that?

MR. SALTZBURG: I don't think anybody on this panel could possibly predict. I mean, those of us who thought it was a bad decision when it came down thought the Supreme Court would overrule it. That was before we had new membership. And that one new Justice, no one knows what her view on this subject is, and we've got another one who will be soon on the Court.

So I mean they may have read her crystal ball, but I think it's really hard to know.

VICE CHAIR CASTILLO: I don't have a crystal ball. I do think that Justice Breyer, who voted in Harris uphold that system, I think he's likely to reconsider as a result of the remedial holding in Booker. So that gives you one vote the other way.
We don't know what the new Justice, or Justice Sotomayor thinks on this subject, so we don't know. But as five to four rulings go, it's a pretty shaky ruling.

MR. SCHULHOFER: But as a matter of policy, it seems to me that *Harris* was wrong from the beginning, and that for something as important as mandatory minimums, and with the numbers that we're talking about, to think that those numbers are in some way different from a maximum was never realistic.

And so I think as a matter of policy those facts, those drug weights for example, should be proved beyond a reasonable doubt. That I think is true.

But it won't fix something like the relevant conduct problem, which I think this Commission can fix tomorrow, or in your next amendment cycle.

The other point with respect to the new Attorney General guidelines, I did want to comment on that briefly, because the Ashcroft guideline were
basically like the Thornburgh Memo under which we did most of our research. And the Thornburgh Memo required prosecutors to charge every readily provable count.

The Ashcroft Memo, as strict as it is, is actually more flexible than the Thornburgh. So we found even under a strict regime, as strict as Main Justice could possibly make it, there was all kinds of simply ignoring mandatory minimums.

There's no doubt that it became more flexible with Ashcroft, and it would be still more flexible under the new ones.

How do I feel about that is very ambivalent, because I don't like the results of the mandatory minimums and this is a way to mitigate them. But it mitigates them in the worst possible way, and you still have -- every judge still has cases where the U.S. attorney doesn't use the discretion.

Judge Gleeson just wrote an opinion a couple of weeks ago in a case, United States [v.] Vasquez where the U.S. attorney in the Eastern
District of New York, which is one of the more tolerant districts as far as drug quantities are concerned, dropped one guy down from the ten-year minimum to five-year minimum but refused to go lower. Judge Gleeson said: That's ridiculous.

He sent the AUSA back to her office. And she returned and said: I'm sorry, my boss won't let me go any lower. And Judge Gleeson writes in his opinion that this time her supervisor was shadowing her in the courtroom to make sure that she stayed in line.

So it solved some of the problem, but it creates a different problem. And that's why I think it's appropriate to go to Congress and say there's nothing mandatory about these things.

MS. LEVENSON: And I want to emphasize I agree with what Professor Schulhofer just said. I don't think this problem goes away by having the Justice Department make these incremental allowances, because (a) it's still shifting the discretion from the sentencing judges to the prosecutors, and (b) you will still have these situations and nothing in the
law that will be guiding the AUSAs other than what
their office policy might be.

CHAIR SESSIONS:  Jonathan?

COMMISSIONER WROBLEWSKI:  Thank you,
Mr. Chairman.

Professor Saltzburg, first of all I want
to say what a pleasure it is not only to see you but
to hear the name of Judge Weigel mentioned.  I first
became interested in federal sentencing working for
Judge Peckham, just down the hall from Judge Weigel.
I want to ask you a question really about,
It's more about political science than I think it
really is about sentencing.  I know you've worked for
a long time with the ABA and on the ABA sentencing
standards, and as you know those standards which have
been in place for a long time do call for presumptive
guidelines, for guidelines with the force of law and
with meaningful appellate review.

And I do take issue, frankly, with your
assessment of the current appellate review standards.
The Justice Department now, because of the standards
that have been laid down by not only the appellate
courts, which I think you were right at the beginning were really struggling to figure out what this reasonableness review was about, but then the Supreme Court told them in no uncertain terms several years after Booker, which is: It's deference.

And that's what the appellate courts are applying, by and large, is deference. And so the result of that is the Justice Department is appealing a few dozen cases a year in a system of 75,000. So I'm not sure we have meaningful guidelines with meaningful appellate review.

But the ABA Sentencing Standards always called for that. And it seemed to me that we were moving in this direction of maybe finding a consensus among the defense community, the academics, the Justice Department, and Congress, a consensus that has evaded us since the Sentencing Reform Act that we might be able to find a way of no mandatory minimums, but presumptive guidelines, maybe some changes in severity levels, and there was a lot of discussion -- you testified in front of the Commission, a number of others testified in front of the Commission -- about
such a system, a system that was less complex, more simple, but had the force of law behind those guidelines.

And that has now evaded us again. And I'm curious. From your experience, number one, why do you think that's evaded us? And how do we get some consensus back?

Because it strikes me, if there's no other lesson to be learned from the crack/powder experience, it's that without consensus we're not going to get meaningful reform in the way that we're talking about.

MR. SALTZBURG: Actually, I appreciate the opportunity to answer that question because it actually hits me where I live, and what I thought for a long time, which is this:

I like the ABA guidelines, for the most part, the standards, I should say, and I think that the system really makes very good sense.

I had hoped -- and I'm speaking here only for myself; I have the ABA sitting behind me, and God knows they don't want me to say this on their
behalf --

COMMISSIONER WROBLEWSKI: Yes, they're shadowing you.

(Laughter.)

MR. SALTZBURG: I had hoped the Supreme Court was going to say that the greater the departure from the guideline sentence, the stricter the review. That made sense to me in a system of guidelines.

And that still seems to me the right approach. Now unlike the jury trial holdings of the Supreme Court, and unlike the Sixth Amendment holdings, I think this was previously -- I think Professor Levenson previously mentioned this -- that Congress is free to adjust the appellate review standard when a judge decides to give a sentence that's outside the guideline range.

I would think that in fact there could be a wide -- and I'm not saying -- there's never universal consensus, but a fairly broad consensus on several things. I do think the sentences are too high. I think they are where they are, as I said, because of mandatory minimums being there.
And I'm not sure, by the way, I don't -- never believe that Congress follows this in a very careful way and makes this delicate judgment, we really want the sentences to be here; that's why we picked this mandatory minimum.

I think these mandatory minimums are drawn out of thin air. They tend to come in response to particular highly publicized crimes or sentences from time to time. And they tend not to be well thought out. But a system in which there was a presumptive character to the guideline determination, left the trial judge free to say I'm going to take some of the 3553(a) factors into account and adjust the sentence, and the greater the adjustment the stronger the appellate review, makes sense to me.

I think, and the reason that the Supreme Court didn't say that, is that very few of the Supreme Court Justices at the time had any trial experience as a judge. The only two Justices who had trial experience, in my recollection, were Justice Souter and Justice O'Connor. The rest of them had been appellate judges.
And to tell you the truth, appellate judges I think were not extremely anxious to get into the business of having to review a lot of sentences. And one of the things the Supreme Court decision was I think it discouraged to some extent the Justice Department from appealing, and it kept the workload of the federal appellate courts down.

There's no doubt that to the extent appeals become a larger part of the system, that's more work for appellate courts and not something they would probably welcome, but it's something that I think is an important part of a rational sentencing system.

MR. SCHULHOFER: If I could comment briefly on that, and I know that we're nearing the end of the time, but just briefly, I think the consensus that you referred to is already here among all those constituencies that you mentioned, except for Congress. And even within Congress I think it's here, except that many of them don't have much room to maneuver to vote.

I think the reason that we've gotten to
where we are is worth mentioning, because back in the 1970s it was not just severity that was driving this movement. I'm sure you all remember that it was Senator Thurmond, together with Senator Kennedy, that pushed this regime forward. And that was because, at least equally important as the push for severity was the concern about inequality.

It is hard to imagine that today, with so much of what we've seen about the inequality of the sentencing guidelines, but in the '70s the concern was that underclass African American defendants were getting much harsher sentences than white collar, or White defendants. And that was a big part of the push. That's why the Sentencing Reform Act passed with only one dissenting vote in the Senate, and so on.

That was the consensus. And I think we've learned a couple of things. One is that there are some things that are worse than inequality, and we are seeing that. The other is that even with the regime of guidelines and mandatories, we have huge inequalities. To some extent they are worse than
they were before.

So certainly I don't think you would find many people worried about harsh treatment of African American defendants who would attribute that -- who would think that the guidelines were a solution to that problem. So that again, I think that creates an environment.

The guidelines have accomplished a great deal in this area that we forget. Drugs were not such a big thing in the federal docket back in 1970, or even in 1986. I believe it was under the first President Bush that the number of U.S. attorneys was doubled in order to bring more drug cases into the federal system.

But at that time, the problem was there were white collar crimes, there were bank robberies, there was mail fraud, that was the federal docket. And stockbrokers whose families were suffering got probation, while the kid who held up a mom and pop store, or robbed a federal bank got 25 years in prison. That's what we were worried about. And the guidelines have contributed enormously to solving
that problem.

I don't think we should lose sight of that. But in a world where drugs now represent more than 50 percent of the federal docket, that's not just one offense. That's almost the whole show. So I think that we can -- part of moving this problem forward is to see that the guidelines themselves, and rigidity, has created new problems, different problems of inequality. They're in a more narrow area, but they're in many ways more important.

The 43 levels that you have is the result of the 25 percent rule. Nobody sat there, because as I mentioned it's nice to be back in this building, I remember when the Commission was in ramshackle quarters over near the White House, and when we were drafting the guidelines, nobody wanted 46 levels. We were locked in by the 25 percent rule. And you can't get sentencing ranges with only 15 points on the grid unless you have more flexibility.

That might be an area, maybe you could go back to Congress. That's separate from the mandatory minimum issue, but it might be something that would
be easier for Congress to understand, especially in a
post-Booker world. That may be a 35 or a 40 percent
spread between the minimum and the maximum would be
something more sensible.

CHAIR SESSIONS: I just have a couple of
questions to ask. First, you used the word
"consensus." I'm unclear as to whether or not you
suggested that we are near consensus in terms of our
view on the severity of sentencing, or to a
presumptive guideline structure, which may be
different than the guideline structure that exists.
I think that's what Commissioner Wroblewski was
talking about.

I would be interested to know from the
panelists whether you would think that a presumptive
guideline system with wider ranges and more inherent
flexibility, et cetera, could meet constitutional
muster under the Sixth Amendment in particular, and
how exactly you would do that.

And the second thing I wanted to bring up
is in relation to whether or not we have the power
essentially to de-link the drug guidelines from the
mandatory minimums. I mean, obviously those were
linked at the very beginning in 1987. That's
contributed to the severity of sentencing.

The language I think in 994(a) as I recall
is consistent with all pertinent provisions of any
federal statute. Does that mean that we are
foreclosed from de-linking the guidelines from the
mandatory minimums because of the guidelines being
the result of Congress statutes?

Those are the two questions. First,
generally -- well, second, de-linkage; first, general
presumptive guideline system.

MR. SALTZBURG: And there's a third you
had in there, which is constitutionality under --

CHAIR SESSIONS: Well that was sort of
linked to the presumptive. But how about 1(a)?

(Laughter.)

MR. SALTZBURG: I think the states have
demonstrated, and the Supreme Court review of the
state decisions, you can have presumptive guideline
ranges that don't require jury trials on every fact,
as long as you're in the range.
What the Supreme Court has said is that when you move from one range, guideline range, to another then it goes up, then you have to have jury fact-finding justifying that increase.

But I think the de-linkage poses two separate questions. One is the statutory question: Can you do it lawfully? I think you can.

The second question is: Do you want to do it? And there, either way you get perverse results, it seems to me. Right now, where you are linked, as I said before, you have the wonderfulness of equality, which as Professor Schulhofer pointed out is not so wonderful sometimes, and that is where the mandatory minimums drive up the other sentences and everybody gets too much.

So you could change it. And then what you'd end up with is a system where, in the 50 percent of the cases where the prosecutor in discretion chooses the mandatory minimums, they get slammed. That's the cliff. Boom. And the judge though on the other 50 percent of the cases can now impose a lower, more reasonable sentence and you've
now at least for 50 percent of the cases you have a better sentence but you have more disparity. So I mean personally I would rather have the latter. I mean, anything that will start driving down sentences to reasonable ranges in drug cases I'd be for.

CHAIR SESSIONS: Any other response from any other panelist?

MS. LEVENSON: I would only add to the response that, rather than look at the cure as being a wholesale change in everything that you need to do with all the guidelines, I do think it is possible to just look at those offenses that deal with the mandatory minimums and ask about having presumptive ranges for them, once again consistent with the Supreme Court's decisions on fact finding.

In other words, I don't think you have to change everything with regard to how the guidelines operate in order to make some of these changes.

To answer the question about whether you can deal with the "consistent with" language in the statute, I do think you can. It's an open question,
obviously; the courts will have to answer it. But part of it is looking at what the role of the guidelines are as opposed to the role of the mandatory minimums.

I don't hear anything from this Commission as saying we are usurping Congress's role. What we're asking Congress to do is take a look at a different approach. Should Congress give that to you, I don't see that there'd be any problem at all.

MR. SCHULHOFER: I may differ, Judge, from my fellow panelists on this. I think that even before the Commission existed on any question of statutory interpretation, or any question of applying the law, courts are in a partnership with the Executive Branch and with Congress. And I think courts should see themselves as working as partners with Congress.

The Commission, having a commission re-emphasizes that point, that I think the Commission is working in a partnership with the judiciary and with Congress. So when Congress says that we think the minimum sentence for possessing 500 grams of powder
cocaine should be five years in prison, I don't think
it's right -- I can't predict whether the Supreme Court
would slap you down, but I think it's quite
inappropriate for the Commission to say that you
think the sentence should be two years instead of
five years.

You can say it could be five years, with a
reduction of four levels for minimal role, that's a
different matter, but I think you should start at the
right level.

