Appendix J

SUMMARIES OF THE ORAL AND WRITTEN REMARKS OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
SENTENCING REFORM ACT 25th ANNIVERSARY REGIONAL HEARINGS

PUBLIC HEARING – MONDAY AND TUESDAY, FEBRUARY 9–10, 2009
9:00 a.m. – 4:45 p.m.
ATLANTA, GA

I. APPELLATE BENCH

Fourth Circuit Court of Appeals
The Honorable Dennis W. Shedd, Circuit Judge

Judge Shedd suggested that this is a time of "tremendous opportunity" in sentencing and stated that the Commission has two options. The first is that the Commission could continue working within the guideline system as if nothing has changed post-*Booker*. The second option is that the Commission could "really make [the guidelines] usable in today's sentencing, by "encourag[ing] alternate sentencing," and "maybe the Commission could consider encouraging mandatory minimums, because that may be one of the only ways there is some kind of uniformity in sentencing on some accounts." (TR 20). Judge Shedd further stated "I do understand how people saw mandatory minimums as a problem for the guideline sentencing scheme as it existed pre-*Booker*. I'm not sure it's a problem now. I think it may be one way to get to some uniform sentencing in some dire cases" and "maybe the world has flipped on mandatory minimums" (TR 27). He suggests that post-*Booker*, the center of sentencing is uniformity, and one way to get to uniformity in sentencing in some cases would be through the encouragement of mandatory minimums (TR 28).

Eleventh Circuit Court of Appeals
The Honorable Gerald B. Tjoflat, Circuit Judge

Judge Tjoflat believed that the Commission should provide an explanation of the purpose behind each guideline (TR 14–5). He stated, "Congress has always set norms with mandatory minimums, but the fact that Congress has set those norms, they are just arbitrary. They are not based on anything empirical. But the Commission has access to a lot of empirical information" (TR 24). He further stated "the Commission ought to tell judges, ought to tell the world when they set the norm, here is why we are setting the norm and tie the setting to one of the sentencing factors in 3553(a)" (TR 24). By doing so, judges would have a better idea as to why the particular punishment is required, for example, because of the predominance of the offense or the need for deterrence. Judge Tjoflat indicated that "just having a number, it is a norm but it does not explain the underpinning of the norm" (TR 24). He further stated that the reasoning behind guidelines that are based on mandatory minimums should be provided (TR 26–7). He stated that while statutory minimums and maximums are "arbitrary" and without "empirical

justification," an explanation as to what purposes an offense level based on a mandatory minimum serves, "would be better than just a flat line" (TR 26–7)

Judge Tjoflat also expressed concern over departure practice under §5K1.1, especially in drug cases, since low level drug defendants "don't have anything to sell" (TR 15). He also indicated that "one of the problems with mandatory minimums is the prosecutor becomes the sentencer in many cases" (TR 29).

II. DISTRICT COURT BENCH

Western District of North Carolina
The Honorable Robert J. Conrad, Jr., Chief United States District Judge

Chief Judge Conrad stated that the goals of uniformity and proportionality are often in tension, and the achievement of them has been complicated largely by the obligation to impose mandatory minimums sentences in certain cases (WT 3).

Chief Judge Conrad stated that "the guidelines themselves are marred by the obligation to impose mandatory minimum sentences" (TR 129). He noted that "typically guideline ranges increase proportionally with factors in criminal history," however, "guideline ranges influenced by statutory mandatory minimums . . . contain large jumps in sentence lengths or cliffs based on small differences in offense conduct or a defendant's criminal record" (WT 4, TR 129). He indicated that he was once forced to impose a mandatory life sentence on a low-level drug conspirator whose role "was essentially that of a chauffeur" (WT 4, TR 129). Chief Judge Conrad also expressed concern with connecting drug guidelines to mandatory minimums, stating "understandably, mandatory minimums are created by the Congress, not the Sentencing Commission. Nonetheless, the Commission's decision to depart from empirical data to cluster Guideline ranges around the statutory minimums makes them less reliable as a sentencing guide. Ultimately, the goal of uniformity must yield to the imperative of doing justice in individual cases" (WT 4, TR 130).

Chief Judge Conrad's criticism of mandatory minimums are that "they focus on one or two specific things to the exclusion of other very relevant things" such as drug quantity and prior conviction. Further, the "application of mandatory minimums to the extent it takes away total discretion of the district court" has the tendency, he stated, to lead to an unjust result (TR 151).

In the era of advisory guidelines, Chief Judge Conrad stated that courts are looking to the guideline ranges for persuasive information on how to sentence, and give the empirically-based ranges more credibility. Therefore, "maybe in an era of an advisory guideline system the emphasis should be more on the empirically driven range than the mandatory minimum driven []" (TR 156). Chief Judge Conrad encouraged the Commission to continue to do research and publicize the results with respect to mandatory minimums and disparate impact (TR 160).

Middle District of Florida
The Honorable Gregory A. Presnell, United States District Judge

Judge Presnell recognized that the crack guideline is "driven by the mandatory minimums" but questioned the "wisdom of promoting guidelines that follow that bad policy and which cause district judges to either impose what they view to be unjust sentences or to comply with the guideline which they know produces an unjust sentence" (TR 133-34).

Judge Presnell stated that mandatory minimums are a problem for the court and for the Commission in doing what it does in trying to structure sentencing ranges. He believes that mandatory minimums are inherently arbitrary but "may be necessary" (TR 152).

Southern District of Georgia
The Honorable William T. Moore, Jr., Chief United States District Judge

Chief Judge Moore stated that there is a view among some judges that the statutory penalties should be increased, including the enactment of mandatory minimums, for cases involving repeat theft and fraud cases (WT 3). Chief Judge Moore stated that his district has sentenced several fraud defendants where the guidelines "did not adequately address the harm caused by their actions, the seriousness of their criminal histories, or the likelihood that they would continue in such criminal acts" (*Id*).

Chief Judge Moore stated that he personally does not favor more mandatory minimum sentences (TR 141). In his opinion, the Commission can devise a better way to deal with the perceived problem than the creation of mandatory minimum sentences. (TR 141).

Northern District of Florida
The Honorable Robert L. Hinkle, Chief United States District Judge

Chief Judge Hinkle stated that he perceives a great deal of disparity in sentencing that goes unmeasured because of practices that vary from district to district. He cited as examples differences in the application of §1B1.8, relating to protection of information disclosed by the defendant while cooperating with the government, differences in the application of the concept of relevant conduct which results in increased or decreased drug weights and the decision as to whether to file a notice of prior conviction under 21 U.S.C. § 851 and seek a mandatory minimum sentence (WT. 2–3). He suggested, however, "that too much attention is given to the issue of disparity. What we should be talking about is not how to reduce disparity but how to improve the quality, the justice, and wisdom of a given sentence" (WT. 3).

Chief Judge Hinkle expressed concern over the Commission's implementation of at least some congressional policy decisions (WT 4). He stated "Congress adopted minimum mandatory sentences for some drug offenses, and the Commission extrapolated them much more broadly into the guidelines. Congress adopted a career offender provision, and the Commission, with the help of the circuit courts, gave the statute a broad application" (WT 4–5). He advised the Commission "to implement Congress's decisions, as [it] of course must, but not to expand them, unless in [its] independent judgment [it] conclude[s] that an expansion is appropriate. If [it]

could persuade Congress not to amend the guidelines directly, but instead to let [its] process – including public comments – play out, it would be that much better" (WT 5).

With respect to proportionality concerns, Judge Hinkle stated "I know there are problems with cliffs. Better to have a cliff than to have everybody get an inappropriate sentence" (TR 155).

III. PRACTITIONERS

Federal Public and Community Defenders
Alan Dubois, Senior Appellate Attorney, Eastern District of North Carolina
Nicole Kaplan, Staff Attorney, Northern District of Georgia

Mr. Dubois stated that the Judicial Conference has taken the position to urge the Commission to assess and adjust the guidelines based on principles of parity, proportionality and parsimony, independent of any potentially applicable mandatory minimums. Mr. Dubois stated that the Judicial Conference wrote "[m]andatory minimums interfere with the operation of the Sentencing Reform Act," and "may, in fact, create unwarranted sentencing disparity." Thus, in its view, guidelines that are based on mandatory minimums provide no helpful advice in cases in which a mandatory minimum does not apply, and the Commission is therefore "obligated to make an independent assessment of what the appropriate sentence should be" (WT 9).

Mr. Dubois and Ms. Kaplan requested the Commission to recommend that Congress abolish mandatory minimums (WT 22). They stated that in its 1991 Report, "the Commission led the way in showing that mandatory minimums result in unduly severe sentences, transfer sentencing power directly from judges to prosecutors, and result in unwarranted disparity and unwarranted uniformity." They maintain that since then "only more evidence demonstrating that mandatory minimum statutes require sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense and racially discriminatory, has accumulated" (WT 21). They asked the Commission to "prepare an updated report on mandatory minimums and recommend to Congress that they be abolished" (WT 22).

Mr. Dubois and Ms. Kaplan stated that the "drug guidelines are too severe, and should be amended to reflect empirical data and national experience. If the Commission still feels bound by the mandatory minimums, it can at least reduce all of the drug guidelines by two levels. In promulgating the two-level reduction to the crack guidelines, the Commission acknowledged that it had contributed to the problem by unnecessarily setting the guideline range two levels above that required to include the mandatory minimum penalties at the two statutory quantity levels . . . This is true of all of the drug guidelines, and should be addressed" (Kaplan WT 26).

