

Day Two
Alternatives in the Guidelines

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SUMMARY

This panel addressed the extent to which the federal sentencing guidelines should encompass and allow for alternatives to incarceration. Some panelists advocated changing the guidelines; another asserted that after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), courts have sufficient latitude to order sanctions other than incarceration. Potential modifications to the guidelines discussed by the panelists included the expansion of the zones on the sentencing table, changing the definition in Chapter Five of "imprisonment" to include confinement other than incarceration, and adding fines or restitution as stand-alone sanctions. Panelists also discussed the impact of technological advances on the implementation of alternatives to incarceration, the possibility of allowing for intermediate sanctions in the guidelines, and how people of different socioeconomic groups might be impacted by the implementation of non-incarceration sanctions.

Panelists agreed on the importance of evidence-based research, the promise of the Second Chance Act and certain reentry programs, and the need for any alternative to incarceration to be tailored to the individual.

ALTERNATIVES IN THE GUIDELINES

COMMISSIONER FRIEDRICH: We're going to start our next panel which is entitled "Alternatives in the Guidelines." We've heard during this conference some discussion about state guideline systems, and this panel is going to focus on the federal guidelines and the various alternatives that are available under the federal guidelines.

We've got a diverse group of experts with varying perspectives who are going to present their views on the alternatives in the guidelines. But before they do that, I want to give you a little historical context for the guidelines, and in particular, focus on Congress's directive to the Commission with regard to alternatives when it established the Commission.

Congress directed the Commission in the Sentencing Reform Act to consider the appropriateness of sentences other than incarceration for certain types of offenders, and in particular, the statute provides that the guidelines are to reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.

Now the initial Commission spent a great deal of time and debate trying to figure out what Congress meant by serious offense, and in the end, one of the things that the Commission determined, after looking at existing sentencing practices, was that there was an inappropriately large percentage of offenders who were being sentenced to probation, particularly in the area of economic crimes. It was the initial Commission's view that a large number of those offenses were serious offenses for which a short but mandatory period of incarceration was appropriate.

And the Commission accomplished this goal in the way in which it structured the sentencing table. It structured the table into four zones, Zones A through D. For those of you who are unfamiliar with the guidelines, Zone A contains those offenders with the lowest total offense level and the lowest criminal history, while Zones B, C, and D contain offenders with higher total offense levels and criminal history scores in graduated severity.

And in general, in the lower zones, Zones A and B, an offender can be sentenced to probation. Offenders sentenced in Zone C can receive split sentences, but offenders sentenced within Zone D are sentenced to a term of imprisonment.

Now our panelists today are going to talk in some detail about the different specific alternatives under each of the zones, and they are also going to share with us some of the arguments they make for and against certain alternatives. And finally, we look forward to their views and their perspectives on what sort of amendments, if any, should be made to the guidelines consistent with the Sentencing Reform Act to take into account additional alternatives.

I will introduce the first panelist to my left, Todd Bussert. Todd is a criminal defense attorney in New Haven, Connecticut. He's the former associate director of client services for the National Center on Institutions and Alternatives. His practice involves sentence and post-conviction representation. He is co-chair of the Commission's Practitioners Advisory Group and of the National Association of Criminal Defense Lawyers Corrections Committee. He's also a member of Families Against Mandatory

Minimums Litigation Advisory Board. He's the past co-chair of the ABA's Corrections and Sentencing Committee, and he's previously been a visiting lecturer at the Yale Law School.

Linda Dale Hoffa is chief of the criminal division at the U.S. Attorney's Office in the Eastern District of Pennsylvania. She also serves as the chair of the Criminal Chiefs Working Group, which is a subcommittee of the Attorney General's Advisory Committee. Linda recently was admitted as a fellow of the American College of Trial Lawyers, and she has taught trial advocacy at both Villanova and Temple Law Schools, and recently taught at Tsinghua University in China.

Nora Demleitner is dean and professor of law at Hofstra University School of Law. Nora has written widely in the areas of criminal, comparative, and immigration law. Her special expertise is in sentencing and collateral sentencing consequences. She is managing editor of the *Federal Sentencing Reporter* and serves on the executive editorial board of the *American Journal of Comparative Law*, and she is the lead author of *Sentencing Law and Policy*, a major casebook on sentencing law.

I'm going to ask each of the panelists to give a brief introduction, and then I'm going to pose a series of questions for them, leaving enough time at the end for questions from the audience. Todd.