I was schooled in this in a world where
the chair of the Commission, Chairman Wilkins, Chief
Judge Wilkins now, had been the chief legislative
aide for Senator Thurmond, and the principal other
member of the Commission, now Justice Breyer, had
been the chief legislative aide for Senator Kennedy.
And both of them understood very well that their job
was to be good agents for Congress, and to work with
Congress, and to implement a partnership with
Congress.

So I really don't -- much as I -- I don't
think that I dislike the high sentences any less
strongly than my fellow panelists, but I really don't think it's right here across the street from Capitol Hill for you to, what might seem to be thumbing your nose at Congress.

And I think you accomplish a lot more by saying, yes, we hear you. This is what you've said. We understand that. But that is not inconsistent with having downward adjustments, and so on.

CHAIR SESSIONS: Any others?

COMMISSIONER HINOJOSA: Just a real quick question to Professor Schulhofer. This may make no difference to you, but the docket is slightly different now, Professor. The drug cases are down to about 29-point-some percent of the federal docket. The felony and Class A misdemeanors and immigration is up to 32 percent. And we've also changed the makeup of the defendants; 42 percent of the defendants are now non-citizens, which therefore raises all sorts of other equality questions about availability of other possibilities within sentencing procedures.

MR. SCHULHOFER: I would say, number one,
I'm not an expert in those cases. Number two, the fast-tracking system that operates strongly in immigration cases I think has a bearing on this, but you're right. Drug cases are not -- in a way that reinforces my point, which is that part of the goal that we've appropriately been preoccupied with drug cases because there are many of them, 10 -- 20,000, I think, 25,000 at last count, there are many of them, and the sentences are huge, and the injustices -- not only are they long sentences, but you don't find people -- I don't hear people ringing their hands about the bank robber, his fourth bank robbery, and he shot, although he didn't kill, but he shot five tellers and he gets life, people aren't ringing their hands about that.

What they're ringing their hands about is the street-level schlemiel who gets tagged with 700 kilos of cocaine because his bosses were dealing that, and he gets life, or he gets 20 years. So drug cases preoccupy us because there are a lot of them, because the sentences are high, and because the sentences are clearly unjust.
They're unjust, as I said in my prepared statement, I don't challenge Congress's value judgments. These sentences are unjust from Congress's own perspective. Congress never thought that the guy on the street should be charged with 600 kilos. So that's why those cases preoccupy us, and I think that's still a source of concern even as other cases start to occupy a bigger part of the docket.

CHAIR SESSIONS: So the word "schlemiel," how do you spell that?

(Laughter.)

MR. SCHULHOFER: I don't even know. "Sch-le-meil" I think in Vermont, I think it's pronounced SCH-LE-MEIL.

CHAIR SESSIONS: We don't have sha-meil.

(Laughter.)

CHAIR SESSIONS: Well thank you for a very informative discussion. Thank you, very much. Let's take a 15-minute break.

(Whereupon, a recess was taken.)

CHAIR SESSIONS: Good afternoon, and thank
you very much for coming to testify today. This is
the view from the Public Policy Analysts.

Let me begin by introducing you all. Cory
Andrews is a senior litigator at the Washington Legal
Foundation in Washington, D.C. Before joining the
Washington Legal Foundation, Mr. Andrews was an
appellate attorney at the Law Firm of White & Case in
Miami, Florida?

MR. ANDREWS: Yes.

CHAIR SESSIONS: White & Case is in Miami?

MR. ANDREWS: They're everywhere.

(Laughter.)

CHAIR SESSIONS: They are? He received
his J.D. Magna Cum Laude from the University of
Florida where he was Editor-in-Chief of the Law
Review; served as Law Clerk for the Honorable Steven
D. Merryday who has testified before us on a number
of occasions, of the U.S. District Court for the
Middle District of Florida. Welcome, Mr. Andrews.

Next, Dr. David Muhlhausen is a Senior
Policy Analyst at the Heritage Foundation's Center
for Data Analysis. Prior to joining the Heritage
Foundation he served on the staff of the Senate Judiciary Committee where he focused on crime and juvenile justice policy. Dr. Muhlhausen -- "Mahl-hawsen," "Moll-hausen"?

DR. MUHLHAUSEN: Mool-howsen.

CHAIR SESSIONS: Muhlhausen?

DR. MUHLHAUSEN: Yes.

CHAIR SESSIONS: -- previously served as a manager at a juvenile correctional facility in Baltimore. Dr. Muhlhausen earned a doctorate in public policy from the University of Maryland, Baltimore County, and a bachelor's degree in political science from Frostburg State University.

Welcome.

DR. MUHLHAUSEN: Thank you.

CHAIR SESSIONS: And next, Erik Luna is an adjunct scholar at the Cato Institute; is on the faculty of Washington & Lee University School of Law. He has taught in various capacities at the University of Utah, S.J. Quinney College of Law; at Washington & Lee University; at the Cuban Society of Criminology in Havana in 2002; at the Max Planck Institute for
Foreign and International Criminal Law in Germany; and at the University of Chicago. He previously served as deputy district attorney in the San Diego district attorney's office. He received a B.S. from the University of Southern California in 1993, and a J.D. from Stanford in 1996. And, welcome.

MR. LUNA: Thank you, Judge.

CHAIR SESSIONS: So let's begin with Mr. Andrews.

MR. ANDREWS: Thank you, Your Honor, and good afternoon, and thank you again for the invitation to be here and speak before you. The Washington Legal Foundation always appreciates the opportunity to give you positive feedback and -- the way we view matters at least from our particular perspective.

CHAIR SESSIONS: Well you are free to give us negative feedback, as well, if you wish.

(Laughter.)

MR. ANDREWS: I'm sure you've heard a little bit of that today.

I would like to just begin my remarks by
sort of contextualizing the issue of minimum
mandatories as a symptom of what we view as a larger
problem. That is, sort of the over-federalization of
criminal law in the United States.

Just by way of a story, in the beginning
of the republic, in the early days right after the
ratification of the Constitution, there were three
federal crimes. There was a crime against treason, a
crime against piracy, and a crime against
counterfeiting. Now today, at least estimate --
although even the Congressional Research Service
tells us they're not entirely sure how many federal
crimes there are -- there are around 4500 crimes, or
statutes carrying criminal sanction on the book.

The really remarkable thing about those
4500 crimes is that 50 percent of them have been
enacted just in the past 35 years. So something very
dramatic is happening in Congress.

And by federalizing conduct that otherwise
is being addressed, or could be addressed by state
governments, federal criminal laws, including those
that carry minimum mandatories are just a symptom of
this increasing and disturbing trend of over-
federalization.

Traditionally under our system criminal
conduct was punished by the states, and only in the
rarest cases was it prosecuted by the federal
government. And so this unhealthy emphasis on
federal criminal laws basically in part undermines
the careful balance that our system struck with
federalism.

State governments are often more flexible,
more creative, more responsive than the federal
government. States can tailor criminal laws to local
needs and community norms without consequence to the
rest of the nation. And such a decentralized
approach allows for greater innovation and
experimentation among the 50 states to find good
social policy, you know, as opposed to a centralized
one-size-fits all federal solution.

Perhaps the most famous case for
encouraging states to function as laboratories of
democracy and experimentation was made by Justice
Brandeis himself in his famous dissent in New State
Ice Company v. Liebmann in which he observed that the "[d]enial of the right to experiment may be fraught with serious consequence to the nation. It is one of the happy incidents of the federal system that a single courageous state may, [without risk to the rest of the country] if its citizens choose, serve as a laboratory; and try novel social and economic experiments."

Brandeis went on to explain that, because they are closer to their constituencies, states are often able to react to social problems much more swiftly and responsively than the federal government. And nowhere is state experimentation more vital today than in the area of criminal justice, where the latest axiom seems to be: If it's a good idea to criminalize something at the state level, it must be even 50 times better to criminalize something at the national level.

WLF also supports enhancing the statutory tools that are available to district judges by which they may sentence defendants below statutory mandatory minimums in nonviolent offenses.
As the Commission is well aware, currently the only way that a district judge can do so is under the "substantial assistance" provision of 3553(e), or under the "safety valve" mechanism of 3553(f). And we believe expanding those mechanisms to other nonviolent offenses would allow Congress to do what it seems intent on doing, and what I will tell you in a moment I think is probably the best thing, to maintain a system that includes mandatory minimums but providing district judges with meaningful opportunities to avoid harsh and unintended sentencing results.

One idea that we support is to expand the idea of the safety valve to all nonviolent first-time offenders with a Criminal History Category I. Another idea worth considering and studying is to grant district judges the authority to impose a sentence below a mandatory minimum for a nonviolent offense if the court finds that it's necessary to do so to avoid violating the requirements of 3553(a).

This allows a judge to consider the seriousness of the offense of the defendant, the
defendant's criminal history, and all the factual context surrounding the crime.

At the same time, it obligates the judge to articulate why the minimum mandatory sentence in this case would violate 3553(a). Such a sentence, of course, as was discussed previously, is subject to appeal by the government if it's unreasonable or if it's insufficient.

And, while WLF feels that most mandatory minimums should be re-evaluated and even eliminated in instances, we believe it would be a mistake to return to the kind of arbitrary disparity that Judge Frankel decried in his classic book, Criminal Sentences: Law Without Order, which is the milieux in which many of today's problems both sprang from and were a response to.

And so we share common cause with those who seek to reform the current mandatory minimum regime. We don't favor the sweeping elimination of mandatory minimum penalties in all cases. We believe that repeat offenders and hardened criminals who fail to learn from sentences and who are true recidivists
should receive harsher sentences. And, most importantly, we believe that some crimes are so serious and pose such a pervasive threat to the nascent citizenry that a tough mandatory minimum sentence is entirely appropriate.

For example, for the crime of treason. We have no problem with a minimum mandatory of the crime of treason, although five years somehow seems a little bit low when you look at some of the other minimum mandatories that are on the books.

Likewise, terrorism is sort of a concern it seems increasingly everywhere you turn, and there are several minimum mandatories such as airplane hijacking, the use of atomic weapons, the use of biological and chemical weapons that result in the death of another, these are the kind of crimes that are so heinous, so unambiguous in nature that no examination of any fact other than the commission of the crime itself should be necessary to establish that the mandatory penalty is appropriate.

There's strong bipartisan and postpartisan concern, and I think a growing consensus, to reform
the current minimum mandatory regime, and I look forward to your questions, and thank you for the opportunity to testify.

CHAIR SESSIONS: Okay. Thank you, Mr. Andrews. Dr. Muhlhausen?

DR. MUHLHAUSEN: Thank you.

My name is David Muhlhausen. I am a senior policy analyst in the Center for Data Analysis at the Heritage Foundation. I thank Chairman William Sessions and the rest of the Sentencing Commission for the opportunity to testify today.

The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation. My spoken testimony will focus on four points:

My first point is that Congress and the Commission need to place special emphasis on the doctrine of just deserts when considering the use of mandatory minimum sentencing statutes.

In general, there are four justifications for criminal sanctions: deterrence, incapacitation, rehabilitation, and just deserts. With my spoken
testimony I will focus on just deserts.

Under the doctrine of just deserts, the commission of a crime is itself sufficient justification for punishment. Punishment should be commensurate with the moral gravity of the offenses. Regardless of utilitarian benefits or hypothetical root causes, the moral gravity of the offense validates punishment.

The amount of punishment to be administered should be guided by proportionality, with minor crimes receiving more lenient punishments, and more serious crimes receiving harsher punishments. Thus, the level of punishment is determined by the seriousness of the crime.

Even if punishment fails a utilitarian cost/benefit analysis, punishment is still morally justified. Punishment appropriately applied is inherently just and deserved.

While some criticize this approach as playing into public outrage expressed for certain crimes, public anger epitomizes a moral judgment that is most properly depicted as moral indignation.
Moral indignation is an appropriate response to inherently wrongful conduct carried out intentionally with knowledge that the act is unlawful or wrongful.

While the utilitarian goal of lower crime through deterrence and incapacitation is worthwhile, lawmakers need to place a special emphasis on the moral gravity of offenses in determining the proportionality of punishment.

As political scientist James Q. Wilson has explained, "The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault -- these acts are destructive of the very possibility of society and affronts to the humanity of their victims. Parents do not instruct their children to be law abiding merely by pointing to the risks of being caught."

Professor Wilson's statement brings me to my second point: Some crimes are so heinous and inherently wrongful that legislatures have a moral responsibility to establish sentencing for [them] that do not involve probation.
Mandatory minimum sentences should be justified based on the nature of the crime. Such factors as inherent wrongfulness, depravity of the crime, harmfulness to the victim, and dangers to society should serve as a guide in setting mandatory minimum sentence lengths.

According to the Constitution Project's Sentencing Initiative, there is no constitutional role that requires that the bottom of every sentencing range be set at probation.

Without a doubt, some offenses -- such as forcible rape, or a premeditated murder -- should always include a minimum period of imprisonment. For example, Congress has mandated death or imprisonment for life for those convicted of first degree murder of the President of the United States or a member of Congress.

These harsh sentences are justified because they correspond to the gravity of the offenses, including their dangerousness to American society. Less serious offenses assigned harsh mandatory minimum sentences are harder to justify.
based on just deserts.

Mandatory minimum sentences are largely incompatible with crimes where the relative severity of the particular acts, and the relative culpability of the individual offenders are difficult to assess.

My third point is that many mandatory minimum sentence statutes are generally incompatible with the operation of the sentencing guidelines.

While Congress has legitimate power to establish mandatory minimum sentences, many of these sentences are inconsistent or in conflict with the sentencing guidelines.

In the opinion of Paul Cassell, a former judge and current professor of law at the University of Utah, the sentencing guidelines already stipulate tough sentences, so mandatory minimum sentences are largely redundant.

Further, the Constitution Project regards mandatory minimum sentences as generally incompatible with the operation of a structured guideline system.

My fourth point is that the Sentencing Commission needs to conduct a study comparing the
public's views on punishment compared to current federal sentencing outcomes.

The Sentencing Commission funded a similar study during the 1990s. While the original study found that the public substantially agreed with sentences provided under the sentencing guidelines, sentencing practices have changed over the years.