Mr. Dubois suggested that the Commission establish drug penalties consistent with its research and expertise rather than tying them into mandatory minimums. He believes that in this way the Commission can have a dialogue with Congress (TR 82).

Ms. Kaplan stated that there is a confluence of mandatory minimums and strict compliance minimums and restrictive §5K policy in some districts, which she suggested means in a great

majority of the cases there is nothing left for the judge to do "but tote up the mandatory minimum and sentence" (TR 102).

Practitioners Advisory Group
Lyle J. Yurko, North Carolina

Mr. Yurko voiced opposition to mandatory minimum sentences. He stated that "statutory mandatory minimums, co-existent with the guidelines, are flawed because mandatory [minimums] usually rely on a single factor to achieve punishment while the guidelines are multifaceted and rationally based" (WT 5, TR 74). Mr. Yurko believes that grounding guideline punishments in mandatory minimums "results in both under punishment and over punishment of drug offenders" and a better system would factor in both aggravating and mitigating circumstances rather than only two factors which are accounted for in mandatory minimums, *viz*., drug quantity and criminal history (WT 5, TR 75). He recommended that the Commission advocate the elimination of mandatory minimums "after a carefully designed restructuring of the drug guidelines is effectuated," demonstrating to Congress that the alternative that would be in place if they abolished the mandatory minimums, so as to make abolition more politically practicable (WT 6, TR 75).

Weil Law Firm
Amy Levin Weil

Ms. Weil stated that defense attorneys believe mandatory sentences are unfair, and it is becoming more unfair with the advisory guideline system. In her opinion, under a mandatory system of the guidelines, with the sentences that were imposed, any cliff between the mandatory sentence and the guideline sentence was less of a cliff because the Commission had taken into consideration what the statutory sentence was going to be and had tried to alleviate the disparity. However, with this new advisory system, sentences can be based on "virtually almost anything, that exacerbates or enhances those cliffs." Ms. Weil thinks that the Commission could present to Congress the fact that those cliffs have gone a long way toward giving a sense of unfairness in sentencing (TR 106).

IV. PROBATION OFFICE

Thomas W. Bishop
Chief U.S. Probation Officer, Northern District of Georgia

Mr. Bishop noted that some in his office believe that penalties involving cocaine and crack should be lowered and a recommendation should be made to Congress to consider reducing the drug mandatory minimums (TR 54, WT 1).

V. LAW ENFORCEMENT

Miami Police Department
Chief John Timoney, President, Police Executive Research Forum

Chief Timoney stated that he does not think that the high mandatory penalties for federal drug crimes, armed career criminal offenses, or firearm offenses is the operable deterrent for offenders, but rather the certainty of the sentence in the federal system (TR 123).

VI. ACADEMIA

Wake Forest School of Law
Ronald Wright, Executive Dean for Academic Affairs, Professor of Law

Dean Wright stated that although it is not realistic to think the Commission can suggest to Congress that it abolish mandatory minimum sentences, in his view, the information that the Commission provides Congress on mandatory minimums enables judges and prosecutors to "do a better job of improving the system within the current rules" and he believes the Commission can act with these other parties to "bring that forward through [its] portrayals" (TR 183).

North Carolina State University
Rodney L. Engen, Ph.D., Associate Professor of Sociology

Dr. Engen questioned the role that prosecutors play in the sentencing process, the control they exercise over the process and the disparity that results from too great a prosecutorial role (WT 4-7). Specifically, he noted the disparity between districts and between AUSAs in deciding whether to charge mandatory minimums.

Dr. Engen also expressed strong opposition to mandatory minimum sentences. He stated that mandatory minimum sentences result in especially harsh punishment to some offenders while others will escape mandatory sentences by pleading to a lesser charge (WT 9). Dr. Engen believes that application of mandatory sentences is "controlled entirely by U.S. Attorneys whose decisions are not reviewable" and "run counter to the very principle" of guideline sentencing (WT 9). Dr. Engen recalled the results of the Commission's 1991 report that found only 25 percent of those cases eligible for drug and firearm mandatory minimum sentences were convicted of crimes that did not carry the mandatory sentence, and that "prosecutors granted substantial assistance departures in a third of those cases where they did apply the mandatory minimums, negating the mandatory sentence." In his view, these statistics give "some sense of the frequency with which [the U.S. Attorneys] exercise" discretion (WT 5, TR 175). He "urge[s] the Commission to encourage Congress to repeal mandatory minimum sentencing statutes in favor of the guidelines provided in the SRA" (WT 9, TR 172). Dr. Engen further revealed that a study by the General Accounting Office estimated that from one-third to half of those offenders eligible for mandatory minimums in the courts avoided them (TR 175).

Dr. Engen cited Michael Tonry, a former President of the American Society of Criminology:

> Evaluated in terms of their stated substantive objectives, mandatory penalties do not work. The record is clear from research in the 1950s, the 1970s, the 1980s, and the 1990s that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh. (1996; p. 135 at WT 9)

VII. COMMUNITY INTEREST GROUPS

Families Against Mandatory Minimums
Monica Pratt Raffanel, Communications Director

Ms. Raffanel testified in an effort to "convey the human face of the sentences imposed by mandatory minimums and the guidelines" (TR 190). She discussed the difficulties encountered by incarcerated individuals and their families and related the stories of two individuals who received lengthy mandatory minimum sentences in drug cases, which, in her view, seemed disproportionate in relation to their conduct (WT 3–5, TR 191–94). Ms. Pratt described the impact of these sentences on the defendants and their families (*Id*). She made three specific recommendations to the Commission. First, Ms. Raffanel recommended that the Commission recommend to Congress to end mandatory minimums (WT 7–8, 195–196). Ms. Raffanel argued that mandatory minimums often result in unduly long sentences and are a "chief contributor to the undue length of many guideline sentences indexed to them" and they "utterly undermine the mandate of individualized consideration, proportionality and parsimony in 18 U.S.C. § 3553(a)" (WT 8). Ms. Raffanel requested that the Commission update its report on mandatory minimums, stating that it is "still a resource that everyone from advocates like FAMM and other sentencing practitioners refer to on a regular basis." Second, Ms. Raffanel asked the Commission to extend the two-level reduction for crack offenses to all guidelines anchored in mandatory minimums. And third, Ms. Raffanel asked that the Commission "review the guidelines with an eye to lowering those sentencing ranges that have generated continued concern with their undue length and severity of punishment in certain cases" (WT 8, TR 195–196).

PUBLIC HEARING – THURSDAY AND FRIDAY, MAY 27–28, 2009
8:00 a.m. – 4:45 p.m.
STANFORD, CA

I. APPELLATE BENCH

Ninth Circuit Court of Appeals
The Honorable Richard C. Tallman, United States Circuit Judge

Judge Tallman stated that the court's ability to vary based upon the crack/powder ratio under *Kimbrough* and *Spears* has led to further appeals as to whether the court abused its discretion by not varying or whether it understood it had the discretion to vary on that basis. Inmates are raising *Kimbrough* issues and Amendment 706 claims where they are not entitled to relief, *i.e.*, career offender and statutory minimums. Another question is "whether a sentence-modification proceeding under 18 U.S.C. § 3582(c)(2) is an appeal pursuant to Section 3742, a collateral attack, or something else entirely." He stated that the U.S. Attorney's Office in the Central District of California is permitting agreements to downward variances in crack cases (TR 28-30).

II. DISTRICT COURT BENCH

Western District of Washington
The Honorable Robert S. Lasnik, United States District Judge

In the context of discussing the need for the inclusion of more sentencing alternatives (treatment, diversion, drug courts) in the guidelines, Judge Lasnik stated that "the politicization of crime as an issue" "led to mandatory minimum terms, tougher drug sentencing, tougher sex offender sentencing, et cetera . . .." In this regard, he further opined that "we have a much fairer system with a guideline approach where [the politicization] is somewhat moderated than we would have had we retained the prior system and had mandatory minimum terms one after another imposed by Congress because they were so unhappy or so unaware of what the federal judges were really doing" (TR 93-94).

District of Hawaii
The Honorable Susan Oki Mollway, United States District Judge

Judge Mollway argued mandatory minimums are frequently unreasonable and urged the Commission to work for their elimination, noting mandatory minimums are contrary to the dictates of section 3553(a) (TR 98). She also commended the Commission for its work on the crack/powder disparity and hoped that a 1:1 ratio would be adopted soon (WT 2-3, TR 98). She believes the guideline sentences in child pornography cases under §2G2.2 are too high and in fraud cases are too low because fraud "comes in a greater variety of forms than some of the other crimes do" (WT 3, TR 99). Judge Mollway also asked for clarification of the phrase "referenced to in this guideline" found in §2B1.1: asking whether "reference" includes a listing in Appendix A, and (2) if there are two counts of conviction with only one with a statutory maximum of 20

years or more, whether the base offense level for the second offense is also seven (WT 3, TR 102).