MR. BUSSERT: Thank you. I want to thank the Commission for inviting me. I realize it's one of the last panels. It's been an extraordinary couple of days, I think, for all of us. In terms of my introductory comments, I'd like to start by more fully explaining my background because I was fortunate enough before I actually left law school to work at the National Center on Institutions and Alternatives. That organization was co-founded by Dr. Jerome Miller and by Herb Hoelter, who's actually in another room here right now speaking. Jerry Miller is credited in many sentencing circles as the founder of this idea of alternative sentencing and private presentence reports.

In the late '60s and '70s, Jerry was a juvenile justice reformer, and at one point he found himself in the Pennsylvania State system. A young man that he had worked with through the state system came to him and said, "Dr. Miller, I have a case and I'm going to go into prison. I really I think if I get the right program I can do well," I think Jerry may have reached out to some people, and wrote a three-page letter to the judge and said, "Judge, I know this young man. I've dealt with him in the past. I found this program. This I think would be an appropriate alternative sanction to imprisonment." The judge said, "I've never seen anything like this; this sounds great. Let's impose the sanction."

And from that grew NCIA and this idea of client-specific planning, which from the defense perspective, is a very client-centered approach to sanctions. It looks at the offender, your client, looks at the offense, puts all those things in context, and tries to identify sanctions for the courts that address the recognized goals of sentencing: retribution, incapacitation, deterrence, and rehabilitation, with the feeling, as expressed in the name of the organization, the idea that institutionalization on the whole does not work. It's ineffectual in that there are more than adequate resources within the communities to work with individuals and to create a comprehensive, meaningful sanction that can address these greater needs that are commonly seen in every case.

And I think that, historically, working in the guideline system was fairly difficult in trying to achieve that type of—because I think the manual by and large is a presumption of imprisonment and the scope of meaningful alternatives is very limited to the extent that it exists. And what you see with most judges is, particularly post-guidelines judges and those without criminal experience, particularly one of

the earlier judges was saying, “Look, I have no criminal justice experience. I’m here and this whole thing is new to me relative to being a judge. I didn’t have this background before I became a judge.”

And so you have a judge’s natural inclination to kind of be wedded to the guidelines. It takes a lot, in most cases, to move a judge from the idea of what the guidelines suggest is appropriate, to what may be appropriate for the individual. I think we’re slowly, and everyone talks about this pendulum, but I think that’s what *Booker* and these more recent cases really speak to, is this idea of individualized sanctions that are sufficient but not greater than necessary, and it’s a difficult question, and we’ve talked collectively here before coming up.

One is an issue of resources and resource allocation between probation and BOP and also of those agencies working together to try and manage offenders. And then I think from my perspective as a defense attorney, we don’t do a good enough job of presenting our clients to the courts and helping the courts understand why we believe the sanction is appropriate. We may know because we’ve spent an inordinate amount of hours with our client and know about their family issues and everything else. But I think, more often than not, we don’t do a sufficient job presenting that information to the courts, and also identifying alternatives if probation isn’t equipped or isn’t inclined to find an alternative sanction in the community. It’s actually doing that work ourselves. I mean putting that in place and putting it in place early.

When I did this work at NCIA, what we always found was that when you have the sanction in place before the client goes to sentencing, the judge is more apt to impose it, or at least some portion of it, so if community services, if the person has a track record, treatment, employment, all these things are already there, and the judge can see that it’s working, and if you have more time obviously relative to conviction, the judge can feel more comfortable keeping that person in the community.

So that’s my background and that’s kind of why I feel that at the end of the day, the Commission, and I think it’s doing this now, and I think it’s terrific that it is, needs to look at these practical realities and I think the courts have been saying for a number of years they want more options. I think they’re looking to the Commission and looking to this expertise that they feel that they don’t have in terms of identifying what are the best options available to them.

COMMISSIONER FRIEDRICH: Thank you, Todd. Linda?

MS. HOFFA: Okay. As Todd said, we were talking together beforehand. What Todd didn’t tell you is when he went to law school, he thought he’d be a federal prosecutor and when I got out of law school, I thought I’d be a federal defender, so here we are at the opposite sides of each other.

I’m here to speak today on behalf of the Department of Justice, and I want to thank everybody for participating in this symposium. I know that I’ve learned a lot, and I trust that you all have learned a great deal that we hadn’t really known before or thought about before. It makes sense to have this panel discussion as the last panel discussion, which is what alternatives to incarceration should there be, what kind of changes should there be to the guidelines to incorporate what we’ve learned about.