First, a new study should compare the public's views on the appropriate levels of punishment to those set forth under mandatory minimum sentencing statutes.

Do various mandatory minimum sentencing statutes correspond with public sentiment? Are mandatory minimum sentences too lenient, too harsh, or just right?

The answer to this question would be informative to Congress and the Sentencing Commission.

Second, the study should shed light on how well the public's views match with the sentencing practice of federal judges after the United States Supreme Court's 2005 decision in *United States v.*
Booker. This decision has allowed federal judges to consider the sentencing guidelines in an advisory role. So judges now have more discretion than they have since the guidelines were established.

In order to evaluate the degree to which the federal judiciary holds criminals accountable in the post-Booker area, Congress and the Sentencing Commission need to be aware of how the trend in sentencing compares to the public sentiment on appropriate levels of punishment.

I thank you for the opportunity to testify.

CHAIR SESSIONS: Thank you, Doctor.

All right, Mr. Luna?

MR. LUNA: Thank you. Thank you, Judge Sessions, and fellow members of the United States Sentencing Commission.

I appreciate the opportunity to speak to you today on this important topic. My name is Erik Luna and I am a law professor at Washington & Lee University School of Law, and an adjunct scholar with
In my brief comments today I won't go into detail on all of the points raised in my written testimony. I should just briefly note, though, through no fault of the hardworking and extremely conscientious Sentencing Commission staff, an earlier version of my written testimony was written and passed out today. I believe the final version is online now and would refer the audience to that version, or I would be happy to provide that version to any interested party.

And of course I'd be happy to answer any questions that the commissioners have about the written testimony. But what I'd like to do is to get to what seems to me to be the heart of the matter: What accounts for the rise and persistence of mandatory minimums? And what can be done about them?

Undoubtedly there are some in Congress who genuinely believe that mandatory minimums serve the goals of punishment; that they prevent sentencing disparities among defendants; and provide law enforcement the leverage needed to deal with major

...
As you've heard today, there are good reasons to question each argument that is made in favor of mandatory minimums. Some suggest that the use of mandatory minimums has done nothing to prevent unwarranted disparities in punishment, as was just discussed by Professor Schulhofer.

The claim of crime reduction has been contested, as well, with most researchers finding no meaningful deterrent effect from mandatory sentencing laws.

The statistics also may belie categorical assertions of government necessity. Most recipients of federal drug mandatory minimums, for instance, are drug couriers, mules, and street-level dealers, not the folks who can provide a great deal of information, and they are certainly not the prototype defendants for whom mandatory minimums were enacted: drug kingpins, leaders in international drug cartels, and so on.

What's more, the rate of substantial assistance in nonmandatory minimum cases is
comparable to the average in those types of federal
cases where mandatory minimums would be available.

This challenges one of the hidden
subtexts: namely, that federal judges can't be
trusted; that the bench is filled with bleeding-heart
set-'em-loose Bruces. For numerous reasons, this
argument is false.

The federal judiciary is the most credible
and competent government body in the nation, and
claims to the contrary offer refrains on the anti-
judge political rhetoric of the not-so-distant past.
But even if mandatory minimums were necessary to
induce pleas and cooperation, that would simply beg
the question:

Is this a good thing? Is it appropriate
to threaten grossly disproportionate and
penologically ineffective sentences, imposing what's
been called a trial tax on those who dare challenge
the government and exercise their constitutional
rights, all in order to extract information and
guilty pleas? Do these ends justify the means?

We might be able to reduce jaywalking, for
instance, by attaching a five-year mandatory minimum
to it, but that doesn't make that punishment just.

More generally, should it concern us that
the entire federal criminal justice system, indeed
criminal justice across America, has become a massive
exercise in plea bargaining?

It certainly concerns me that once again
we heard law enforcement use the words today,
"weapon" and "arsenal" in reference to mandatory
minimums, as though they were being used against
foreign soldiers in a real shooting war, not fellow
citizens of the United States.

It also concerns me that law enforcement
considers vast sentencing differentials between state
and federal systems as some type of unmitigated good,
especially treating the states as the junior
varsity.

It also concerns me, although it was
refreshingly honest, that one witness positively
referenced the greater chance of being denied bail
under the federal system and the likelihood of being
sent out of state to serve a federal sentence as
providing extra leverage over defendants. Again, this assumes that it's a good thing that this type of banishment becomes part of forum-shopping and serves as the basis of plea negotiations.

Now again to be clear, there are conscientious lawmakers and law enforcers who, although agreeing that mandatory minimums can produce miscarriages of justice in individual cases, will still balk at explicit legislative repeal or any large-scale reforms. But even those representatives who would like to eliminate some or all mandatory minimum sentencing laws -- and there are some -- face a seemingly intractable problem in American democracy: the dysfunctional relationship of politics, mass media, and criminal justice.

To reiterate what the last panel touched upon, sensationalistic news coverage tends to increase the public salience of crime, generating fear and attendant calls for action. Even in areas where concern may be unfounded, populace pressures create incentives to enact new crimes and harsher
punishments which give politicians the tough-on-crime credentials that can fill campaign coffers and garner votes at election time.

This general political dynamic has stymied efforts to reform mandatory minimums in Congress in the past, with any reform effort carrying the danger of being labeled "soft on crime."

My preference would be for federal lawmakers to eliminate mandatory minimums in one fell swoop. To sum up my views I'll borrow a line from former federal Judge John Martin:

Mandatory minimums are over-inclusive, they're unfair, and they can even be draconian. They transfer sentencing power from neutral judges to partisans in the criminal process. They make for poor criminal justice policy and raise all sorts of constitutional problems. Other than that, they're a great idea.

(Laughter.)

MR. LUNA: But given the real politic of federal lawmaking, I fully recognize that every journey must start with a first step.
In a forthcoming article co-authored with former U.S. District Judge Paul Cassell, we propose some reforms that are more minimalist in nature. In a nutshell, the proposal has two parts:

First, an explicit legislative authorization for the U.S. Sentencing Commission to set guideline ranges where it deems them to be appropriate, without automatically being required to peg guidelines to existing mandatory minimums.

And second, a broader and more detailed safety valve provision that would permit federal judges to depart downward whenever the guidelines provide for the possibility of a lower sentence than the mandatory minimum.

This new safety valve provision would draw upon the existing safety valve for low-level drug offenders, but it expands the application to all defendants, except those whose crimes result in death or serious bodily injury; provides a series of criteria to guide a court in its evaluations of the issue, again drawing upon the existing safety valve as well as the Supreme Court's own Eighth Amendment
jurisprudence that to my mind is too infrequently
used by the Court in analyzing terms of imprisonment;
but here all of these would be criteria. They would
be factors to be considered, rather than dispositive
rules.

It would limit the reduction under the
safety valve to the otherwise applicable guidelines
range. And, as we try to argue, all of these points
were intended to inspire a consensus based on
mutually agreed upon principles.

We also offer several changes that would
build upon these initial reforms, assuming that they
were successful, such as empowering judges to receive
input from juries in determining whether a given
mandatory minimum is unjustifiable, given the facts
of the case; eliminating the stacking function of 18
U.S.C. 924(c), converting it into a true recidivist
statute; and providing a limited revival of, although
people may not know this, the still-existing U.S.
Parole Commission, to revive sentences for inmates
serving extremely long terms.

Again, in general we tried to craft a set
of proposals that proceed from principles of consensus and focus reform on the most extreme situations of injustice, recognizing that Congress has historically been reluctant to repeal mandatory minimums.

Our hope is that by taking a minimalist approach, the proposal might have some prospect of passage in Congress and could serve as a useful measure towards creating a federal criminal justice system that is fair to all.

What is more, we hope that it would inspire further reforms to the federal criminal justice system.

I would be happy to discuss our proposal in more detail, or any of the points that I make in the written testimony, but let me conclude there and thank you again very much for inviting me to testify today.

CHAIR SESSIONS: Thank you, Mr. Luna. So, any questions? Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very much. Is this on? Can you hear? Okay. This
question is for Professor Luna, but also I would
welcome any comments from the other panelists.

I don't know, Professor Luna, if you're
familiar with the work of Professor David Kennedy at
the John Jay College of Criminal Justice. He
tested in front of the Commission at one of the
seven regional hearings.

In addition, there was a deputy police
chief from High Point, North Carolina. And both of
them described and discussed the drug market
intervention strategy in Operation Ceasefire, and
those types of programs that Professor Kennedy has
studied for a long time. In very simple terms, those
programs are to identify at-risk individuals, people
who are either coming out of state prison, people who
have been involved in gangs, people who are at risk
to be involved in serious either drug activity, gang
activity, or violent crime, and to provide those
people basically with two options: support,
including federal support; or telling them that if
they go and commit another crime that they would be
prosecuted federally with very stiff penalties.
Professor Kennedy's research has suggested that that strategy has worked, that it has reduced crime dramatically in High Point, North Carolina, for example, places in Chicago where it's been tried, in Baltimore, Maryland, and elsewhere.

So I'm curious, because you suggested that mandatory -- and part of that strategy is to have the threat of a mandatory minimum penalty put right in front of those at-risk folks, as well as the resources available to give them the opportunity to go straight and make something of their lives.

So I'm curious. Your testimony was that mandatory minimums are completely ineffectual, and I'm curious if you think that this research and experience contradicts that. And I'm also curious from the others, because -- this is a federalism question -- should the federal government, and should this program, be in place?

MR. LUNA: A couple of points.

First, when it comes to drugs, you've got to remember I'm from Cato. I don't approve of drug criminalization. I also don't -- am not particularly
keen on federal involvement in the criminal justice
system for many of the reasons that Cory mentioned,
and for the reasons that I state in my written
testimony.

David Kennedy is a brilliant scholar. I
have not read the study. I don't know what the
answer is to that.

I would point you to another study just
recently completed, or was published by Michael
Tonry, which found that mandatory sentencing, across
the federal system but also across all jurisdictions,
did not provide effective deterrence or
incapacitation. And I also would say that that's not
the whole game, for other reasons, as Dave just
mentioned.

They're not consistent with any decent
conception of retribution. But if in fact -- I guess I
would have to look at the study itself. I think
there is still a normative question about the use of
plea bargaining and extremely hefty sentences as a
means to extract information. I think it's a
normative question, not an empirical question. It's
a normative question of the value judgment about
whether the government should be using these
sentences that are, most people would say are grossly
disproportionate.

COMMISSIONER WROBLEWSKI: Yes. This
program is not about a threat for cooperation. It's
saying, they're coming out of prison and saying: You
now have opportunities. You have a life to live in
front of you, and you have an opportunity to go
towards a law-abiding life, and we're going to assist
you with that. We're going to provide services. Or,
you have an opportunity to go back to a life of
crime. And we're telling you that if you go towards
a life of crime, we're going to next time send you to
the federal system, which has a mandatory penalty.
And if you go towards the life without crime, you
won't.

It's not coercing --

MR. LUNA: I apologize. I did not quite
understand how the system worked.

VICE CHAIR CARR: Actually, before you
answer, Professor Kennedy's research is that these
penalties provide no deterrence at all, no deterrent
effect; that the people out there don't know what the
penalties are until they're faced with them.

And actually I think in the High Point
situation what he said is we go, we find the 60 most
active gang members. We take the four of them who have
got to be taken off the street, and they get indicted
with substantial federal penalties -- 20, 30 years to
life.

The other 56 are invited into a room and
told: We have the evidence to indict, convict you,
and jail you right now. But no one in this
room -- police officers, community members, family
members, clergy, want to help you out and want you
not to get convicted and not to go to jail.

So part of his theory is that you can't
deter these people with these penalties at the
outset, but you can have the whole community involved
in trying to straighten them out; but that it only
works if they know that there's a substantial threat
that the next time we have you on videotape you won't
get a break.
I'm not trying to change your mind about it; it's just that I think that's what the setting is.

MR. LUNA: It seems to me it sounds like a very interesting experiment.

VICE CHAIR CARR: And I understand that you're not in favor of the drugs being illegal, and you're not in favor of the coercive hammer, but I just wanted to let you know --

MR. LUNA: -- to fully understand it. And I'm glad to know about that. I get all my furniture from High Point.

(Laughter.)

VICE CHAIR CARR: No longer made by federal prisoners, by the way.

(Laughter.)

MR. LUNA: Good. That's good news.

I guess I have some concerns, but they are not -- they will have a lot to do with the federalism aspect of it. I still question the use of the federal government as a means to deal with what I perceive, and what many people perceive, as local
Can it be effective? Well it kind of depends on what you mean by "effective." If it means that this type of intervention will somehow convince a certain percentage of individuals to go straight, that's a fair argument.

But I can come up with counter arguments. It sounds to me like it's a little bit similar to using the hammer, although it doesn't sound like they're threatening it, but it sounds a little bit like the drug court threat. And that to me I have some problems with, with individuals, many of whom have some real addictive propensities, using the threat of prison or jail time to try to get them straight. And again you have to ask the question: Is the means to that end, does that justify the ends?

DR. MUHLHAUSEN: I'd like to follow up. I am familiar with Operation Ceasefire. I would say that the federal government has done some wonderful things in the sense of testing innovative ideas. In this case, Operation Ceasefire is one good example.
However, Operation Ceasefire is the type of program where basically it leverages assets of police departments and prosecutors. And it's a good technique that other police departments and communities should engage in, but doesn't necessarily need to have federal involvement.

So I think the federal role, while it has planted the seed and shown that it does work -- there is some good evidence in Chicago -- I would say that what is unique about this program is that it recognizes that you have a small portion in the community who engage in violent crime. And by targeting them, and letting them know what the consequences are, and not just passing a law or passing new laws but going and meeting with them face to face, can have a real deterrent effect.

So I think it is an innovative strategy that communities should look at replicating.

However, they shouldn't be dependent on the federal government to do it.

MR. LUNA: If I could just quickly follow up on that because I think it was a fair point, this
all to a large extent -- and again it sounds like it was, and I'll have to look at it and I probably shouldn't comment since I don't know it -- but it sounds like it's dependent on having a select group handling this what might be called an intervention, and it involves trust, the trust that the process is picking out those individuals appropriately.