Northern District of California
The Honorable Vaughn R. Walker, Chief United States District Judge

Judge Walker strongly urged the Commission to reevaluate the drug guidelines, stating that drug quantity is not a good indicator of culpability (TR 11-17). Noting that statutory minimums create sentencing cliffs, he stated "the Commission should not aggravate the problematic character of these minimums by conforming sentences not subject to statutory minimums to these same features" (TR 17). He claimed the drug quantity table, with offense levels tied to quantity, is little more than "rank pseudo-social science" (TR 19-21). "What drug quantity should be is simply one of numerous other factors that would be considered in determining the seriousness of the offense and the threat to society, which the offense represents" (TR 25). In regard to mandatory minimums, he noted "I'm not suggesting for a moment that we can do away with the minimum mandatories or with the congressional limitations that they place upon us, but that doesn't mean that we should march lemming-like into the sea where we are convinced that Congress' determinations are not appropriate" (TR 30). He also stated "the minimum mandatory sentences of course are troubling for all of us in many cases because they don't necessarily adequately reflect the tremendous variations in the particular facts and circumstances of the case" (TR 42).

District of Idaho
The Honorable B. Lynn Winmill, United States District Judge

Judge Winmill noted that one of his concerns relates to "the continued ability of the prosecutor to affect the application of the guidelines in ways that I think were not envisioned by either Congress or the Commission." As an example, he noted concern regarding the prosecutor's discretion to withhold the filing of a section 851 information to seek an enhancement in the mandatory minimums until very late in the game, such that they hold it over the defendant's head (TR 73-74).

III. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

District of Oregon
Karin J. Immergut, United States Attorney

Ms. Immergut asserted that the increased number of variances on grounds otherwise discouraged by the guidelines has led the government to charge more readily-provable offenses which carry a mandatory minimum and increase its reliance upon binding Rule 11(c)(1)(C) plea agreements (TR 234-35, 239-41, 262-65).

Eastern District of California
Lawrence G. Brown, Acting United States Attorney

Mr. Brown noted that in the Eastern District of California, the use of mandatory minimums and binding plea agreements have increased to prevent large variances by the courts, particularly when appearing before certain judges (TR 265-67). In particular, in the context of child pornography cases, he noted that as judges began to routinely impose below guideline sentences in these cases, the government began to "charge receipt, distribution, manufacturing charges if they are available so as to avail [itself] of a 60-month minimum mandatory sentence," or to "seek (c)(1)(C) plea agreements on straight possession of child pornography cases" (TR 253).

B. FEDERAL PUBLIC DEFENDERS

Western District of Washington
Thomas Hillier, Federal Public Defender

Central District of California
Davina Chen, Assistant Federal Public Defender

In Mr. Hillier's and Ms. Chen's opinion, the Commission should abandon its policy of mirroring mandatory minimums in the guidelines. Rather than creating proportionality, this policy magnifies the disproportionality of mandatory minimum penalties by spreading them across the board. Similarly, the Commission should not abdicate its independent expert role when responding to congressional directives. Mandatory minimums fail to track either the harms caused or the defendant's culpability. In their opinion, drug quantity has proven to be a very poor proxy for offense seriousness, and linking the guidelines to the mandatory minimum levels has resulted in unwarranted disparity and excessive uniformity (WT 15-16, TR 306).

Additionally, they recommended that the Commission should issue an updated report on mandatory minimums, and urge their repeal. Current data indicates that prosecutorial control over mandatory minimums results in disparity, including racial disparity, which judges and the Commission are powerless to correct (WT 37-39).

IV. PROBATION OFFICE

District of Idaho
Marilyn Grisham, Chief U.S. Probation Officer

Ms. Grisham requested that the Commission and Congress review mandatory minimums and the penalties for methamphetamine compared to marijuana, crack, and immigration offenses (TR 156-60). While Ms. Grisham would welcome alternative sentences, she noted the strain it would put on her small and widely dispersed staff (TR 157-59). In responding to questions regarding the extent of a variance the probation officer recommends, Ms. Grisham stated they were "not based on any empirical evidence. So we're still using — still using the gut" (TR 211). Also, in response to questions from the Commissioners, Ms. Grisham noted that while she had not seen

an increase in the use of § 851 or § 924(c) enhancements, they are "a big bargaining tool" (TR 216).

District of Nevada
Christopher Hansen, Chief U.S. Probation Officer

Mr. Hansen suggested that the guidelines or statutes be amended to (1) allow departures based upon the history and characteristics of the defendant, as such "discouraged" factors may aid the assessment of risk/recidivism; (2) provide for a uniform reduction in all immigration cases to eliminate disparity with those districts with a fast track program; (3) increase the availability of probation to low risk, non-violent offenders; and (4) revise mandatory minimums for defendants convicted of non-violent offenses and who pose a low risk of recidivism (TR 166-173).

V. ACADEMIA

University of San Diego Law School
Kevin Cole, Dean

Dean Cole described the Commission's decision to calibrate sentences for drug offenses involving smaller drug quantities to the penalties in the mandatory minimum statutes as defensible, but also as "infect[ing] the guidelines with the same malady that so many perceived in the mandatory minimum offenses themselves" (TR 122-123).

VI. COMMUNITY INTEREST GROUPS

Pioneer Human Services
Larry Fehr, Senior Vice President

Mr. Fehr urged the repeal of mandatory minimums or taking an intermediary step of expanding the criteria to qualify for "safety valve" reductions on all mandatory minimums to eliminate disproportionate and overly punitive impacts (TR 186-187).

American Civil Liberties Union
Caroline Fredrickson, Director

Ms. Fredrickson discussed the history of mandatory minimums and the Anti-Drug Abuse Act of 1986. Ms. Fredrickson presented arguments regarding the negative impact on African American communities and the racial disparities arising from mandatory minimums and the crack/powder cocaine ratio. She advocated that the Commission urge Congress to eliminate mandatory minimum sentences for all drug offenders (TR 219-229).

PUBLIC HEARING - THURSDAY AND FRIDAY, JULY 9–10, 2009
8:30 a.m. – 5:15 p.m.
NEW YORK, NY

I. APPELLATE BENCH

Second Circuit Court of Appeals
The Honorable Jon O. Newman, Senior Circuit Judge

Senior Judge Newman stated that he was one of a few federal judges who supported the Sentencing Reform Act, back in 1977 (WT 1). Senior Judge Newman believes the "Commission made a mistake years back in building its guideline table on top of the mandatory minimums" (TR 92). The "country needs [the Commission's] judgment what the right sentence should be," whether above or below the mandatory minimum (TR 93). In his opinion, if the Commission's judgment of what the sentence should be comes out below the mandatory minimum, that will send a message that the mandatory minimum is too high (*Id*).

Third Circuit Court of Appeals
Honorable D. Michael Fisher, Circuit Judge

Judge Fisher believes that judges should have significant discretion and that mandatory minimums sentences "do nothing more than set down arbitrary guidelines that don't fit the particular cases" (TR 67).

Fourth Circuit Court of Appeals
The Honorable Jeffrey R. Howard, Circuit Judge

Judge Howard recounted his history as a state and federal prosecutor and a judge and argued that mandatory minimums are unnecessary and too many times makes the case unjust. In his opinion, judges know what they are doing and he therefore does not support them (TR 46).

II. DISTRICT COURT BENCH

District of Maine
The Honorable John A. Woodcock, Jr., Chief United States District Judge

Chief Judge Woodcock believes the mandatory minimums are too high in child pornography cases and asked the Commission to work with Congress to review those penalties (TR 139-41). In his opinion, Congress has a constitutionally imposed responsibility to do what it thinks is in the best interest of the country in terms of mandatory minimums, and judges may wish they did not exist because when looking at individual defendants it seems they are not fair or just. However, he cautioned the Commission to avoid a confrontation with Congress over congressional authority. Instead, Judge Woodcock recommended the Commission open lines of communication with the appropriate congressional committee to avoid "the imposition of congressional mandates that [the Commission] know[s], because of [its] empirical determination,

are not in accordance with the best sentencing practices." In that way, he suggested, the Commission might be able to deflect Congress from exercising its authority (TR 141).

Southern District of New York
The Honorable Denny Chin, United States District Judge

Judge Chin believes that "mandatory minimums sometimes result in unjust sentences, as they often require judges to ignore sentencing factors that usually are an important part of the mix" (WT 2, TR 129). However, Judge Chin stated that with the additional flexibility through the safety valve and the §5K1.1 departures, "a mandatory system isn't so bad" (WT 2, TR 129).

Eastern District of New York
The Honorable Raymond Dearie, Chief United States District Judge

Chief Judge Dearie, recounting statistics, discussed the "culture of incarceration" and the need to rethink mandatory minimums and simplify the guidelines (TR 344-46). In Chief Judge Dearie's opinion, the Commission's decision to dovetail the guidelines to the mandatory minimums was a mistake because "no other decision has had such a profound impact on the federal prison population" (TR 345).

District of Puerto Rico
The Honorable Gustavo A. Gelpi, Jr., United States District Judge

Judge Gelpi stated that Congress needs to reexamine mandatory minimums, and the crack-powder cocaine disparity (TR 353-55). Judge Gelpi stated that the Commission should consider a recommendation to Congress for a review of mandatory minimums for minor participants (TR 353).

District of Massachusetts
The Honorable Nancy Gertner, United States District Judge

In Judge Gertner's view, in this time of advisory guidelines, there are certain statutory provisions that are so rigorously applied that they create cliffs and unfair distinctions between similarly situated defendants. Thus, Judge Gertner recommends that Congress and the Commission should address the relationship between the safety valve and the mandatory minimums in 18 U.S.C. § 3553(f). She stated that either the statute should not refer to "criminal history I," thereby keying the safety valve to the formal categories of the now advisory guidelines, or the guidelines should redefine criminal history I (WT 11).

Judge Gertner believes that Congress should repeal mandatory minimums and stated that if it does not, the Commission should change the tables so that a guideline sentence does not exacerbate the injustices of the mandatory minimum statutes (WT 12).

In response to questioning, Judge Gertner said she would be skeptical of a deal between Congress and the Commission that says no mandatory minimums in exchange for a broad-based,

mandatory guideline system, because she fears after twenty years of a culture of a mandatory guideline system, "judges are going to wind up going back to where we were." Thus, she believes the Commission should instead focus only on mandatory minimums, without trying to bargain with mandatory guidelines (TR 383).

III. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

Eastern District of New York
Benton J. Campbell, United States Attorney

Mr. Campbell reported that the Eastern District of New York has not modified its charging practices post-*Booker* and has not increased its use of mandatory minimums, enhanced sentences under 21 U.S.C. § 851, or binding plea agreements, but continues to base its decisions on the law and facts of the particular case (WT 10, TR 301).

Eastern District of Virginia
Dana J. Boente, United States Attorney

Citing examples of large variances by the court, Ms. Boente asserted that the Eastern District of Virginia is now prosecuting cases that qualify for mandatory minimums to avoid significant downward sentencing variances (WT 6, TR 311-14). Ms. Boente also stated that the district is also bringing more child pornography cases where it has proven receipt, rather than possession, because of the mandatory minimum five year sentence. In her estimation, the district has seen a tendency among judges to give reduced sentences in these cases because of the difficulty in providing evidence of contact offenses (WT 6).

B. FEDERAL PUBLIC DEFENDERS

Northern District of New York
Alexander Bunin, Federal Public Defender

Mr. Bunin stated that in most of the thousands of cases he was involved in, the defendants were sentenced under the guidelines and many were controlled by mandatory minimum punishments. During his 23 years of practice under the guidelines, and in different parts of the United States, Mr. Bunin concludes that "a prosecutor's decision to charge a defendant in federal court, and what federal charges to bring, is vastly more determinative of the sentence than any other factor in the process" (WT 1). In his view, the threat of a mandatory minimum is used by prosecutors to coerce guilty pleas and dictate sentencing outcomes (WT 15). Mr. Bunin stated that the Commission could help eliminate disparity by recommending the elimination of mandatory minimum sentences. Mr. Bunin recommends that "to the extent that statutes, particularly mandatory minimum punishments, skew the system by encouraging and compounding charging disparity, the Commission should recommend to Congress that those statutes be eliminated" (WT 3).

Mr. Bunin further stated that virtually every judge before whom he has appeared "expressed dissatisfaction with mandatory minimum punishments, particularly in drug crimes." In addition, he claimed that all the judges "appreciated the assistance of the guidelines and only felt unnecessarily constrained when some requirement, whether a mandatory minimum, a prohibition on departure, or a restrictive appellate interpretation, kept them from fairly and individually addressing the defendant before them..." (WT 3).

Mr. Bunin believes that calibrating the drug guidelines to mandatory minimums is contrary to the Commission's basic responsibilities described in sections 991(b)(1)(A), (B) and (C) and section 994(g). He stated that this is not required by the general provision in section 994(a) that the promulgation of guidelines be "consistent with all pertinent provisions of any Federal statute," because under §5G1.1(b), a mandatory minimum trumps a lower guideline (WT 12). He disfavors basing guidelines on mandatory minimums but recommends that if the Commission feels bound by mandatories, then all drug guidelines should be reduced by two levels (*Id*). Mr. Bunin believes that the real check on prosecutors is to give the power back to the courts by getting rid of mandatory minimums and letting the judges use their discretion (TR 272).

Eastern District of Virginia
Michael S. Nachmanoff, Federal Public Defender

Mr. Nachmanoff stated his belief that the Commission can play a vital role in urging Congress to repeal mandatory minimums, and that the time is ripe given the interest of the administration in solving the crack/powder disparity. In his opinion, there is a statutory basis for the Commission to provide Congress its expert opinion on this topic**,** and the Commission has the responsibility and the capacity to be persuasive (TR 238).

Mr. Nachmanoff strongly opposes mandatory minimums, and stated: "mandatory minimums remain the most serious impediment to justice in federal sentencing and the main cause of over-incarceration." He does not believe that judges cause unwarranted disparity but rather asserted that prosecutors use mandatory minimums in their sole discretion to control sentencing outcomes (WT 2). Mr. Nachmanoff believes discussing mandatory minimums is important because it "helps to explain where much of the problem lies in our system, and it helps identify where it does not lie. We do not believe the problem lies with increased judicial discretion. To the contrary, we believe that the system has improved as a result of greater discretion." Instead, he believes the area of focus in looking at the differences in the way people are sentenced is to look at mandatory minimums and decisions by the Department of Justice as to how they charge (TR 230). He urges the Commission to report to Congress "and recommend that it repeal mandatory minimums" (WT 4). Mr. Nachmanoff made the following specific criticisms of mandatory minimums:

"Mandatory minimums are unnecessarily harsh and are the primary cause of over-incarceration in the federal system" (TR 228; WT 4). Mr. Nachmanoff believes that they directly result in greater than necessary sentences and indirectly over-inflate sentences by their incorporation into the guidelines. He believes that Congress' assumption that only major drug traffickers would be subject to mandatories turned out to be wrong (WT 5-6). He believes that the safety valve does not solve the problem of mandatory minimums in part because of the limitation that the defendant have only one criminal history point to be eligible. He thinks this limitation should be

expanded and that the safety valve should be expanded to cover all crimes.

"Mandatory minimum statutes, whether used according to the Department of Justice charging policy or as inevitably used in practice, result in disproportionately harsh punishment, create unwarranted disparity, and distort the criminal justice process. The first priority of those concerned about unwarranted disparity and disproportionate punishment should be the repeal of mandatory minimum statutes" (TR 235, 260-65). Mr. Nachmanoff maintains that mandatory minimums override the Commission's judgment and often trump the guidelines. He indicates that the government's use of mandatory penalties to override the guidelines had an adverse impact on African-American defendants (WT 9). Furthermore, Mr. Nachmanoff asserts that if the Department of Justice followed its charging policies and pursued the most serious charges, "guidelines would be irrelevant in a very large portion of cases and the Bureau of Prisons would be overwhelmed" as a result of the application of mandatory minimums. He believes that mandatory minimums are improperly used as tools to force pleas:

> The threat of unduly harsh punishment is used to pressure defendants into cooperating with the government and giving up constitutional rights that are important to the fairness and truth-seeking function of the system. The threat of filing harsher mandatory minimum charges, § 851s, and § 924(c)s is routinely used to induce defendants to plead guilty. (WT 13)

In response to questioning, Mr. Nachmanoff stated the prosecutors should file cases without mandatory minimums in order to allow the courts the flexibility to evaluate offender characteristics, *i.e.*, in cases involving mental illness (TR 268-69), or crack cocaine (TR 269-71). He also stated that the repeal of mandatory minimums, along with advisory guidelines, would give the courts flexibility to impose individualized sentences, and it would go a long way to achieving greater variance in the system, where there would be freedom among the various players to achieve just sentences (TR 264-65).

"The Commission should review and revise, and/or report to Congress regarding the need to revise, all guidelines that are based on mandatory minimums or congressional directives" (WT 15, TR 237). "Even if Congress does not repeal mandatory minimums in the near future, the Commission should amend the drug guidelines. Linking the drug guidelines to mandatory minimums maintains proportionality only with mandatory punishment levels that are arbitrary and overly severe, and then magnifies that disproportionality by spreading it to every offender at every quantity level" (*Id*). Mr. Nachmanoff indicated that "no statute required or requires the Commission to link the guidelines to mandatory minimums" and recommended that all guidelines based on mandatory minimums be amended (WT 16, TR 239). In his view, to the extent judges believe the drug guidelines are too harsh, they would be more likely to comply with the guidelines if they were lowered "in a way that was based on empirical evidence, that was based on the purpose of sentencing" (TR 241).

"I believe fully that the Department of Justice and law enforcement objectives can be achieved without mandatory minimums, and therefore [believe] that the Commission taking the position that they should be repealed is not the same as saying sentences should be lowered . . . without regard to what the Department of Justice and what law enforcement is trying to achieve" (TR 242).

C. CJA PANEL ATTORNEYS

District of Rhode Island
Robert Mann, CJA Representative

Mr. Mann stated that "federal sentences are too long and alternatives to incarceration are not used enough" (WT 1, TR 251). Mr. Mann attributes what he perceives as too lengthy sentences, in part to the use of prior drug convictions to enhance penalties or trigger mandatory minimums. He stated that: "what the statute does is remove the sentencing decision from the Court and place it in the hands of the prosecutor" (WT 4). In his view, one way to reduce the complexity of the system "would be the repeal of many of the statutes . . . which create mandatory minimums or otherwise require the imposition of sentences without affording the Court discretion to vary" (*Id*). He stated that he believes the power should be given back to the judge who can sentence the defendant for a long period of time, if required (TR 272).

IV. PROBATION OFFICE

District of Maryland
William Henry, Chief Probation Officer

Mr. Henry stated the disparity in crack and powder cocaine should be eliminated and mandatory minimums should be revisited (WT 5, TR 173).

District of Connecticut
C. Warren Maxwell, Deputy Chief Probation Officer

Mr. Maxwell believes mandatory minimums should be reviewed to determine their effectiveness on deterrence and recidivism, because some of the guidelines are set by the statutory minimum (TR 187). In his view, mandatory minimum sentences seem to have been chosen arbitrarily "without much regard to research in what is most effective" (WT 2, TR 187). He wondered whether Congress should be required to state its reasons for mandatory minimums similarly to the requirement in 18 U.S.C. § 3553 for judges to state their reasons for imposing sentences (WT 2). He also wondered whether the Commission could research whether the gender and racial makeup of Congress leads to harsher penalties for other racial groups (WT 2, TR 188).