I come from a background where government generally should be distrusted. That is, something in which it's a kind of a first principle of mine. And when you think about the way in which --

VICE CHAIR CARR: By the way, we all work for the federal government.

(Laughter.)

MR. LUNA: I understand.

(Laughter.)

CHAIR SESSIONS: But we're an exception to the rule.

(Laughter.)

MR. LUNA: That's right, that's right.

But I think we can come up with examples where trust doesn't quite work.
There is, as you all know, a case where the Supreme Court I think wrongly decided a discovery issue, a case called Armstrong, where you had kind of a forum-shopping issue. You had all the Black crack cocaine defendants were going to the federal system. All the White powder cocaine kids were going into the state system.

Could it be based on good reasons? Maybe. But the government wasn't willing to open up its books, it's decisions as to how this process was made. The federal courts, at least according to the Supreme Court, were not willing to demand that discovery. And so we're totally dependent on trust that they in fact are doing what is just and what is fair. And I generally rebel against that type of assumption.

VICE CHAIR CASTILLO: Professor Luna, I want to go back to your proposed solution with former Judge Cassell. Why do you think we need legislation that's explicit from Congress to de-link the guidelines from the mandatory minimum? Would that be part of Congress also then changing the mandatory
minimums? Or is that stand-alone legislation to just
do that?

MR. LUNA: I think the two come as a
package, I think. The key aspect is the
assumption -- and maybe well founded; Professor
Schulhofer just recently made, in the last panel made
some arguments as to why maybe Congress, this
Commission should not deviate from mandatory
minimums.

I think fair arguments can be made the
other way, that the Commission was in fact
specifically instructed to use its independent
judgment, and I can think of a whole variety of
political dysfunctions that lead to mandatory
minimums, and that this Commission was intended to
try to circumvent.

But putting that aside, I think the
easiest way to solve this would be for Congress to
say you do not have to link your guidelines to
mandatory minimums. That would solve all of the
constitutional issues, and also the very difficult
questions that you as commissioners would have to
resolve. And so that would be my opinion on that.

Not because I think it's necessary -- I think a fair argument could be made that you don't have to -- but because it would avoid all the questions and the problems that might result.

VICE CHAIR CASTILLO: I understand. In the absence of that, it seemed to me that in the last panel Professor Saltzburg made a point of saying if that didn't occur he was in favor of just a de-linkage and some reduction in what seemed to be unfair drug penalties.

MR. LUNA: It's a fair proposal. What that would require for it to be meaningful is that, for Congress to then reduce the mandatory minimums that currently exist. And I just am less sanguine about that possibility.

The whole idea behind -- again, my preference, and I have to make this clear -- my preference would be to eliminate mandatory minimums. But absent that, and given the very interesting dynamics that exist on the Hill, and given the likelihood that they will -- and I hope that the Biden
Bill goes through -- but the unlikelihood that very many mandatory minimums will be eliminated, that that would be political fodder for an incumbent's opposition, that this provides a means where they can, based on principles -- lay them out, talk about federalism, equality, separation of powers -- where they can provide this, a solution to some of the worst examples of mandatory minimums without explicitly repealing or reducing any mandatory minimum.

VICE CHAIR JACKSON: I am interested in Dr. Muhlhausen's position on public anger and public response to various crimes. I am just wondering whether or not, you say that the Commission should survey the public's views and determine, you know, what penalties are too harsh.

Do we need mandatory minimums to take that into account? In other words, if the Commission were to do such a survey and determine what the public thinks about various crimes, would putting that information out for judges who then operate within the guidelines system be sufficient, so that judges
would then know what the public thinks about various
crimes when they're determining whether or not to
impose, or at what level to impose a sentence?

    DR. MUHLHAUSEN: Well if I understand your
question correctly, I do not think that any sort of
survey should establish sentencing floors. I think
it should serve as a guide, because our laws should
reflect our common beliefs. And so I think that
setting of sentences shouldn't be poll-driven, in the
sense that it's changing year to year, but it should
reflect public sentiment overall.

    VICE CHAIR JACKSON: And that sentiment
then should be taken into account with respect to the
setting of mandatory minimums? Because I understood
you to say that some mandatory minimums were
appropriate, and that we should determine that based
on public sentiments.

    DR. MUHLHAUSEN: Well, I think some -- I
think the public will confirm some mandatory minimums
as being acceptable. And I think they may find some
being too harsh, or too lenient. I think it is good
to know which mandatory minimums are out of step, or
in-step with public opinion. I think that would be a good thing for the Commission to know.

VICE CHAIR JACKSON: And are there other factors that should be taken into account --

DR. MUHLHAUSEN: Oh, definitely. Definitely. It shouldn't be -- that shouldn't be the exclusive, sole method for establishing what sentences are. I think it should help enlighten and inform the Commission and Congress, but it shouldn't be, you know, in 2010 the Commission commissioned a service and therefore for the next 30 years we're locked into what the public viewed sentencing policy should be for that year. I don't think it should be that. But I think it would be informative.

MR. ANDREWS: If I may, I would just like to add, I think part of the problem is that we've reduced our understanding of crime in this country to very simplistic principles and slogans. "It's always better to be tougher on crime than softer on crime."

"Adult time for adult crime." And if we can't get the job done with a criminal sanction, then we need an even broader criminal sanction, and we need to
throw in a minimum mandatory on top of it. It's always easy for politicians, which after all is who we're here to try to influence through the Commission, to get elected by getting tough on whatever or whoever is the villain du jour. And I am mortified by what's taking place in the Gulf, and I'm very heartened to know that the leak has been successfully stopped, but how long do you think it will be before a bevy of crimes and criminal laws are put in the hopper on the Hill to address this latest villain du jour?

And this is how this happens. It happens slowly. It doesn't happen gradually. And at the end of the day you're left with 4500 crimes. What we desperately need at bottom I think is a more engaged and more informed public that is willing to listen and analyze before demanding a quick fix, and just being swayed by a 15-second sound bite.

But unfortunately that's not what's happening. And in part there's an interesting disconnect, if you will. If you think about it, most people see America as an overly permissive society,
right, in which people are getting away with bloody
murder every day on the nightly news. And yet, we
also happen to have the largest prison population in
the world.

And as I said earlier, the amount of
federal crimes on the books has doubled just in my
lifetime, and I like to think I'm still a relatively
young man. And so I would just add that interesting
disconnect to the conversation.

CHAIR SESSIONS: Okay. Judge Hinojosa?

COMMISSIONER HINOJOSA: Yes. It seems
clear that there's a reluctance on the part of this
panel for the federal government to have much
involvement in criminal law, other than in treason,
piracy, and counterfeiting. And so my question is:
Other than those three, which if any other criminal
acts do you think that the federal government should
be involved in? And do you think that the federal
government should have any kind of more involvement
with acts that involve our borders? Whether they be
drug trafficking, or immigration, or anything that
involves the border areas on the Northern border or
the Southern border, or coming in through the oceans?

And if you would identify which crimes, if any, you think we should expand from the original three.

MR. ANDREWS: Well first of all, I only hope that you're being in jest. Of course I think that there's a much larger role than piracy, counterfeiting and treason for the federal government, but it was just an example to illustrate how far we've come.

I certainly think the federal government has a proper role in all sorts of areas, including regulating the airways through the FAA, and making criminal offenses that occur on airplanes -- I didn't come today prepared with a full list, but I mean I think we have a system that's intended to both have a decentralized federal government that has clearly enumerated roles, and when possible the federal government has a great role in cooperating with the states.

And, you know, it's interesting that you bring up immigration, but I mean I certainly think that's an area where the federal government has -- and
we may not all agree on this -- but where the federal government, although the laws are on the books, they have not been vigorously enforced, and now you're seeing states try to fill that gap. And I think the best solution is for the states and for the federal government to work together collaboratively.

And go to back to an earlier, the problem with the federal role occurs when it begins to completely usurp the authority and to absorb the function of the deliberative bodies of the states. Where it just sort of completely trumps the states, and trumps the input of the state deliberative process.

The High Point experiment is exactly the sort of experimentation that I think is positive and that should be encouraged. And that's an area where the federal government was cooperating and collaborating with the state. And I think good things come when that happens. And I would like to see more of this.

MR. LUNA: I would just add, it's a fair question by Judge Hinojosa. I could come up with a
lot of crimes, as long as it has some kind of federal interest. Attacks on a federal agent, all of the District of Columbia, threats against a federal judge -- I think that's a fine one. We can go on with many others, but the problem -- and again this is, the horse is already out of the barn, it's the presumption of federal jurisdiction. That jurisdiction's assumed, the wire, using the mail, the Commerce Clause, federal is assumed. It's very hard to find things where the federal government cannot be involved.

And it's that presumption that is troubling. And, you know, you can compare it to what was said by -- although there may be people who disagree, but the most important jurist in America's history, Chief Justice John Marshall, that Congress has no general right to punish murder committed within any of the states. And it is clear that Congress cannot punish felonies generally.

Well that is clearly not true today. And I think that should be of concern to us, that Congress just inherently assumes that power. And
again, it frankly doesn't matter because they've assumed it and the Supreme Court is not going to strike down, except Lopez, and the Violence Against Women Act. There's going to be very few situations where they're going to strike a federal statute down. But should it be of concern that the federal government has assumed a general police power when the constitutional text clearly states that they do not? I think it should be of concern.

DR. MUHLHAUSEN: I would like to add that the federal government is way too far involved with the prosecution of ordinary street crimes. This diminishes the role of state and local governments in handling crime themselves. And so I think the federal government should focus on truly national crimes, or crimes that are of national importance, and less on ordinary street crime. So I think that's a sort of just a broad general guide.

CHAIR SESSIONS: Okay. Dabney?

COMMISSIONER FRIEDRICH: Mr. Andrews, you've talked about the states being laboratories for
democracy, and unfortunately we on the Commission can't do a great deal about the over-federalization of our criminal laws. But with respect to the guidelines themselves, are there state sentencing systems which you're familiar with which you would recommend that this Commission take a close look at?

MR. ANDREWS: I think great strides have been made in New York State, for one, in which you're seeing less reliance on things such as mandatory minimums and more contextualized analysis of individual criminals where you're sentencing not, you know, indictments and charges, but you're sentencing people.

And that of course will take into account all of the various factors in 3553(a). And I think I would be happy to supplement my testimony by looking more into all of the various approaches of the states, but unfortunately today I didn't come with particular state solutions in mind.

COMMISSIONER FRIEDRICH: Well one of the statutory recommendations you made in your testimony was that the Commission consider recommending to
Congress that the safety valve be expanded to give judges the discretion to depart from a mandatory minimum in a nonviolent felony case in which the goals for purposes of 3553(a) are not being fulfilled.

And I'm wondering whether you would also recommend that the Commission consider, if it were to make any such recommendation, that Congress also consider whether the standard of appellate review, which would apply to those sorts of discretionary sentences, would be any more rigorous than that that exists right now under the Supreme Court case law?

MR. ANDREWS: Well it's interesting that you bring that up, because that of course is a whole bag of tricks of course, the question of appellate review.

In this regard I just finished a law review article that will be coming out in the next issue of the [University of] Chicago Law Review by Professor Frank Bowman. I would commend it to you. But he points out basically
what a mess we've made of things, which of course no
one on the Commission needs anyone to explain that to
them, but he described it as a doctrinal incoherence
that's resulted in a nationwide festival of
confusion.

And he rightly reminds us that reining in
unduly harsh sentences, promoting sentences that are
proportional to the gravity of the offense, and
reducing disparity in sentences were precisely the
objectives of the structured guideline sentence that
was largely voided by the Supreme Court in Blakely
and Booker.

And he argues that -- and this is I think
his contribution, is he says we've gotten away from
talking about what the elements -- we've confused the
elements of a crime versus things that enhance the
sentence, that these are all facts that need to be
proven. And he suggests this, and I think this is
probably right. He says that any fact which when
proven alone or in combination with other facts
increases the defendant's punishment by increasing
either the penalty a court may impose, or the penalty
a court must impose, must be proven beyond a reasonable doubt to a jury, or if the jury trial is waived beyond a reasonable doubt to a judge, or admitted by the defendant.

And we know that because the Supreme Court establishes the constitutional floor but not the ceiling for protections Congress could adopt this proposal and enact it into sentencing law.

CHAIR SESSIONS: Can I just ask you about what you read in Frank Bowman's law review article, because I was on a panel with him just a little while ago and -- that "festival" language that you just used? I must have missed it. I didn't think he brought that up. But is he essentially suggesting that if there is a factor listed within a guideline range which a judge considers is relevant in determining what the sentence within that guideline range is to be, it may increase it a little bit or may decrease it a little bit -- increase it is the important point -- that in that kind of situation, even within a guideline range, that there would be a right to a jury trial, and that you'd have to prove that beyond
a reasonable doubt?

Is that what he is suggesting?

MR. ANDREWS: I would defer to him to better explain to you his article, but his precise calculation is that any fact which, if proven as true on its own or in combination with other facts -- and I think perhaps "in combination with other facts" would be the ones that you're referring to -- but it would be in some instances more than merely the elements of a crime.

So that's --

VICE CHAIR CARR: But it was the balance of the language, "would affect the sentence that the judge may or must impose"?

MR. ANDREWS: It would.

COMMISSIONER HINOJOSA: Could --

CHAIR SESSIONS: Yes -- we're going to debate this one for awhile I can tell.

(Laughter.)

MR. ANDREWS: It's a very -- it's a very provocative argument. But it's a very thoughtful piece, and it traces the history going all the way
back.

COMMISSIONER HINOJOSA: Well I almost go all the way back, being on the bench 27 years and having done sentencing five years without any guidelines, and so my question is: Why is it constitutionally okay for those five years that I didn't have guidelines, and somebody got convicted and there was a maximum of 20 years, for me to be able to use any factors that I wanted to, which a lot of times turned around some of these same factors that are in the book, mostly the factors that are in the book, but without the book because that's what's common sense, that you were going to take role into account, and this may be astounding to some but if it was a drug case you did take the amount of drugs into account, or whether there was a gun involved, or all those other factors, why is that constitutional, that I can pick anything within the 20 years without having anybody prove anything, or even discuss it for that matter?