Mr. Maxwell believes additional small prisons should be located in urban settings to allow increased use of intermittent confinement (TR 192-94), that the crack/powder cocaine disparity should be eliminated (TR 194), and that mandatory minimums in drug cases should only apply to defendants possessing guns (WT 5).

District of New Jersey
Wilfredo Torres, Senior Deputy Chief Probation Officer

Mr. Torres stated that mandatory minimums are not necessary as drug quantities are adequately reflected in the guidelines which most courts adopt. Mr. Torres stated "our sentencing process continues to rely primarily on the imprisonment range calculated from the advisory sentencing guidelines. As such, the Sentencing Commission is well positioned to approach Congress to remove or amend the statutory mandatory minimum sentences for drug offenses" (WT 3). Probation officers would welcome training and assistance to help determine when variances are appropriate (WT 3).

V. LAW ENFORCEMENT

New York Police Department
Raymond W. Kelly, Police Commissioner

Commissioner Kelly stated that in terms of his partnership with the federal government, he found mandatory minimums were useful (TR 482). He informed that in New York, law enforcement "let[s] anyone arrested for a gun crime know that if they have a prior felony conviction we will do everything we can to have them tried in federal court where penalties are tougher" explaining as an example that the federal mandatory minimum for a first offense while carrying a firearm during a crime of violence or drug trafficking crime is five years compared to three years in the state. In his view, the prospect of a stricter sentence has convinced a number of offenders to give up information, "illustrat[ing] the deterrent role of federal sentencing, even with the vast majority of the cases being prosecuted in state and city courts." In this way, federal sentencing is "an additional, powerful tool to support" the local law enforcement (WT 4). In response to questioning, he further stated that the certainty of punishment is just as important as the severity of punishment because "certainty and severity go hand in hand" and that "practical application of the fact that it may go to federal court helps us" because there is a perceived likelihood of a conviction in federal court than in the local courts (TR 484-85).

VI. ACADEMIA

New York University School of Law
Rachel Barkow, Professor of Law

Professor Barkow stated over the last 25 years, Congress has been responsible for eliminating judicial discretion through the 25 percent rule and the enactment of mandatory minimums. While benefitting from the Commission's data and the advisory guidelines, *Booker* has given "judges some room to account for relevant individual differences in setting punishments."

Professor Barkow reminded the Commission that:

> when it developed its initial set of sentencing guideline ranges for drug trafficking, it incorporated statutory mandatory minimum sentences into the grid so that the trafficking guidelines, like mandatory minimum laws, are driven largely by quantity. Moreover, the

sentences for all quantities have been set based on the sentences Congress selected for mandatory minimums. (WT 15)

Professor Barkow stated that the Commission has recognized in its Fifteen Year Report that "[N]o other decision of the Commission has noted, "has had such a profound impact on the federal prison population." This decision accounts for much of the rise in the federal prison population and for a large measure of the racial disparities in its composition. Judges have almost universally condemned these Guidelines as too harsh. And yet, Professor Barkow claimed that the Commission has not offered much of a defense for this choice. In her view, "the most likely explanation is that the Commission appears to have done this to avoid 'cliffs' in sentencing, where offenders would find themselves with very different penalties, depending on whether they reached the mandatory minimum threshold or fell just below it" (WT 15-16). Professor Barkow claims the use of mandatory minimums to establish guideline ranges violates the purposes of sentencing set out in section 3553(a)(2) that the guidelines provide a punishment that will reflect the seriousness of the offense, promote respect for the law, and provide just punishment (*Id*). Professor Barkow asserts the Commission should establish guidelines based upon its own empirical research. Any disparity due to "cliffs" in punishment by application of mandatory minimums would warranted as that disparity "would be commanded by statute" (WT 18). The Commission's research could provide valuable data for Congress to consider in determining the value of mandatory minimums. Professor Barkow stated "in the absence of a congressional directive to [the Commission] that the guidelines should be built around mandatory minimums, I think the Commission should reconsider those sentences and look to see whether empirical evidence supports them" (WT 3, TR 412-15).

Professor Barkow asserted that Congress did not consult the Commission in setting the mandatory minimums, and "[w]hile those mandatory minimums have the force of law whenever they are triggered, there is nothing in the statutes themselves or the legislative history to suggest that Congress intended that they would undercut the operation of the expert agency in the field to set punishments for all other quantities not specified in the statute." She stated that "Congress knows how to provide such a directive, and its failure to do so in mandatory minimum laws indicates that it left it to the Commission to set the sentences for other quantities" (WT 18).

In her opinion, "now that judges have more freedom after *Booker*, it is likely that they will give more respect to Guidelines that are the product of the Commission's expert evaluation than those that were set based on nothing more than a mandatory minimum" (WT 19). Professor Barkow recommends the following statutory changes: a) Repeal mandatory minimums and allow the Commission to set sentencing ranges on the basis of empirically-grounded knowledge (WT 4), and b) eliminate the disparate treatment between crack and powder cocaine (TR 416-17).

University of Massachusetts Lowell
James Bryne, Ph.D., Professor, Department of Criminal Justice and Criminology

In Dr. Byrne's view, although alternative sanctions can improve public safety and save taxpayers money, greater gains may be achieved, in part, by (1) revising mandatory minimum sentencing laws (WT 2).

PUBLIC HEARING – WEDNESDAY AND THURSDAY, SEPTEMBER 9–10, 2009
8:30 a.m. – 5:15 p.m.
CHICAGO, IL

I. DISTRICT COURT BENCH

Northern District of Illinois
The Honorable James F. Holderman, Jr., Chief United States District Judge

Chief Judge Holderman stated that the Commission should 1) "continue to take a hard look at lowering penalties for low-end, nonviolent drug offenders," because the mandatory penalties that apply to drug offenses is a continuing concern for judges in his district; and 2) update its prior work "on the appropriateness of eliminating mandatory minimums for nonviolent, less serious offenses" (TR 19-20, WT 2).

Northern District of Ohio
The Honorable James G. Carr, Chief United States District Judge

In response to questioning, Chief Judge Carr stated that approximately 20 to 25 percent of his docket is controlled by mandatory minimums, however he stated that through the §5K1.1 mechanism, the affect they have is such that "it's not the predominant factor" (TR 77).

Eastern District of Michigan
The Honorable Gerald E. Rosen, Chief United StatesDistrict Judge

In response to questioning, Chief Judge Rosen said he did not believe linking the pornography guidelines to mandatory minimums was working (TR 69), and that the Commission should not be concerned with linkage in determining appropriate sentencing policy for drug or pornography cases (TR 70-71). He further stated that in his view, there are relatively few sentences as a percentage that are driven by mandatory minimums, and that even in those cases that are so driven, there is a large percentage of cases in which offenders cooperate and therefore receive the benefit of a §5K1.1 departure. Thus, on his docket, he said the number of mandatory minimum sentences is relatively small - possibly 20 to 25 percent (TR 75).

Western District of Tennessee
The Honorable Jon P. McCalla, Chief United States District Judge

Citing, as an example, the addition of mandatory section 924 (c) charges as a result of a plea or a jury verdict, Chief Judge McCalla noted that "[s]entences that appear to be disproportionate run the risk of undermining confidence that the judiciary is acting in a deliberate, disinterested, and impartial way even though the judge is only imposing the consecutive sentence required by statute" (WT 4). In this regard, Chief Judge McCalla urged the Commission to prepare for Congress a review and analysis of the impact of consecutive mandatory minimums and "the corrosive effect on public confidence when sentences are perceived as unjust or arbitrary" (TR 89-90).

Eastern District of Kentucky
The Honorable Karen K. Caldwell, District Judge

Judge Caldwell believed that most of the criticism directed toward the length of federal sentences "is actually aimed at applicable minimum mandatory statutory penalties rather than the guideline ranges themselves" (TR 98; WT 2). She noted that the advisory nature of the guidelines and "safety valve and downward departure motions have served to mitigate unduly harsh results that might otherwise have resulted from statutory penalties" (TR 99; WT 2). Judge Caldwell encouraged the Commission to 1) "consider empirical data along with congressional mandates as it re-evaluates and revises guidelines with corresponding statutory minimum sentences" and 2) "eliminate disparities derived solely from the forum rather than the offense or offenders," such as disparities occurring in illegal re-entry cases where fast-track programs are not available (TR 98-99; WT 2).

Northern District of Indiana
The Honorable Philip Peter Simon, United States District Judge

Judge Simon believed: 1) crack should be treated 1:1 with powder cocaine, and that the powder cocaine guidelines should be increased (TR 107; WT 6); 2) first time offenders should have increased opportunities for probation (TR 107-08; WT 7-8); 3) where Congress increases mandatory minimums which trump the guidelines, the guidelines should be amended quickly to incorporate those changes to encourage pleas rather than trials where a defendant has nothing to lose (TR 108-10; WT 8-9); and 4) increase the guidelines for large scale fraud cases (TR 110; WT 9-10).

Judge Simon had a criticism for the process used by the Commission when a mandatory minimum is increased by statute, because it takes so long for the guideline to reflect that statutory increase. In the meantime, judges have trials on these cases "simply because there [is] no incentive for the defendant to plead guilty." Judge Simon stated that some defense lawyers had reported that the defendants would have pled guilty had the guidelines been amended earlier (TR 109-110, WT 8-9).

II. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

Northern District of Illinois
The Honorable Patrick J. Fitzgerald, United States Attorney

Mr. Fitzgerald discussed the value of mandatory minimums in the prosecution of violent offenders, encouraging defendants to cooperate against more culpable individuals, and the deterrent effect mandatory minimums have on defendants in general. In his view, the threat of mandatory minimums has caused many charged with these offenses to become cooperative witnesses, testifying against those with greater responsibility, and has also caused some people to not commit such offenses (TR 248; WT 7). In addition, Mr. Fitzgerald stated that the safety valve is a good relief because it ameliorates the harshness of mandatory minimums (TR 249; WT 7).

Mr. Fitzgerald suggested that anecdotally, when judges are given discretion in the child pornography guidelines, they often vary substantially from the guideline range, but "a prosecutor is far less willing to forgo charging a mandatory minimum sentence when prior experience shows that the defendant will ultimately be sentenced to a mere fraction of what the guideline range is" (TR 252; WT 8-9). In his experience, when prosecutors see a mandatory minimum that might be too harsh and a guideline sentence might be more appropriate, and they forgo the mandatory minimum sentence, instead of getting a guideline sentence they get "little or no sentence at all." And when they believe a guideline sentence is called for, they are less likely to forgo a mandatory minimum if they think the resulting sentence will be probation or a light sentence (TR 253).

Middle District of Tennessee
The Honorable Edward M. Yarbrough, United States Attorney

Mr. Yarborough noted that the one way to provide a level of structure to the system and to avoid unwarranted disparities "might be to add to the mandatory minimum sentencing statutes already present in federal statutes." While acknowledging that "the Commission and others have suggested in the past that this may not be the best way of achieving the goals and purposes of sentencing," he noted that "[m]andatory minimums have had a place in the federal criminal justice system for some time" (WT 7).

B. FEDERAL PUBLIC DEFENDERS

Northern District of Illinois
Carol Brook, Federal Public Defender

Ms. Brook opined that the drug guidelines also contribute to racial disparity because they are tied to the quantity-based mandatory minimums and do not accurately reflect the seriousness of the offense (WT 7). She asked the Commission to "de-link the drug guidelines from mandatory minimums" (*Id*).

Ms. Brook voiced opposition to mandatory minimum sentences which she believes contribute to racial and other forms of disparity (WT 9-10). She maintained that "mandatory minimums require sentences that are longer than necessary to satisfy any purpose of sentencing" and that they "rarely reflect the seriousness of the offense" (WT 10). Ms. Brook believed that mandatory minimum sentences are applied arbitrarily and do not effectively prevent crime through deterrence or incapacitation (WT 11). She does not believe that the safety valve solves the problem because it "does not distinguish between high- and low-level offenders based on role in the offense, but instead distinguishes amount low-level offenders who differ little from each other" (WT 11).

She requested the Commission to "continue to research and speak out against mandatory minimum sentencing statutes" (WT 12). She also asked "that the Commission abandon its policy of mirroring mandatory minimums, a policy not required by Congress, and recommend to Congress that it immediately expand eligibility for the safety valve in 18 U.S.C. § 3553(f) to all mandatory minimums" (*Id*).

Northern District of Ohio
Jacqueline Johnson, First Assistant Federal Public Defender

Ms. Johnson stated that "empirical evidence shows that the guidelines recommend, and mandatory minimums require, punishment that is greater than fully informed members of the public believe is just" (WT 12). Ms. Johnson cited a study along these lines from Judge Gwin:

> Judge Gwin's study indicates that the guidelines do not accurately reflect community views regarding just punishment. It shows that informed members of the public are considerably less harsh than Congress and the Commission assume them to be, and less harsh than judges applying advisory guidelines. It is consistent with the feedback the Commission has been receiving from judges, and with the Commission's empirical research indicating that certain guidelines and mandatory minimums are greater than necessary to achieve the purposes of punishment. (WT 15)

She further noted that "[s]urveys conducted by the Commission show that both the public and judges believe that guidelines that are based on mandatory minimums and congressional directives are overly harsh" (WT 15).

Ms. Johnson urged "the Commission to de-link the drug guidelines from the arbitrary quantity-based punishment levels in the mandatory minimum statute . . . [and to] create a set of drug guidelines based primarily on functional role in the offense, with quantity given lesser weight" (TR 16). She stated that if the Commission felt bound to reference mandatory minimums, it should "at least reduce all of the drug guidelines by two levels" (WT 17).

Ms. Johnson said that the Commission can improve the sentencing system by revising the guidelines and advising Congress based on feedback from judges and empirical data and research, and should take the opportunity to educate Congress about how and why its mandatory minimums have resulted in sentences that are unnecessarily severe (TR 320-321).

Miller Canfield, **Paddock and Stone, P.L.C.**
Thomas W. Cranmer, Principal

Mr. Cranmer voiced strong opposition to mandatory minimum sentences, and discussed "four principle problems" with mandatory minimums that he identified as follows:

> First, there is simply no rhyme or reason to the designation of offenses for mandatory minimum penalties. Mandatory minimum sentences have been enacted in piecemeal fashion without any consistent policy objective or forethought. Second, rather than enhance uniformity in sentencing by treating similarly-situated offenders alike, mandatory minimums create sentences that are patently unfair by imposing unwarranted uniformity on markedly different offenders. Third, mandatory minimums are disproportionately applied to punish underprivileged individuals in vulnerable segments of society. Fourth, mandatory minimums have been used as a vehicle to transfer the power of sentencing from an impartial judge to a prosecutor whose single-minded pursuit of convictions all-

> too-easily overtakes any concern for proportionality in punishment. It is only when these four problems become part of the regular national discourse that the realities of mandatory minimums can be fully understood and the tide of public opinion turned against a device that is crippling the criminal justice system. (WT 2)

He further noted that "[m]andatory minimums appear to have taken root solely as a consequence of political expedience based upon the intersection of criminal law with whatever topic may have captured the attention of the media of the day." (WT 3). He went on to state that "[a]nother unfortunate impact of mandatory minimum sentences is that the individuals who pay the heaviest price are often those who have the smallest voice in the process by which the penalties are set" (WT 5). Mr. Cranmer reiterated his opposition to mandatory minimums during his oral testimony (TR 336-37).

PUBLIC HEARING – TUESDAY AND WEDNESDAY, OCTOBER 20–21, 2009
8:30 a.m. – 4:30 p.m.
DENVER, CO

I. APPELLATE BENCH

Tenth Circuit Court of Appeals
The Honorable Deanell Reece Tacha, Circuit Judge

In response to questioning, Judge Tacha referred to the linkage between the mandatory minimums and the drug table made by the original Commission as the "great compromise," and "one of the linchpins to acceptance of the guidelines." Judge Tacha further emphasized the importance of the Commission urging Congress to revisit these mandatory minimums and the "crack-cocaine disparity" (TR 48-51).

Eight Circuit Court of Appeals
The Honorable James B. Loken, Chief Circuit Judge

In the context of sentencing ranges that are above the mandatory minimum, Chief Judge Loken opined that, in the absence of a section 3553(e) motion or a tenable safety valve issue that may call for a further reduction, district judges should just go down to the mandatory minimum (TR 52).

II. DISTRICT COURT BENCH

Southern District of Iowa
The Honorable Robert W. Pratt, Chief United States District Judge

While noting that he believed the guidelines are better post-*Booker*, Chief Judge Pratt noted "instances of incredible injustice continue to arise, at least in my court from my personal experience, almost all of them related to either mandatory minimum sentences or even, more importantly, sentencing enhancements where I'm not in charge of this sentence" (TR 258). Chief Judge Pratt stated that "the very first thing the Sentencing Commission should do is to advise Congress to eliminate all mandatory sentences" (WT 2). He believed that the "overly punitive" guidelines and mandatory minimums "all have their origins in the mistrust of judges" (WT 2; TR 260). He further stated that "[t]his mistrust of life-tenured judges does not find a similar mistrust of executive branch actions by politically appointed United States Attorneys serving at the pleasure of the President. . ." yet, he stated, "mandatory minimum sentences have the effect of letting the prosecutor determine the sentence" (WT 2).

Chief Judge Pratt "emphasize[d] the necessity of eliminating all mandatory minimum statutes and sentencing enhancement statutes" (WT 7). He believed that these statutes "unfairly and improperly shift the sentencing function of government from the judicial branch to the executive branch" (WT pp. 7-8).

Western District of Missouri
The Honorable Fernando Gaitan, Jr., Chief United States District Judge

Chief Judge Gaitan stated that "[s]tatutory minimums do not allow the trial judge to exercise his/her role in the sentencing process" (WT 2), and believes that "statutory minimums in some cases continue to result in sentences greater than necessary and fail to meet the statutory mandates of sentencing" (TR 266). He requested the Commission to "use its considerable influence with Congress to eliminate such injustices" (TR 267).