Once there's been a conviction and you have a statutory maximum, do you think that system
should have a constitutional problem?

MR. ANDREWS: That's really -- I mean, honestly, at the end of the day, the Supreme Court has created some of the problem. And, you know, Apprendi and its progeny, I don't know if any of the other panelists have any thoughts about it.

MR. LUNA: It's just, I think, Judge, you've laid your hand on a -- your finger on the perverse logic of Booker/Blakely/Apprendi, and it's just that by being more broad, and with less guidance, it becomes constitutional.

And so -- but I take this from a fairly pragmatic standpoint. I'm not so sure I agree with that line of cases, but it was the vehicle by which mandatory guidelines became advisory guidelines, and that's good enough for me.

Do I believe that -- do I believe that --

COMMISSIONER HINOJOSA: Even though it was the federal Supreme Court that did this, I guess?

(Laughter.)

MR. LUNA: They have some role in *U.S. v. Booker*, and it seems to me that it was a vehicle
toward that end. I'm not -- this is why the discussion
about the case that was just decided, and about these
other cases, I'm not so sure that that has the
O’Brien case and others, I don't know what relevance
in the long term it's going to have for mandatory
minimums. 924(c): Guns, drugs. Jury's going to
find it. Whether you submit it to a jury or you
submit it to a judge, they find it.

The problem is, it's too broad. And, that
you have cases like the one that Judge Cassell
handled, and that I handled on appeal, Angelos, where
that equals 55 years.

So the fact-finding aspect of it, whether
it's a judge or a jury, they still come to the same
conclusions. Five grams of crack cocaine equals five
years. Unless you're going to engage in jury
nullification, or judicial nullification, it is not
going to change that.

So I just think that that is a red herring
to the problem of mandatory minimums.

CHAIR SESSIONS: Any others?

(No response.)
CHAIR SESSIONS: Well thank you very much.

Thank you, very much, for contributing a very interesting discussion, and I guess we'll close the panel at this point.

We will take a break for 15 minutes and be back at a little after five after.

(Whereupon, a recess was taken.)

CHAIR SESSIONS: Good afternoon. Should I say "last but not least"? No.

(Laughter.)

CHAIR SESSIONS: Well, this is the "View from [the] Advocacy Groups," although you're wearing a different hat, or a different coat, or a different responsibility.

MR. HILLIER: I checked the audience, Your Honor, and I don't see any Constitution Project here, so...

CHAIR SESSIONS: You're all set.

(Laughter.)

MR. HILLIER: Free rein.

CHAIR SESSIONS: All right, well let me introduce you all.
First, Marc Mauer. We've had the privilege of having him before us before. He is the executive director of the Sentencing Project. He has been with the Sentencing Project since 1987. He is also an adjunct faculty member at George Washington University. Mr. Mauer began his work in the criminal justice field with the American Friends Service Committee in 1975, where he served as the organization's national justice communications coordinator. Mr. Mauer received a bachelor's degree from Stony Brook University, and a master of social work from the University of Michigan.

Thank you again for coming here today.

Next, Julie Stewart, who has been here many a time, is president of Families Against Mandatory Minimums, which she founded in 1991. Prior to founding FAMM, she worked at the Cato Institute for three years as director of public affairs. Ms. Stewart earned a B.A. in international affairs from Mills College in Oakland, California.

Jay Rorty is the director of the American Civil Liberties Union's Drug Law Reform Project.
Before joining ACLU, Mr. Rorty was an assistant federal public defender in the Northern District of California for 11 years. Mr. Rorty has also been a staff director and senior trial attorney at the Bayview Hunters Point Community Defender in San Francisco; and is a former board chair of the Center on Juvenile and Criminal Justice. Mr. Rorty earned a J.D. from New College of California School of Law, and an undergraduate degree from the University of Michigan. And thank you for traveling a long way to be here.

MR. RORTY: Glad to be here.

CHAIR SESSIONS: And I'll thank you, as well, for traveling from Spokane -- it is Spokane, isn't it?

MR. HILLIER: That's where I was born, but I'm working in Seattle.

CHAIR SESSIONS: Oh, in Seattle? All right.

VICE CHAIR CARR: Thank him, anyway.

CHAIR SESSIONS: Hmmm?

VICE CHAIR CARR: Thank him, anyway.
MR. HILLIER: It's even further than Spokane.

CHAIR SESSIONS: Yes, it is, unless you started heading West and came that way. Yes.

CHAIR SESSIONS: Mr. Hillier is a member of the Constitution Project's Sentencing Initiative's Blue-Ribbon Committee. He also serves as the federal public defender for the Western District of Washington, and has worked in various capacities in the Seattle public defender's office since it was created in 1975. He is also an adjunct professor at the University of Washington, and is a fellow of the American College of Trial Lawyers. Mr. Hillier is the former chair and present member of the Federal Defender’s Sentencing Guidelines Committee. He graduated from St. Martin's College and Gonzaga University School of Law, and I clear knew that you were from Seattle not Spokane.

So, Mr. Mauer, can we begin with you?
MR. MAUER: Certainly. Well first of all, thank you so much for inviting me here, and thank you for your stamina in putting up with a full day of testimony, but I think it's a wonderful opportunity to air a range of perspectives on this. We've heard a variety of ideas generated about the issue of mandatory sentencing. I want to focus my comments on two issues in particular.

The first is the question of what impact have mandatory sentences had on public safety? Presumably one of their key objectives. And the second is, what impact have they had on racial disparity within the criminal justice system?

Now on the public safety issue, there are many people who have suggested in congressional testimony and testimony before this Commission that mandatory sentences have been effective in reducing crime. The story that they tell generally is one where we hear that mandatory sentences began to be adopted by Congress in the 1980s. In the early '90s
crime rates start to go down. And that's all you
need to know about things. We had mandatory
sentences and not long after, crime rates were going
down.

Unfortunately, I think that's a far too
simplistic story about the relationship between these
factors. For a start, we do have some good research
in the field now about the crime decline since the
1990s. And while we don't have all the answers, I
think the general answer is that it's complicated, as
these things often are. That most of the leading
criminologists would suggest that part of this was
due to rising incarceration; part of it was due to
changes in the drug trade; some of it was changes in
community policing, the general economic climate; a
number of factors coming together.

The role of incarceration in particular,
the most optimistic studies suggest that maybe 25
percent of the decline in violent crime was due to
rising incarceration. Other equally strong studies
suggest it was as little as ten percent was due to
rising incarceration.
So we shouldn't discount this completely, but it tells us essentially that at least 75 percent of the decline in crime had nothing to do with incarceration.

Beyond that, we're looking at incarceration here and not necessarily mandatory sentencing. The rise in incarcerations are due to a number of factors, mandatory sentencing being just one of them.

Another problem with the sort of simple assumption that federal mandatories have reduced crime is, as you well know, the federal court system handles less than ten percent of all the crime in the country. The vast majority obviously is prosecuted in state and local courts.

And so if we wanted to determine what is the specific impact of federal mandatory penalties on reducing crime rates, when virtually every state has its own set of mandatory penalties and variety of sentencing structures, I haven't seen any research that suggests we can somehow isolate the impact of federal mandatories in particular.
Another confounding problem here is that, because federal mandatories have been applied so heavily against drug offenses, if you think about how mandatory penalties might work, and might they have a deterrent effect on potential offenders, well if somebody is considering engaging in a drug crime, he or she might be subject to federal penalties, might be subject to state penalties because drug crimes are prosecuted very aggressively in both systems.

So once again, assuming a person is actually thinking about being deterred, how do they weigh the impact of federal mandatories against state mandatories, or indeterminant systems for that matter.

So there are a lot of theoretical problems and a lot of practical problems in making any quick assumptions about how federal mandatory penalties may have affected crime rates.

Thinking more broadly about this and how do mandatory penalties work, essentially if we are going to have a deterrent effect mandatory penalties have by and large increased the severity of penalties
that potential offenders face. And in this regard I think they also clash with what a lot of research has told us over a long period of time. And that is, to the extent that the criminal justice system has some deterrent effect -- and it does have some deterrent effect -- that this effect is more a function of the certainty of punishment rather than the severity of punishment.

And so if we can somehow increase the odds that a given offender may be caught, at least some people may be thinking about the consequences of being caught. If we're merely increasing the severity, if we raise the penalties from five years to ten years, most offenders unfortunately are not thinking about being caught and therefore they're not thinking very much about the penalties that they're subject to.

And if they were thinking about it, in the vast majority of cases one would imagine five years would be enough to get their attention. It's not clear that ten years gets that much more of their attention.
The other problematic part about mandatory penalties, and again particularly with drug offenses, is, unlike some other crimes, unlike many murders or rape, sexual assaults, where it’s a given offender in a given situation committing a very serious crime, drug crimes are very widespread, as we well know, and are very much subject to what the criminologists would call "the replacement effect."

So we have somebody on the street corner selling drugs. The police come along and arrest that person, haul that person off to prison, and if we go back to that street corner in almost any neighborhood in the country that person has been replaced by another young man or woman who is looking to fill what you almost might think of as a job vacancy or so. As long as we've got a demand for drugs in a given neighborhood, there is a virtually endless supply of people willing to step up and try to meet that demand with the idea that somehow this is a lucrative opportunity -- which most of time it turns out not to be the case anyway. So we get this virtually endless supply of replacement offenders.
coming into it.

So I think both theoretically and in practical ways there's very little to suggest or to demonstrate that mandatory penalties have contributed to public safety certainly over the last 20 years, and going back further than that many scholars have looked at that as well.

The other issue is the question of how have mandatory penalties affected racial disparities in the criminal justice system. Certainly this Commission has done very sophisticated work over nearly 20 years now looking at this question in particular, and demonstrated certainly in crack cocaine but also your 1991 report on mandatories as well. But I think in terms of general framework for thinking about this question -- you know, will mandatories have a particular impact on exacerbating racial disparities? -- and I think the answer almost always inevitably has to be: Yes. Over and above what other disparities we see in the system, mandatories will aggravate our existing flow of people in the system.
And that comes about I think for two reasons in particular.

The first, again, is getting back to the drug war. The drug war is not just a function of mandatory penalties, but because of the complicated racial dynamics of policing and prosecution, there's been a fairly broad critique of how that's been carried out. But I think it is undeniable, regardless of where a person sits on that issue, that the drug war itself, the policing and prosecution function, has had a very disproportionate effect on communities of color; and then mandatory sentences essentially exacerbate that effect over and above what we might otherwise see.

The other reason why I think it's virtually inevitable that we will see a racial effect has to do with the fact that mandatories are often premised, or exaggerate the impact of a prior record in making a person subject to mandatories or very excessive mandatories.

And the reason that this becomes an issue I think is that, on average people of color coming
into the court system are more likely to have a prior record than are White defendants.

Now some people would say this is because of greater involvement in crime. Some people would say this is due to racial profiling. It's again a complicated picture, but I think the fact is that people of color are more likely to have a prior record than are White defendants coming into the court, which means a couple of things.

First, there's been a good deal of discussion about the safety valve. We know from your research and others that it means that White defendants are more likely to be eligible for safety valve consideration in part because of the impact of prior record.

And secondly, we see that there's now essentially a very excessive effect of mandatory sentencing. We look at a state like California. The three-strikes-and-you're-out policies in that state are currently about 29 percent of the prison population is African American. When you look at the three-strikes' prison population, it's 45 percent.
Now just to be clear, I don't think it's necessarily inappropriate to consider prior record at sentencing, either by an individual in an individual case or in a sentencing structure; this has been the way it's been done for a very long time. What's changed now is just the excessive nature of the penalties that come along with many of these habitual offender statutes' mandatory penalties. So that in California you can get 25-to-life for a third strike that is certainly not a very serious crime.

So the degree to which we sort of exacerbate the problem has now been magnified. And certainly in the federal system Weldon Angelos and the other cases like that illustrate that, as well.

So again I think we're seeing the impact of a prior record. People of color are more likely to have a prior record. And then mandatories, excessive mandatories coming on top of that all combine in ways that may or may not have been intended, may be viewed as race-neutral on the surface, and yet have an effect that I think could have been predicted at the time. Certainly we have
many years of data now to look at to show us that
this is essentially a very likely outcome once we
have a structure like this.

So I think these are very problematic
questions here. Certainly what we want to do in a
sentencing structure is to not exacerbate racial
disparity, and we also want to promote public safety
and not do things that are counterproductive. And
unfortunately I think mandatory penalties have fallen
short on both those counts.

Thank you.

CHAIR SESSIONS: Thank you, Mr. Mauer.

Ms. Stewart?

MS. STEWART: Good afternoon. Thank you,
Chairman Sessions, and the members of the Commission
for inviting me to testify today.

I am testifying on behalf of Families
Against Mandatory Minimums. So, as our name
suggests, the subject of today's hearing is of
existential importance to our organization.

I first became aware of the U.S.
Sentencing Commission in 1991 when you published your
first report on mandatory minimums. It was just one year after my brother had been arrested and sentenced to five years in federal prison for growing marijuana, and it was about one month before I was to launch FAMM.

I knew from my own family's experience how devastating mandatory sentences were and how wrong they were, but as I prepared to launch a national organization to expose the laws I really needed hard data and solid evidence, and the 1991 report that you produced provided that.

That report also served I think as the intellectual foundation upon which the safety valve was built three years later. I don't think that Congress would ever have gone as far as to scale back mandatory minimums even for the lowest level defendants if the report from 1991 had not been produced.

Nineteen years later I am eager for this Commission's new report in October. I am hopeful that it will be as bold and as uncompromising as the original.
I expect that the Commission will find that after 19 years of mandatory minimums not much has changed, and that the original report's conclusions are still unfortunately the same. That is why I urge you to continue to play the same leadership role in opposing mandatory minimums now that the previous Commissions have done in the past.

You have the bully pulpit. You should continue to use it to say loudly and clearly that mandatory minimums were wrong before there were sentencing guidelines, mandatory minimums were wrong when the guidelines were enforceable, and mandatory minimums are wrong now that the guidelines are advisory.

The second point I want to make is that the number of stories we collect of people receiving absurdly long sentences continues to grow, demonstrating that these sentences are not anomalies. Beginning with my brother's case, I have always believed that it was important to show the
faces of these mindless mandatory minimum sentences
and how they affect real people. And in fact many of
those real people have testified before this
Commission in the past.

Today in this room we have FAMM members
from around this area, and one who has traveled as
far as from South Carolina, and I would like to just
take a second to ask them to stand up and be
recognized, please.

(FAMM members stand.)

MS. STEWART: Thank you. They are the
reminder both to me, and I know to you as well, that
everything that you do here in fact impacts real
people. It's not just politics. It's not just
theoretical. It's personal.

Because Weldon Angelos has been mentioned
about six times, and I've only been here for the last
hour or so, I will only briefly describe his case as
one of the examples of sentencing gone awry. He's
really become a poster child I think for what's wrong
with 924(c).

He is now 30 years old. He was 25 when he
was sentenced to 55 years and a day in prison for having a gun present at two drug transactions involving half a pound of marijuana.

The first time the gun was present, a five-year sentence was triggered. The second time, a 25-year sentence. When a gun was found in Angelos's home, another 25-year sentence was required. All of these of course to run consecutively, for a total of 55 years.

As you know, Paul Cassell, Judge Cassell, tried very hard not to apply that mandatory sentence. He noted that an airplane hijacker receives a shorter sentence than Weldon Angelos would were he to impose that sentence. In the end, Judge Cassell followed the law and sentenced Weldon to 55 years for the guns, and one day for the marijuana conviction.

In the past five years, FAMM has received an increasing number of letters from individuals who are serving crimes[sic] for child pornography. Among them is a 36-year-old named Eric Rinehart who is serving 15 years in a federal prison for downloading sexually explicit photos and a video that were taken
by him and his 16-year-old girlfriend, and his 17-year-old girlfriend, who did not know about each other.

Although both girls were of the legal age of sexual consent in the State of Indiana, downloading the photos violated federal law and Rinehart was charged and convicted of producing and possessing child pornography.

The charges carried a mandatory minimum sentence of 15 years. The sentencing judge, David Hamilton, wrote a strongly worded sentencing memo for the express purpose of helping Rinehart get a Presidential commutation. He wrote:

The mandatory minimum 15-year sentence is far greater than necessary to serve the statutory purposes of sentencing.

If we had collected only a handful of these horrible stories over the past 20 years, I would understand Congress's reluctance and this Commission's reluctance to pay much attention. But in fact we have collected thousands of cases, and it really is an epidemic of injustice.
Mandatory minimums do not simply result in sentences that are too long, they don't just wreak havoc on individuals and their families, they destroy faith in the criminal justice system -- one sentencing hearing at a time.

American citizens believe that courts and judges should sentence individual offenders. They are shocked, dismayed, and angered, as I was, when they find out that that is not the case.

They feel that their rights have been violated and there's no remedy for them. And this anger leads to disrespect for and distrust of the justice system.

That brings me to the final point I want to make today, which is related but not limited to mandatory minimums, and it is this:

That individualized sentencing where judges, guided by this Commission, are free to judge is not the enemy of uniformity. To the contrary, individualized sentencing complements both uniformity and proportionality.

The biggest change that has taken place
since the Commission released its report in 1991 is that the guidelines are no longer enforceable. I have heard it said that in an advisory guideline world mandatory minimums are more important than ever to ensure uniformity of sentences. I believe that is flawed logic.

Congress has commanded that sentences should be sufficient but not greater than necessary to ensure the purposes of sentencing. In the shadow of this directive, uniformity simply cannot mean issuing the same sentence to every person who commits Crime A. That is because hypothetical violators of Crime A are certain to have varying levels of culpability, different criminal backgrounds, and divergent potentials for rehabilitation.

To uphold the congressional command to sentence sufficiently but not greater than necessary, the courts need more discretion. At a minimum, this Commission should endorse an expanded safety valve to give the courts the ability to meet that command.

You should also call on Congress to repeal all mandatory minimums. They may not do it, but it
can't hurt to ask.

And, short of repealing all mandatory minimums, I urge this Commission to tell Congress to pass the Ramos-Compean bill in the House, which is a broad safety valve.

I would also like to urge the Commission to de-link the drug guidelines from drug statutes. This was done by previous Commissions with LSD and marijuana. And as far as I have seen in the past 15 years or so since that was done, that has caused absolutely no problems for the courts.

There is no reason that the Sentencing Commission cannot act independently to make the drug guideline sentences more realistic.

Further, I would urge the Commission not to see every variance from the guidelines as evidence of wayward judging. In many cases, what is called disparity is simply a healthy rejection of unwarranted uniformity and a guideline system that has become, partly as a result of mandatory minimums, a one-way ratchet toward ever higher sentences.

Guideline variances can be addressed by
either ignoring the message sent by the district
courts, or by heeding it. To paraphrase: Best yet,
the safest way to make the guidelines respected is to
make them respectable.

Members of the Commission, for those of us
who have made mandatory minimum reform their mission,
this hearing comes at an exciting time. States
across the country -- those laboratories of democracy
as we've heard earlier -- are turning away from
mandatory minimums. In the past year alone, New York
and Rhode Island have both repealed or severely
reformed their mandatory drug laws.

In January, we culminated a year's long
effort in New Jersey to enact a law limiting the
reach of one of the state's worst mandatory
minimums.

Marc Mauer and his group have produced
some excellent reports detailing the sweeping changes
taking place across the country in the states. These
studies reveal that states have not gone lax on
public safety, but rather that they have chosen to
replace their reliance on long prison sentences with
new evidence-based sentences, and programs that have been effective at less cost to taxpayers.

We also meet at a time when Congress stands on the verge of repealing a mandatory minimum for the first time since the Nixon administration. The Senate has already voted unanimously to eliminate the mandatory minimum for crack possession, and dramatically reduced the disparity between crack and powder cocaine sentences. We are hopeful that the House will follow suit.

It is fitting that I close my remarks on the issue of crack, because I remember very clearly the day in 2007 in this very room when you voted to apply the new crack guidelines retroactively -- crack-minus-two.

The hugs and the calls and the letters that I got following that day from our members reminded me of why we are in this fight. But what I also recall is the leadership role played by this Commission.

It was not simply a final vote for reform, it was the intellectual and moral leadership shown by
the members of the Commission leading up to and
making that final vote possible. That strong, smart,
and moral leadership is what we need now from this
Commission on the issue of federal mandatory minimum
sentences.

I look forward to your support and to
working with you to make our federal sentencing laws
worthy of respect again. Thank you.

CHAIR SESSIONS: Thank you, Ms. Stewart.

Mr. Rorty?

MR. RORTY: Thank you, Chairman Sessions,
members of the Commission.

I am honored to be here today to represent
the American Civil Liberties Union, a nonpartisan
organization with more than 500,000 members,
countless activists, and 53 affiliates.

As you heard, my background is also as a
federal public defender, where I was in the trenches,
a phrase many people have used here, of the federal
sentencing system for 11 years. So much of my
testimony is informed by that experience, as well as
my time with the ACLU.
Mandatory minimum sentences defeat the purposes of sentencing, create unwarranted racial disparities, and overcrowd our prison system. They take discretion away from judges and give it to prosecutors who too often use the threat of these sentences to frustrate constitutional rights.

We cannot continue to use a one-size-fits-all approach to sentencing. Instead, we must balance public safety with a need to assist individuals on the path to health and rehabilitation.

This Commission is an expert body and will employ its knowledge and resources to craft fair and effective sentences. This Commission should tell Congress to abolish all mandatory minimums, to abandon that mandatory sentencing structure, and to instead rely on the advisory guidelines to set public policy.

My comments today will touch on a variety of the themes that we've heard through the day. I've been here since 8:30 this morning and heard all the experts testify. You've got my written submission, so I am glad to take the opportunity to talk about
some of the threads we have heard in the conversations that you've had with these experts, and to follow up on some of your questions.

Let's start with the Department of Justice. I was glad to find some agreement with the Department of Justice today. I was glad to hear them say that the federal prison population has reached a period of unsustainable growth.

I was glad to see that the Holder Memo, as we've called it, of May 19th provides greater flexibility to line and supervising United States attorneys in charging and sentencing advocacy. That's a welcome change from the Thornburgh and Ashcroft positions.

I was glad to hear, too, that at least the Department agrees that 924(e), career criminal predicates; 851, drug priors; and 924(c) stacking provisions are excellent starting points for the elimination of unjust mandatory minimums. I certainly hope they'll extend those recommendations further than that.

I am also glad to hear that the Department
does not recommend any return to mandatory guidelines and does not endorse any tradeoff between an exchange of reduced mandatory minimums for a more mandatory guideline system.

And lastly, I think I heard the Department asking this Commission to reassess the harms of drug crimes. I'm unclear if the Department agrees with me that that should lead to this Commission de-linking offense levels from the mandatory minimums, but I did hear them call for a reassessment of the harms posed by drugs, and I welcome that.

Now some of the areas in which I have perhaps less agreement with the Department:

I heard the Department say that it favors limited judicious use of mandatory minimums in serious cases. It remains to be seen what the Department consider to be "serious" and what it means to exercise "judicious use of mandatory minimums."

Hopefully the Department will continue an open dialogue not only with the Commission but all the experts who have testified here today and elaborate on their position as to the extent to which mandatory
minimums should be eliminated or reduced.

I hope that any conclusions of the Department will be subject to an open debate between the experts and the Commission between now and October.

I certainly hope and trust that the Department will acknowledge that drug sentences are excessive, and that at least those mandatory minimum sentences in drug offenses be eliminated.

I was particularly struck by Commissioner Castillo's example, used a couple of times today, of a drug mule and hope the Department acknowledges that it's extremely important to achieve proportionate sentencing in drug conspiracies.

One of the themes we have heard about all day is disparity: what it means, what are different kinds of disparity, how should the Commission and Congress account for and be concerned about disparity.

Certainly many of you have expressed concerns about disparity in the federal system. I heard that the Department supports retaining some
mandatory minimums in the interests of uniformity.

We should question the notion that any disparity is bad.

Certainly disparity that is based on race or other inappropriate factors must be eliminated; however, any disparity arising from appropriate consideration of individual factors as mandated by 3553(a) is entirely warranted and appropriate disparity and should not serve as an argument for retaining mandatory minimums.

I would urge that the Commission not lump together all types of disparity, and to use them as a basis for maintaining the status quo, but rather to think carefully about the kinds of disparity which may arise from the application of individual sentences to individuals in a wide range of circumstances.

Another theme that we've talked about today is the impact on cooperation and plea bargaining. I think that the Department is wrong, the Department of Justice is wrong to tout cooperation as a benefit of mandatory minimums.
They are wrong for a couple of reasons:

First, none of the statutory purposes of sentencing are designed to make prosecutors' jobs easier by threatening defendants with unjust prison terms. Those threats force defendants into relinquishing constitutional rights, even punishing them for asking for bail.

Any benefit that is perceived or real benefit derived from coerced cooperation by using mandatory minimums is not worth the tradeoff.

Certainly as a representative of the American Civil Liberties Union I am concerned that meritorious constitutional claims are not being made because defendants are scared to make them and threatened by mandatory minimums, and as a result don't make those motions.

Second, using mandatory minimums leads desperate defendants to fabricate false testimony leading to the conviction of innocents. We have seen that in a number of cases around the country -- Jerrell Bray in Cleveland is one example. I believe there are 26 persons released from custody based on his
fabricated testimony, after he was threatened with a mandatory minimum.

On a similar issue of deterrence from mandatory minimums, I want to refer to a conversation that occurred in the previous panel in the discussion of David Kennedy's research.

I think it's an important point that my own understanding of Professor Kennedy's research is not that it was the threat of a particular lengthy sentence that was an effective deterrent, it was the certainty of consequence that was the deterrent.

Mr. Mauer referred to this in his own testimony, and I think that is an important distinction; that there is a deterrent effect from the certainty of some kind of consequence from criminal conduct. And the difference between some punishment and ten, 20, or 50 years is very significant.

Let me now turn to the ACLU's recommendations to this Commission.

First and most importantly, we ask that you reaffirm your excellent 1991 report and recommend
that Congress entirely abolish mandatory minimum sentences.

We recommend, as well, that you expand the safety valve. We have had significant discussion about that today, and I agree with many of the experts who have testified here today, particularly my federal defender colleagues, that you should apply the safety valve to all mandatory minimum offenses and, as necessary, craft safety valve guidelines appropriate to each type of offense, just as there are with drug offenses. But they can be applied across the board.

Lastly, and another area we've had a lot of talk about here today, de-linking the offense levels from mandatory minimums.

Let me first address the question that Chairman Sessions asked to the earlier panel about whether it is possible, legal for the Commission to do so. It certainly is. I think the Commission should be guided and instructed by the Supreme Court on this matter. The Neal and Kimbrough cases speak directly to this issue and authorize the Commission
to de-link from the mandatory minimums.

And as I believe Ms. Stewart noted, the Commission has done so in the past in the LSD and marijuana context. I know the Commission has had some concern about this in the past, but you should not shackle yourselves from taking appropriate steps to step away from these unjust policies and to exercise your role to assess the appropriate harms connected particularly with drug offenses.

I say "drug offense," and I address them particularly because we know from Justice Breyer's comment in Gall that none of the drug offense levels exemplify the Commission's characteristic institutional role, and the Commission should undertake a careful, close assessment of the harms posed by drug offenses in order to set appropriate levels, whether or not they connect with the mandatory minimum.