III. PRACTITIONERS

A. DEPARTMENT OF JUSTICE

District of Minnesota
Mr. B. Todd Jones, United States Attorney

Mr. Jones stated that as a result of the change in practices due to *Booker*, "Assistant United States Attorneys have become greater sentencing experts, conversant in the § 3553(a) factors, in addition to becoming greater sentencing advocates" (WT 8). He also indicated that "we now mentor AUSAs as to charging alternatives in cases where below-range sentences are otherwise likely" and cited the increased use of charges carrying mandatory minimums in firearms and pornography cases (WT 8; TR 135). Mr. Jones stated:

> On the flip side, regular deviations from the guidelines by the government and the courts may cause Congress to legislate more mandatory minimum sentences. After all, Congress reacts to constituent groups, which often lobby for enhancements to the criminal code following a horrific act, particularly if that act is not redressed with stiff, consistent penalties. In an effort to address those concerns as well as those constituents, who often are grieving or angry, Congress may enact extremely harsh and unforgiving mandatory minimums. (WT 9, TR 156-157).

B. FEDERAL PUBLIC DEFENDERS

Districts of Colorado and Wyoming
Mr. Raymond B. Moore, Federal Public Defender

Mr. Moore noted that the Commission's decision to cap the mitigating role adjustment does not appear to be the product of empirical evidence regarding culpability, but instead is "another casualty of the Commission's decision to link the drug guideline to the mandatory minimums" (WT 29). He further questioned whether the linkage between the use of mandatory minimums as an effective law enforcement tool and the purpose of sentencing has "been overemphasized" (TR 353).

Northern and Southern Districts of Iowa
Mr. Nick Drees, Federal Public Defender

Mr. Drees suggested that the "Commission should urge Congress to expand the safety valve to all mandatory minimums to prevent [prosecutorial] manipulation, and also because there is no rational basis for excluding offenses not currently on the list" (WT 9). He believes that the "safety valve should also be expanded to include defendants at least in Criminal History Category II, if not higher" (WT 9; TR 339).

He stated that "the guidelines recommend that low-level, nonviolent defendants be sentenced to prison for substantial periods" (WT 21). He believes that "this is not based on empirical evidence, but on the Commission's policy of tying most, but not all, drug guidelines to mandatory minimums" (*Id*). In this regard, he noted:

> The comments the Commission has received in these hearings appear to be unanimous: The drug guidelines are "arbitrary," "not based on anything empirical," and should be de-linked from the mandatory minimums. The Commission should not wait for Congress to repeal mandatory minimums, but should take the lead by untying the guidelines from mandatory minimums and promulgating new guidelines based on empirical data and research. Or, if the Commission still believes that it must tie the drug guidelines to mandatory minimums, it should educate Congress by preparing a report and proposal for a new set of drug guidelines. The Commission should give serious consideration and study to a set of drug guidelines based primarily on functional role in the drug trade with quantity as a secondary factor.
>
> In any event, the Commission should reduce all of the drug guidelines by two levels, as it did with crack cocaine. As the Commission acknowledged then, the drug guideline ranges are set two levels above that necessary to include the mandatory minimum penalties at the two statutory quantity levels. (WT 24-25, TR 338).

He stated that "the guidelines for child pornography offenses, driven by congressional directives and also mandatory minimums, are simply too severe . . . most judges who have testified before the Commission share this view" (WT 25).

Mr. Drees expressed a hope that the Commission will recommend that Congress eliminate mandatory minimums (WT 27). Mr. Drees opined that "mandatory minimum sentences transfers sentencing authority from judges to prosecutors, and that this creates unwarranted disparity" (*Id*). He believes that eliminating mandatory minimums and basing sentences on section 3553(a) factors would increase respect for the law (WT 27-28). He asked the Commission "to educate Congress, to urge Congress to repeal or at least reduce them, to de-link the guidelines from mandatory minimums or seek permission to do so, and to seek expansion of the safety valve" (WT 28-29).

In response to questioning, Mr. Dress also expressed doubt that the elimination of mandatory minimums would significantly reduce cooperation by defendants (TR 350-351).

C. CJA PANEL ATTORNEYS

District of Kansas
Mr. Thomas Telthorst, CJA Panel Representative

Mr. Telthorst believes that certain statutes and guidelines "shift sentencing power toward the prosecution, and create opportunities for misuse" (WT 2). He indicated that the requirement that the government move for the third point for acceptance of responsibility gives the government the ability to "wield its authority over the third point in ways that stretch the spirit of acceptance of responsibility"(*Id*). He believes that mandatory minimums have a similar effect (*Id*).

He requested the Commission to "encourage Congress to repeal mandatory minimum laws" and "decouple" guidelines that are linked to mandatory minimums (WT 2-3, TR 345-346).

Like his fellow federal defenders on the panel, in response to questioning, he also expressed doubt that the elimination of mandatory minimums would significantly reduce cooperation by defendants (TR 352-353).

IV. PROBATION OFFICE

District of Minnesota
Mr. Kevin Lowry, Chief Probation Officer

Mr. Lowry recommended that "the Sentencing Commission continue to pursue the elimination of mandatory minimums to remove the conflict that exists between the statutory goals of sentencing contained in 18 [U.S.C. §] 3553 and the mandatory minimum sentences that exclude the consideration of any of the many offense and offender characteristics" (TR 99). He believes that "mandatory minimums tie the hands of the court and contradict the need for appropriately tailored punishment that will deter, protect and provide corrective treatment" (*Id*). Mr. Lowry favors amending the safety value to capture "a larger category of offenders" (TR 100-101, 122-125).

V. ACADEMIA

University of Utah
Mr. Paul Cassell, Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law

Professor Cassell discussed the increasing number of outside guideline sentences. He stated that we are "going to start seeing racial disparities, geographic disparities, judge-to-judge disparities, which was the whole reason for the system to start with" (TR 234). He believed the "grand bargain" to solve this problem "might be to see if we could somehow relax the mandatory

minimums and make the guidelines a bit more binding" (*Id*). In this regard, he further noted: "We live in the weirdest of worlds where if you're charged with a mandatory minimum offense, the judge has zero discretion; but if you're charged with anything else, the judge essentially has close to unlimited discretion. It seems to me there ought to be some way to meet in the middle on that" (TR 234-235).

VI. COMMUNITY INTEREST GROUPS

Squire, Sanders & Dempsey LLP
Ms. Diane Humetewa, Principal, Public Advocacy

In discussing potential sentencing disparities in the application of federal laws in Indian Country, Ms. Humetewa observed that mandatory minimums have discouraged guilty pleas and resulted in more trials. She noted, by way of example, that a defendant is bound to a 30-year mandatory minimum once charged under the Aggravated Sexual Abuse statute, which has resulted in "a surge of defendants going to trial." She explained:

> Relatively no consideration was given to the potential that instituting severe sentences, including mandatory minimums, would have on limiting a prosecutor's ability to resolve these sex cases. Yet the discretion to resolve these extremely difficult cases without trial is a necessary tool to balance the need to spare child victims from having to testify to his/her emotional detriment and ensuring that the defendant received just punishment. Prosecutors now find it extremely difficult to exercise discretion to resolve cases based on the facts, the defendant's background, and the impact of testifying at trial to very young and often traumatized children. This challenging set of circumstances is not occurring nationwide, but rather primarily occurring in Indian Country and to Indian defendants and Indian victims. (WT 8, TR 198-199)

PUBLIC HEARING – THURSDAY AND FRIDAY, NOVEMBER 19–20, 2009
8:30 a.m. – 3:00 p.m.
AUSTIN, TX

I. APPELLATE BENCH

Fifth Circuit Court of Appeals
The Honorable Fortunato P. Benavides, Circuit Judge

Judge Benavides stated that he "would not spend too much time" with the issue of mandatory minimums because he views "that as kind of the will of the Congress, and it's a political decision" (TR 212).

II. DISTRICT COURT BENCH

Western District of Oklahoma
The Honorable Robin J. Cauthron, United States District Judge

Judge Cauthron urged the Commission to "work for fewer statutory minimums." In his view, too often the discretion is given to the prosecutor to charge bargain these mandatory minimums away (TR 14). More specifically, he noted his belief that there are cases in which mandatory minimums are excessive, and that "too often the discretion is given to the prosecutor who can charge bargain to avoid the mandatory minimums, while the sentencing judge has no such ability" (WT 5).

Eastern District of Louisiana
The Honorable Jay C. Zainey, United States District Judge

Judge Zainey suggested that the Commission recommend the elimination of mandatory minimums to Congress (WT 2-3, TR 27). He believed that district court judges are in the best position to determine the appropriate sentence (TR 27-28). Judge Zainey stated that currently the only way that a court can impose a sentence below the mandatory minimum is on motion of the government:

> The Government can do this because it is completely in the discretion of the Government to file a motion for downward departure or a recommendation to the Court to impose a sentence below the statutory minimum in cases where the safety valve applies. And even though the Court can impose a sentence below the mandatory statutory minimum when the safety valve applies, this too is contingent on the Government's input as to whether the defendant has provided truthful information. (WT 1-2).

He believed "it should not be the ultimate responsibility or power of the government to [allow judges] to go below the statutory minimum" (TR 29). He stated "it just doesn't seem right" (TR 29). He further opined that "[g]iven that Congress authorizes the courts to impose a sentence

below the statutory minimum in certain instances, Congress should have enough confidence in the courts to forego a statutory minimum in any case, and certainly not leave it to the discretion of the Government" (WT 2).

Judge Zainey discussed the "risk of unfairness associated with mandatory minimums" which "has been recognized by Justice Breyer, in particular" (WT 2, TR 30). He discussed mandatory minimums as they relate to drug offenses and child pornography offenses (WT 2-3, TR 31-34). Judge Zainey noted that while judges may consider the crack/powder disparity when imposing sentence, such consideration is foreclosed if a mandatory minimum is applicable (TR 31).