If the Commission does de-link offense levels for mandatory minimum, then you should also develop a metric for culpability that accurately assesses the role in the offense.
You should begin by turning away from quantity as a proxy for culpability. Too often sentences are imposed based on a gross amount that has no relationship whatsoever to the individual's connection to the conspiracy or to that amount of drugs.

Again, as Commissioner Castillo's example of the drug mule illustrates, drug quantity is simply a poor substitute for culpability, and this Commission should again give careful thought as to how you might best set up a metric which reasonably and carefully assesses the role in the offense, including quantity as just one of those measures.

I am going to close with another personal instance, because as Ms. Stewart acknowledges it is so important that we think about the individuals affected by all of our work.

I represent Hamedah Hasan, who is serving now 27 years in federal prison. Hamedah Hasan was a young African American mother fleeing a physically abusive relationship when she was caught up in her cousin's crack-dealing conspiracy.
Although she never used any violence, did not possess a weapon, had no criminal record, and functioned as little more than an errand person in the operation, she was sentenced to life in prison.

This sentence was a combination of mandatory minimum sentence and the then-mandatory guidelines. The sentence had such an impact on Judge Richard Kopf, who was her original sentencing judge, that Judge Kopf took the unprecedented step of writing President Bush and requesting that the President commute Hamedah's sentence.

Subsequent judges have all tried, everyone who has attempted to re-sentence Ms. Hasan, has recommended that she be released, or her sentence dramatically reduced. And in each instance, appellate courts have reversed them, finding that either 3582(c), the Commission's 1B1.10 guideline, or other strictures prevent the imposition of a just and fair sentence in her case.

We have now reached a point in Ms. Hasan's case -- and I think it illustrates everything we are here today to talk about -- that this combination of
mandatory minimums and guidelines set in accordance
with or higher than the mandatory minimums has
resulted in the imposition of an unjust sentence
which is now reversible only through the exercise of
Presidential commutation power. We are certainly
hopeful that President Obama will exercise that power
for Ms. Hasan.

Thank you very much. I appreciate the
chance to speak with you.

CHAIR SESSIONS: Okay. Thank you, Mr.

Rorty. Mr. Hillier?

MR. HILLIER: Thank you, Chairman

Sessions, and distinguished members of the United
States Sentencing Commission.

Good afternoon and thank you for the
opportunity to testify on behalf of the Constitution
Project. And with that comment, my written notes are
corrected. I began there with "good morning," and
thank you. But much else of what I have written
could probably be simply eliminated at this point.
And as this mishmash of the typed and freshly
scribbled notes suggests, a lot has been, because
much of what is in our written testimony has been said again and again by the previous distinguished panelists that you have invited here today, and said much better than I could possibly hope to do.

But I do want to start by recognizing the Constitution Project, and how grateful I am that I was invited to be a participant on the Sentencing Initiative, which was called a Blue-Ribbon Committee designed to look into our sentencing guidelines system and make thoughtful recommendations about how it might be improved.

The Constitution Project, as you know, is an independent think tank that specializes in bringing diverse groups together to try to solve complex legal solutions. And it would be an understatement to say that this was a diverse group of individuals.

It was remarkable in terms of the breadth of its membership, and breath-taking in terms of the range of opinions and ideas that came out of that group. We had then Judge Alito, and Judge Nancy Gertner, Attorney General Meese, myself, and others
all in the same room hashing out our thoughts about
sentencing in the United States.

And it was as a result of that mishmash of
two people, or actually a very thoughtful cobbling
together of people involved in the criminal justice
system, that we put together the report that we did.

And the report is really, as you would expect, a lot
of compromises, a lot of collaboration and consensus
building. And in some ways, somewhat superficial
compared to many of the provocative ideas that have
been spun out here this morning and this afternoon.

We did, as it relates to this topic, 
mandatory minimums, have clear consensus and did
determine in our own view that mandatory minimum
sentences are generally incompatible with the
operation of a guideline system, and thus should be
enacted in only the most extraordinary circumstances.

So you hear words like "generally incompatible," and "except in extraordinary
circumstances" suggesting that there was a lot of
give-and-take in our conversation.

We identified the same problems with
mandatory minimums that have been discussed in depth here today. Primarily, that mandatory minimums deprive sentencing judges of imposing fair sentences that take into consideration individual circumstances that ought to shape the final result.

We found also that mandatory minimums punish too severely too many people. And finally, and I think importantly, we found that mandatory minimums suggest a legislative disregard for you and your opinion, your advice, your guidance in the sentencing function and thereby create an institutional imbalance which is at the heart of many of the difficulties that we face here in the federal sentencing system.

As I indicated in my written submission, I think this is really one of the key problems and certainly one that I focused on in the written comments that were submitted to you: That is to say, that the mandatory minimums create an imbalance.

We expressed it this way: It was our conclusion that a system that concentrates sentencing authority disproportionately in the hands of one or
even two institutional sentencing actors may be prone
to difficulty.

That understatement is the result of
consensus-building. But we went on to say:
Mandatory minimums in fact are a blunt
instrument that is used by government prosecutors to
coerce guilty pleas and to effect unjust results when
those guilty pleas are not obtained.

An even more problem -- well, in addition,
as Judge Castillo recognized this morning and again
this afternoon, the use of mandatory minimums is
erratic from district to district throughout the
country, contributing mightily of course to
unwarranted disparity and gross unfairness.

I am encouraged by the Holder Memo. It is
brand-new. It is fresh information I saw for the
first time last night. As Commissioner Wroblewski
knows, the last two sections of my paper -- or our
submission reflect thoughts that I submitted to the
Attorney General late last year in hope that he would
do exactly what happened with the Holder Memo.

So I am happy for that change. Cynics
say, what good is it going to do if mandatory
minimums are still out there as a bludgeon, a blunt
instrument for prosecutors, practices are ingrained
in some districts, and nothing's going to happen.
I disagree. I believe that with this
memorandum what we will do and can do is to go to our
individual U.S. attorney's offices and try to breathe
that document into policies that are extant in the
various districts throughout the country -- even the
ones that are the most difficult.
In that respect, I disagree entirely with
Professor Schulhofer's observation -- it's completely
wrong -- that the Thornburgh Memo was more severe than
the Ashcroft Memo. We all remember when the Ashcroft
Memo came out and the effect of that Ashcroft Memo in
the trenches. It may be -- I don't know that -- I didn't
parse the sentences. What I know is that it was used
in my district, and it was used throughout the
country to say, hey, we've got to do this. We must.
We were encouraged to use mandatory minimums as a
plea bargaining chip. And if we don't do it,
somebody's looking over our shoulder and we've got to
report it, and all that stuff.

So there was a lot of fear in the trenches because of the Ashcroft Memo; whereas, the Thornburgh Memo had an exception large enough to drive any fair sentence through.

So I believe the Holder Memo is a gigantic step forward. It brings us back to a period where prosecutors can, consistent with the principles of federal prosecution, take into account a vast range of circumstances and charging decisions that hopefully will ameliorate some of the harm of mandatory minimums at the front end.

And in that respect, I think when a prosecutor makes a decision that a mandatory minimum shouldn't be used because of fairness concerns, we're talking about warranted disparity to the extent that that is at odds with something that happens somewhere else, and even more importantly what we're hopeful of is that we'll drag those other districts back into the realm of fairness as a result of the Holder Memo.

When I wrote that paper and provided it to the Attorney General, it was recognizing that the
legislation that would repeal mandatory minimums will be more difficult to obtain, and that this policy change is a necessary and helpful fix in the interim.

I was interested in the testimony of United States Attorney Sally Yates earlier this morning who talked about the practice in Georgia where in Georgia they turn away cases because they're too small and let the states handle them, and the federals only deal with the larger issues.

And this is important because that's not the way it is everywhere. And it's certainly not the way it is in the Western District of Washington where we are theoretically progressive, you know, end-of-the-road, hug-tree kind of people.

(Laughter.)

MR. HILLIER: In my district, unlike Georgia -- I'm sort of embarrassed to say -- the United States attorney employs special AUSAs whose job it is to review the charges in the state system, all of our major county jails, for gun and drug cases to decide whether there's somebody there who ought to be drug into the federal system where they're going to be
facing harsher charges.

And they've been doing that now for years.

And as you might expect, they've run out of what these inexperienced SAUSAs consider to be worthy suspects, and now we're getting pretty much the dredges, low-level drug dealers who by some happenstance may have had a gun with them and may not have. And the next thing they know -- basically they're nuisance defendants in some county or another, and the county prosecutor says, hey, this guy's been here again and again, please take him out for awhile.

And the case that is in our materials, one of the cases, is United States v. Nanquilada, which is a Western Washington case, and it really I think hits a lot of the points that have been discussed here today and on this panel.

That was one of our clients in my office, in the liberal Western District of Washington. He was taken out of the state system because he was going to win there. He had a legitimate search and seizure issue that would have required suppression of
the evidence because the State of Washington rejects much of the jurisprudence of the Supreme Court as it relates to limiting the Fourth Amendment.

So he came into the federal system, and he had guns with him during some drug transaction, so he faced harsh penalties. Nonetheless, we all got together -- we have a process in Western District where sometimes judges will mediate where we can't come to agreement, and everybody decided that a 12-year sentence would be a good sentence for this gentleman.

He disagreed. He wanted to fight it, and he did fight it. He decided to fight it and as a result of that the prosecutor upped the ante and stacked 924(c)s and he was facing 60 years of mandatory minimums because he decided -- because he decided he wanted to exercise his constitutional rights.

So the penalty that the government decided was appropriate for that exercise of his constitutional right, that crime of exercising his constitutional right, was 48 years.

He won in the federal court because the
district judge found that, even with our more limited Fourth Amendment protections, the evidence should be suppressed. And the reason he did that is because he found, accurately, that the cop was lying. Which is another byproduct of mandatory minimums, and what has been talked about here, that people are being threatened with these penalties and are giving up legitimate claims of both, this is over-punishment, or it's a violation of my constitutional rights, or I'm innocent, because of their fear of the mandatory minimum.

In other words, mandatory minimums threaten and actually harm the truth-seeking function of the criminal justice system.

The Constitution Project has recommended repeal except in extraordinary circumstances. We didn't offer you our definition of what that meant, or any idea on what that might mean. It wasn't really our role at that point in time.

I would submit that drugs never should be a part of that equation, as has been discussed again and again here. It is a single factor that overrides
many others that are much more relevant. And in fact sometimes drugs can be an unreliable proxy for culpability, as has been demonstrated. Sometimes people are just puffing; there aren't really those drugs out there; sometimes the amount of drugs is a result of what we call "sentencing entrapment" where the police ask for drugs again and again and again, and then there's of course the Pinkerton theory that Professor Schulhofer talked about earlier today.

So I would respectfully hope that, consistent with the Constitution Project, that you recognize that mandatory minimums, again recognize that they are not consistent with your system, recommend that they be repealed in the context of drugs at least. That would make a huge -- would have a huge impact, as we all know, on the sentencing system in the United States, given the amount, or the numbers of defendants who are in prison today because of that.

I will stop there, with the hope that we have time for some robust questioning and answering.

CHAIR SESSIONS: Well let me begin with
some robust questioning. It is a bifurcated robust question -- and it's essentially to define terms.

We talk about mandatory minimums, and I think those of us who deal with mandatory minimums on a regular basis think about mandatory minimums in terms of five, and ten, and 20 years, and up to life imprisonment.

So much of the comments that we heard today subtly relate to the severity of the mandatory minimum. And my question is, philosophically, just from a philosophical point of view, when you talk about — Mr. Rorty, you talk about certainty of punishment. Is there a justification for Congress to say, let us say six months is a mandatory minimum, is there justification to say we really are concerned about certainty of punishment, as opposed to length of punishment, and therefore a mandatory minimum in terms of six months, or three months, or a relatively short period philosophically is justified?

And then the second question, the broader question is -- and I don't want to put you in a
position of having to say that you're going to vacate
your position in regard to eliminating mandatory
minimums -- but you heard the Department of Justice
this morning invite us to engage in discussion about
certain mandatory minimums. They didn't identify
them. But they basically said that perhaps there
were penalties which were too severe. And they
invited us to, I suppose, sit down around a table, or
in some particular forum, and study those particular
mandatory minimums to actually address the level of
severity of those penalties.

And I'm not asking you to say, give up on
your point of eliminating all mandatory minimum
penalties, but would you, if you were on the
Commission, take up that opportunity to sit down with
them and, theoretically, with other stakeholders in
the process to review the severity of the penalties
that exist? Or would you just say no?

MR. RORTY: Everyone may speak to it, but
let me address your questions first.

As to my philosophical position on the
certainty of say consequence as well as punishment,
because I think that really is the direction of Professor Kennedy's research, it's the certainty that there is some consequence for criminal conduct that matters.

And it's important to remember that even sanctions such as probation are a consequence that severely limit people's lives. It need not be a jail or a prison sentence that is deterrent to folks.

So, no, I think that your proposal that it might be wise for the Commission or Congress to simply reduce mandatory minimums significantly, even to the level of six months, is inappropriate and I do have a philosophical disagreement with it.


CHAIR SESSIONS: For the purposes of discussion.

MR. RORTY: Yes. Any proposal that suggests that is inappropriate for all the reasons we've discussed today, and I discussed in my testimony.

There are so many flaws to mandatory
minimums that, as a philosophical matter, reducing them to lesser levels will not cure those problems. And as to your second question, I mean I certainly think it's always appropriate for the Commission to engage in discussion with the Department and with other stakeholders, but any discussion which begins with the premise that the Commission will back away from its 1991 report and recommend the reduction of mandatory minimums rather than their abolition I think is inappropriate. I mean, certainly I'd like to see them reduced as an incremental step if this Commission feels that it cannot recommend abolition to Congress, but the 1991 report was so well founded, its principles remain true and the Commission should adhere to it.

CHAIR SESSIONS: So, alternatively, you would not engage in discussions with the Department, or anyone else to reduce the severity of the five- and ten- and 20-year mandatory minimums?