Judge Zainey stated that there is a difference between a "user, slash, viewer" of child pornography and "the person who actually exploits children" (TR 32). He discussed the argument that punishing viewers will reduce the market for child pornography and the exploitation of children (TR 32; WT 3). While he stated that it is a "very good argument" he noted it applies equally to the drug market and mandatory minimums generally do not apply to drug users (TR 32.). He stated "there's no statutory minimum for . . . the [drug] user, then why should there be a statutory minimum for the user of pornography" (*Id*).

III. PRACTITIONERS

A. FEDERAL PUBLIC DEFENDERS

Northern District of Texas
Jason Hawkins, Supervisory Assistant Federal Public Defender

Mr. Hawkins stated that he looked "forward to the Commission's report on mandatory minimums" and joined "all of the Defenders and other witnesses who have urged the Commission to recommend that Congress repeal, or at least significantly reduce, mandatory minimums, and that Congress expand the safety valve to all offenses subject to mandatory minimums and to defendants in Criminal History Categories II and III" (WT 3). He stated that "mandatory minimums result in inhumane punishment in some cases and extreme unwarranted disparity" (WT 4). Mr. Hawkins believes that in his district "the decision to charge a § 924(c), with rare exceptions, does not depend on the seriousness of the conduct" (*Id*). He stated that inexperienced prosecutors charge section 924(c) counts whenever possible while experienced prosecutors only threaten such a charge when the defendant is going to trial (*Id*). Mr. Hawkins believes that "placing this potent weapon in the hands of fallible human beings, whose decisions are not subject to judicial review, results in sentences the courts have described as 'irrational, inhumane and absurd,' 'immensely cruel, if not barbaric,' 'unjust, cruel and even irrational, 'and 'abusive'" (*Id*).

Mr. Hawkins opined that "mandatory minimums are not necessary to obtain cooperation," despite some prosecutors belief that they are (WT 7). In this regard, he noted that for many of his clients, "[i]t does not matter how high or low the initial sentence is, whether it is subject to a

mandatory minimum, how uncertain it is that the prosecutor will move for a departure at all, or

the fact that the most they can expect to receive is a 2-3 level reduction" (*Id*).

He stated: "In drug trafficking cases, where mandatory minimums are widely available, substantial assistance departures were granted in 25.9 percent of cases in 2008. In many kinds of cases without mandatory minimums, the rate was comparable or higher: 79.2 percent in antitrust cases, 20 percent in arson cases, 28 percent in bribery cases, 26.1 percent in civil rights cases, 28.6 percent in kidnapping cases, 25.9 percent in money laundering cases, 25.7 percent in racketeering/extortion cases, and 19.9 percent in tax cases" (WT 7). Additionally, Mr. Hawkins believed that mandatory minimums do not deter crime and create disrespect for the law (WT 8-9). He concluded that "[w]hether a defendant cooperates and receives a departure for substantial assistance depends on many factors that have nothing to do with mandatory minimums" (WT 8).

Mr. Hawkins also opined that "mandatory minimums do not deter crime and create disrespect for law" (WT 8-9). In support of this position, he cited a study that concluded that "'there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects'" (WT 8).

Northern District of Oklahoma
Julia O'Connell, Federal Public Defender

Ms. O'Connell voiced strong opposition to mandatory minimums (WT 11-14). She stated that mandatory minimums are not necessary to encourage defendants to cooperate, as prosecutors contend (WT 11). Ms. O'Connell believes that defendants will "choose to cooperate in an effort to win a reduced sentence, whether or not they are facing a mandatory minimum" (*Id*). She further stated that because defendants who are facing a term of imprisonment will cooperate regardless of whether the potential sentence is large or small, mandatory minimums "have a corrosive effect on the process" (TR 182). Citing to specific case examples, she stated that she believes there is a serious risk that mandatory minimums will encourage fabricated cooperation and innocent people to plead guilty out of fear of facing a lengthy mandatory sentence (WT 12-14). She also expressed her concerns that mandatory minimums "permit prosecutors to punish the exercise of the right to trial by decades in prison," and that, as a result, they "reduce[] the number of trials, and the overall accuracy of the outcomes" (WT 12). She urged the Commission to recommend that Congress abolish mandatory minimums. She stated that "judges find mandatory minimums disturbing" (TR 181). In addition, in her view, mandatory minimums are one of the major causes of over-incarceration in the country (TR 182).

Ms. O'Connell urged the "Commission to de-link the drug guidelines from statutory mandatory minimums" (WT 14). She stated that the "Commission should formulate drug guidelines based on empirical data and research, and give serious consideration and study to a set of drug guidelines based primarily on functional role in the drug trade, with quantity as a secondary, less weighty, factor" (*Id*). Ms. O'Connell believes that drug quantity is not a proper measure of culpability, does not correlate with role in the offense and can easily be manipulated by law enforcement agents (*Id*). She stated that the Commission is not required to "tie the guidelines to mandatory minimums" and expressed a hope that "the Commission will see its way clear to take the lead on this issue, and not wait for Congress to repeal mandatory minimums" (WT 15). She

requested the Commission to "educate Congress by including a proposal for a new set of drug guidelines in its mandatory minimum report" (*Id*). Ms. O'Connell also urged "the Commission to expand the safety valve currently available in the guidelines under USSG §2D1.1(b)(11) and USSG §5C1.2 to all defendants who meet the criteria, regardless of the offense of conviction, and to expand the criteria to include defendants in Criminal History Categories II and III" (WT 16).

B. CJA PANEL ATTORNEYS

Eastern District of Louisiana
William Gibbens, CJA Panel Attorney District Representative

Mr. Gibbens expressed an appreciation that the "Commission has made it a priority to study mandatory minimums" (WT 4). He stated "mandatory minimums are another way that vast sentencing authority has been placed in the hands of prosecutors rather than judges, and . . . it is important for the Commission to report on the impact of mandatory minimums and urge Congress to repeal or reduce them" (*Id*). Mr. Gibbens also requested the Commission to "urge Congress to expand the safety valve to all mandatory minimums and include defendants at least in Criminal History Category II, if not higher" because "by allowing no more than one criminal history point, many non-violent offenders with minor roles in an offense are excluded from the safety valve" (*Id*).

Mr. Gibbens stated that he believed the government is the party least interested in sentencing, because "the reality of it is that the decisions that they make at the inception of the case are what's dictating the outcome." He did not believe that in his district, the government really wants mandatory minimums, instead he suggested "a lot of times I don't think they really care" because by the time of sentencing, they already have the conviction, and they don't "have a real strong belief" in what the sentence is (TR 175-176).

PUBLIC HEARING – WEDNESDAY, JANUARY 20, 2010
8:30 a.m. – 3:00 p.m.
PHOENIX, AZ

I. DISTRICT COURT BENCH

Central District of California
The Honorable Audrey B. Collins, Chief United States District Judge

Chief Judge Collins explained her district's whole-hearted support for the idea that the Commission should work, in whatever capacity it can, to encourage the elimination of statutory mandatory minimum sentences. In this regard, she noted her belief that much of the progress represented by *Booker* expanded sentencing discretion for judges, the renewed focus on the sentencing goals and factors of 18 U.S.C. § 3553(a), the ability of judges to impose truly just and reasonable sentences, tailored to a defendant's individual circumstances is undercut in cases involving mandatory minimum sentences. She further believed that "[m]andatory minimums sweep so broadly that they often result in the imposition of extremely disproportionate sentences, preventing judges from carrying out one of the most basic goals of sentencing: that sentences imposed be sufficient, but not greater than necessary, to carry out the goals of punishment, deterrence, protection, and rehabilitation" set forth in 18 U.S.C. § 3553(a)(2), and noted that "[m]andatory minimums often result in sentences that are far greater than necessary to meet any of these goals."

Chief Judge Collins also suggested that mandatory minimums lead to unwarranted disparity in sentences:

> Mandatory minimums are most often imposed due to criminal history and drug type/quantity. Thus, despite the theory that mandatory minimums lead to greater proportionality in sentencing, the reverse is often the case. Defendants whose conduct was in fact quite similar may receive widely divergent sentences, if one is subject to a mandatory minimum and the other is not. Likewise, a defendant whose role or conduct is much less culpable than that of his co-defendants may receive a sentence as severe, or even more so, if he triggers the minimum and his co-defendants do not. (WT 3-4).

District of New Mexico
The Honorable Martha Vazquez, Chief United States District Judge

Chief Judge Vazquez stated that "it seems incongruent that under the sentencing scheme, our great country which was founded under the principles of liberty and freedom could have earned the shameful distinction of imprisoning more of our own people for longer periods of time than any other nation in the world" (TR 49). She pointed to "harsh sentencing Guidelines as well as statutory mandatory minimums" as an explanation (*Id*). She believes that while the "goal to eliminate sentencing disparity is a laudable one and one that is definitely worth pursuing . . . we have incarcerated our people for too long" (TR 50). Chief Judge Vasquez believed that the guidelines are "too harsh, especially in the context of drug cases" (*Id*). She pointed to comments

by Justice Kennedy that characterized mandatory minimums as unfair, unjust and unwise" and a survey that indicated that 70 percent of District Court judges and 83 percent of Circuit judges "thought that the punishment for drug offenses called for in the Guidelines was greater than appropriate to reflect the seriousness of the offense" (*Id*).

She stated that she has "been applying the Sentencing Guidelines and the mandatory minimums to these very common scenarios without being able to avoid the tragic results when the particular circumstances cried out for a different result" (TR 54).