MR. RORTY: No, I mean in my own written submission I suggested that as a potential alternative, incremental approach. I think it's
totally appropriate to sit down and for this Commission to assess appropriate penalties, as it does as its everyday work. And if it needs to do that in the context of mandatory minimums, fine. But I think that the first position should be the one that so many people have articulated here today, that that discussion is unnecessary because you were right in 1991, you've been right all along, and mandatory minimums should be abolished.

MR. MAUER: If I could respond briefly, I mean you raise a very interesting philosophical and practical point.

It seems to me if we took a certain set of mandatory penalties that currently call for five or ten years and reduce them to let's say six months or so, it probably would eliminate a very substantial portion of the problem in that if you incorporate that in an advisory guideline system chances are the bulk of defendants falling in that category under any sentencing regime would get at least six months, and therefore there's no sort of additional penalty that's being attached.
At the same time, as we've seen in the history of mandatory sentencing, there are always cases that we can imagine whenever we set very rigid structures, and maybe it is only one in 100 rather than one in five that would be problematic, but it would be very nice to leave open some possibility to deal with that one in 100 cases that any person on the street would think is problematic.

On the second issue, I think those of us on the panel, as well as many of us in the room, confront that issue from a somewhat different perspective than you have. And on the very subject of the crack cocaine panel days, I think it's fair to say that many of us in the room believe, as the Commission has documented for a long time, that the penalties should be equalized at the level of powder cocaine. And yet many of us are very vigorously trying to work to have the sentencing quantity reduction reduced from 100-to-1 to 18-to-1, and we view that as a compromise.

We view that as not providing full justice, but at the same time we view it as a very
significant step that needs to be taken. And we
won't rest after that's adopted, as well.

I personally don't have any problem with
your negotiating and working with the Department. I
think you can come up, and I hope you will, with some
very broad statements. At the same time, the
political world we live in is one of compromise, and
if we can achieve some short-term compromise that
doesn't affect our long-term objectives, that is all
to the good, it seems to me.

CHAIR SESSIONS: Do others agree with
that?

MS. STEWART: Well, yes, I suppose so. I
mean, I've been doing this a very long time, almost
19 years, and I know that the perfect is the enemy of
the good. I do believe that the Commission should --

CHAIR SESSIONS: I've heard that
expression before.

MS. STEWART: Yes, a little bit famous.

I do believe that the Commission should
ask and urge Congress to repeal all mandatory
minimums. However, the likelihood of that is
probably low. And I do feel, because FAMM has over
20,000 members whose lives are affected by these
laws, that we are always interested in seeing what we
can do sooner rather than later to ensure that no
more people -- fewer people suffer in the future, or
those who are already there have their sentences
shortened.

So it is not my first choice, but I
definitely think you should talk to the Justice
Department. I see no harm in that. I wouldn't, you
know, make a devil's deal with them, but I think that
it's a good idea to talk to them.

MR. HILLIER: I always believe that
talking is a good thing. I don't agree that that is
a good approach.

VICE CHAIR CARR: That's why we have these
lights.

(Laughter.)

MR. HILLIER: Beg your pardon?

VICE CHAIR CARR: That's why we have these
lights.

(Laughter.)
MR. HILLIER: You should have one of those hatch things where you can just get rid of me entirely.

(Laughter.)

MR. HILLIER: But I think our idea of an extraordinary case isn't embraced by any of the mandatory minimums that are on the books today. All of them, in my view, should be abolished. I think it was Michael Nachmanoff who mentioned earlier today that, sort of ironically almost, the most serious crimes we have, like murder, don't have mandatory minimums, but we know judges aren't going to sentence those people to probation. If it does happen, then it's going to be done in an open way where the rationale is going to be laid out there, and it's probably going to be agreed to by everybody. And if it's not, it's going to be appealed.

But so I think the mandatory minimums we seem to -- I haven't read all 170-plus, but the ones we experience day in and day out in my view should be repealed.

CHAIR SESSIONS: Well thank you for your
patience. I had to ask that question. Go ahead.

COMMISSIONER HINOJOSA: This question is to Mr. Hillier. When you spoke about General Ashcroft's Memo --

MR. HILLIER: Right.

COMMISSIONER HINOJOSA: -- I think you may have been thinking about the one that was required of him by statute by the PROTECT Act that he had to within six months set up a written policy as to reporting to Washington with regards to what was going on in the field basically on the part of the courts with regards to sentencing.

And that's the one that he came up with with regards to reporting requirements, not individual offices of the U.S. attorneys, and frankly I think there was a big sigh of relief when he finally came up with it because people felt that he had taken the statute and done the best that could be done with regards to what was required of him by the statute.

In reviewing this Holder Memorandum, there's a lot of quoting of present manual policies
that are already in effect. And most of it actually cites the present manual policies that are already in effect. So I don't see much change in that, other than now there is a requirement that you actually have to visit with a supervisor within that office in order to get approval with regards to anything that an AUSA does. And then there does have to be a reporting to Washington with regards to this.

One of the things that it does also is to say that you are no longer bound to argue the guideline sentence, and that's it. And that generally that's what you should do, but you have the discretion on an individual case.

And what I suspect I will see, based on the facial expressions that I've seen in the courtroom in the past from the U.S. attorneys, is that now more of them will feel that they can actually ask for higher than guideline sentences in certain cases where they have felt that they've been constrained with regards to have to argue for a guideline sentence.

Do you think that's a possibility as to
what may come as a result of this memo?

MR. HILLIER: Well, I hope not, but I don't know. It's not going to happen, I trust, in our district where that's never happened historically, and I see no evidence that --

COMMISSIONER HINOJOSA: Yours is a slightly different district than some other districts.

MR. HILLIER: I understand that. And, you know, all of these problems tend to be regional at some level because of the discretion that the prosecutors enjoy.

I would say, Your Honor, just to go back a bit, I tend to disagree with your analysis of the Ashcroft Memo. My recollection of this so-called legislative history giving rise to the PROTECT Act is that it was something that was championed by a couple of DOJ lawyers, and --

COMMISSIONER HINOJOSA: It was congressionally passed, and it was giving a direction, a requirement under the statute, and he had to come up with a policy of reporting. And when
it was done, the sense of the courts and others in
the system was this is about the best that could be
done based on the legislation as it was written.

So I think it's unfair to characterize his
memo as setting up on his own some kind of reporting
requirement.

MR. HILLIER: Well, you know, again I
disagree. I think the reporting requirement was
initiated in the proposed legislation which was
drafted by the DOJ, in essence.

COMMISSIONER HINOJOSA: Well I don't know
that any of us really know that that's true. It was
passed by Congress.

MR. HILLIER: Right, it was passed by
Congress. And its passage, or potential passage, in
its initial iteration was protested mightily by
even --

COMMISSIONER HINOJOSA: My only point is I
don't think that there should be misrepresentations
as to what the Ashcroft Memo did. It was not his
sentencing memo that had the reporting requirements;
it was his response to a statutory requirement.
And whether they had anything to do, or
the Justice Department had anything to do with the
statute, it was the statute and he was required by
law to do that. And I do recall that when it was
done the view of many in the system was that was the
best that could be done based on the way the statute
was written.

MR. HILLIER: Well, Your Honor, I just
respectfully have a different take on all of that,
and I'm certainly not misrepresenting anything by
offering you my observations. I appreciate what you
have to say.

(Pause.)

COMMISSIONER HINOJOSA: I didn't mean for
us all to get quiet.

(Laughter.)

CHAIR SESSIONS: Well actually I got
c catch pouring water.

(Laughter.)

CHAIR SESSIONS: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very
much.
First of all let me thank all of you for being here. I've known many of you, most of you, for a long, long time. It reminds me that my work on policy, I was a defense lawyer and a prosecutor first, but my work on policy was forged on the issue of crack/power cocaine.

And I remember in this very room, about now 15 years ago, Judge Conaboy and three other commissioners voting to completely eliminate the disparity. And of course I've lived through, as you all have, the subsequent 15 years and, frankly, 80,000 defendants being sentenced under the law as it existed in 1994 and as it existed all since.

And that has had an effect on me and my perspective on how to move forward. And so from all of that, I am intrigued by projects like the Constitution Project that brings together people of different points of view and tries to come up with some consensus.

Because I think especially in criminal justice policy and legislation at the federal level, it seems to me, or at least one of the takeaways I
have from this last 15 years, is that consensus is pretty important. And even unanimity in the Senate may not be enough.

So that's my takeaway. And it brings me back to the Constitution Project again. I read through the Project back in 2003 or 2004 when it was first, and I pulled it out again, and of course the Project has a vision of guidelines that are simpler but that are presumptive that has much stronger appellate review, meaningful appellate review -- something different from the current advisory guideline system.

And frankly what's distressed me most over the past couple of years is that, as the Supreme Court has moved us from a mandatory system to an advisory system, the consensus has disappeared. And a lot of people who signed on to this consensus have now run away from it. And so consensus is now elusive.

So I am curious whether you all could comment just a little bit on whether we should try to forge consensus; and, if consensus means there may be
either some mandatory minimums or mandatory
guidelines that you all don't agree with, whether
that's something worth pursuing. And whether, also,
I'm getting the wrong lesson from the last 15 years.
Am I just getting it wrong, and we should not go for
consensus but go for some other strategy?

MS. STEWART: Well since I was here in the
room with you 15 years ago when Chairman Conaboy led
the Commission on that vote to equalize crack and
power cocaine, I'll take a first stab at it.

I don't know that consensus -- I'm not sure
who you're trying to get. The right and the left, I
guess? I mean, you say the Senate's unanimity
doesn't guarantee it in the House; that's correct.
But that was bipartisan, unanimous consent in the
Senate.

I am not sure we ever get consensus on
everything we want; and that it may be unrealistic to
wait for it. My takeaway from the past 15 years
isn't that we need to wait until we get consensus;
it's that we need to do what's right. And, that if
there are people like this body who are the
sentencing experts and are supposed to tell Congress
and tell the public what the right thing to do is,
that you all are entrusted with that role and that
responsibility. And I just urge you to do it.

And I think that from 15 years ago, what I
saw is that the Commission was slapped down and a
little bit cowed by what Congress did, and hasn't
been willing to come back with quite the strength of
consciousness and certainty that what you all are
doing is right. And I realize the politics of it,
believe me, but I think that a lot can be done
without full consensus that we have everybody checked
and signed off. We're never going to get that.

So I look to this body to do the right
thing because that's what you are assigned to do
here, and I don't think we have to wait until
everyone has agreed.

MR. HILLIER: I think it's important to
recognize that back then we had both a mandatory
sentencing guideline system and mandatory minimum.
So all of the players in this room were looking for
ways to ameliorate what we saw to be both its
complexity and severity, the combination of those matters.

So consensus on trying to do that, as was the case with the Constitution Project when we started, was perhaps easier to find because of that combination. With the advent of the advisory guideline system, there's a strong belief among many of the players -- myself included of course, and as I read the testimony from your regional hearings all the district judges who testified before you -- that this system is working, and we should allow it to play out.

So the idea of all of us now revisiting, bringing in -- I don't know the difference between a presumptive guideline system and a mandatory guideline system, I think they're pretty similar -- is something we don't want to have happen now. We'd prefer to see if we can improve upon what everybody agrees is a system that's working rather well.

MR. MAUER: I guess I would just add, quickly, it seems to me it's partly which arena we're talking about. When it's developing policy in
Congress, for example, if things are not done in a bipartisan way I don't think anything is going to go very far these days. And that's been the case for a long time. And so that's been very important.

I think it behooves all of us to make sure we try to forge whatever consensus we can on that, even though it may be viewed as compromise sometimes.

We need to do that.

When it comes to federal sentencing in particular in the post-Booker period, it seems to me it is still relatively early in that new era. I mean, we have some data and we have some anecdotal experience about what's going on. I don't know that we know all the range of experience yet. To the extent that there are more departures, I don't know that we have -- I think each of us has our own sense of what's going on there, but I don't know that we have as thorough an analysis as we might have in a few years or so.

And it seems to me we do know that there certainly haven't been any what we might think of as very extreme cases, or consistently extreme cases.
You know, we heard examples this morning, well, shouldn't we have mandator\!

ies for treason and using nuclear weapons? 

Well, that's not very significant, or day-to-day issues, but the day-to-day cases go through the courts and, yes, some judges are viewed as more liberal or conservative than others, but, you know, it seems to me it's reasonably defensible on all parts of it. And as we get more data and more understanding it will tell us if we need to jiggle with the structure a little bit within what the Court says is permissible. 

I don't think it's a major problem at the moment. 

MR. RORTY: It's a bit hard to know how to answer your question when you talk about consensus because, as Mr. Mauer says, consensus between whom about what, and in what context is very important. 

If you mean whether or not this Commission should take steps without the agreement of Congress, or attempt to move Congress through discussion over time, unfortunately I think the 20 years of crack
cocaine advocacy on the part of the Commission and others is a hard lesson in what happens when you try to build consensus.

The modest bill we have before us and hope will pass, but aren't sure will pass, is a harsh lesson in that. Certainly, as Mr. Hillier said, conversation is good. We should all be engaging with decision makers about how to reach common ground on these issues.

But this takes me back to an issue I had with Professor Schulhofer, I believe who, in talking about de-linking, said, I think I heard him say that this Commission should defer to Congress. And if Congress has determined that these mandatory minimum sentences are appropriate, I forget his metaphor, but the Commission shouldn't step away from or thumb its nose at Congress.

On the contrary. This is the expert body created by Congress to develop knowledge and expertise in sentencing, and it should lead and not wait for consensus of that type.

CHAIR SESSIONS: Any other questions?
(No response.)

CHAIR SESSIONS: Well, thank you very much for coming. This was a fascinating panel. We appreciate very much your contribution.

And I also want to thank, by the way, the staff who put together a full day of excellent panels. Those of us who were here the whole day can testify that these panels have been absolutely terrific.

So thank you, staff, for doing all of this hard work, and we'll call it a day.

(Whereupon, at 5:18 p.m., Thursday, May 27, 2010, the hearing of the United States Sentencing Committee was adjourned.)