One of the things I didn’t realize when I heard this was going to be on alternatives to incarceration—I hadn’t thought about it before, but of course, alternatives to incarceration do exist at every stage of the criminal proceedings because the issue from the time that people are charged until the

time that they end their supervised release, they're always at a risk at some point in time of being put in jail, so it's not just focusing on that period of sentencing. And the other thing that I've learned that I didn't know before is that because of technology, we do have more alternatives than we've had before. You've heard about them, about videos and voice recognition, GPS, and things like that.

The other lesson that I'm taking away with me from this symposium is—and another speaker said this and Todd just spoke to it as well—that alternatives to incarceration really have to be tailored to the individual defendant, exactly to what those circumstances are for that person that would make it appropriate.

I understand that it was over a decade before that the Sentencing Commission explored this topic, and since that time obviously these things have changed. There have been more studies, the changes in technology. The other big change that's in place right now, of course, is that the guidelines are no longer mandatory, that they're now advisory. So the question for this panel, or that was put to us, is "What changes should there be, if any, to the sentencing guidelines?" First, I want to just make sure everybody understands that the alternatives to incarceration—in other words, not a straight jail sentence—really exist in three zones: Zone A, Zone B, and Zone C. Zone A is zero to 6 months; Zone B is six to 12 months where you've got to do at least a month in jail; Zone C is no greater than ten to 16 months and you can have a split sentence, half of it in jail and half of it in home confinement, community confinement, or home detention; and Zone D is jail.

The suggested changes that I've heard and that I've read about in preparing for this would be that you would expand those first three zones. You could just expand Zone A so that it makes it straight probation; it could be larger. You could expand each of the zones, Zone A, Zone B, Zone C, moving that line down. You could combine Zone B and C, which is confusing anyway for a lot of people, what the differences are between the two of them. I kept having to read the guidelines to make sure I got that right, so that it could just be any combination of intermittent confinement, community confinement or home detention in those zones.

And another possibility for a change in the guidelines would be to change the definition of prison under the guidelines, such that certain things could count for jail. So one day in jail could be equal to so many days in a halfway house, or an intermittent confinement, or home detention, or so many days of intensive supervision would equal so many days in jail.

Another suggestion that I read about that could be changed under the guidelines, would be to forget any sentence of jail or supervised release, and just let there be a stand alone for a fine or a stand alone sentence for restitution—stand alone in the sense that that would just be the only sanction that would be possible. That, I don't think, makes a great deal of sense because, if you ever have a fine or you ever have restitution orders, you always need to have that under the supervision of probation, so that you can make sure that that is going to be enforced, and those things are going to be met.

And those are the alternatives that I want to just talk about right now. Those are the ones that I could think of that perhaps are going through everyone's mind as changes to the guidelines.

Before I talk about it, there are just two points that I want everybody to remember. One is that federal statutes do give the Bureau of Prisons considerable discretion in deciding where a defendant will serve a term of imprisonment. The Department of Justice and the Bureau of Prisons interpret penal or

correctional facility to include community correction centers or halfway houses, so community confinement is technically available—indeed, in some cases to people who are even in Zone D. People may not be aware of that. I think the Bureau of Prisons [inaudible] up to 12 months. It's at their discretion whether or not they want to give that kind of community confinement sentence. That's up to them if they want to do that, or if the judge wants to make a recommendation.

Another point that's very important to remember is this, and I speak about this as a prosecutor. Obviously I'm the one that goes to sentencing, and I oftentimes advocate for jail, but when I see prisoner defendants again that I have prosecuted in a violation of supervised release or a violation of probation hearing, I am always very disappointed and feel that the system has failed. Because, as prosecutors, the Department of Justice, we really do want people not to be recidivists again. We don't want to see them come back into the system at all. So the Department of Justice very much supports Bureau of Prisons programs and probation office programs which are designed to reduce the rate of recidivism.

The Department of Justice very much does support the Second Chance Act, and the Department of Justice does support prisoner reentry programs. And you've all just been at breakout sessions talking about various reentry courts and other reentry programs that exist, and the Department of Justice does support that. So I want everyone to sort of remember that when I address the other issue that this whole breakout session is about, and that is whether or not there should be these kinds of changes that I just listed off to you to the guidelines.

The Department's position is that we don't think that there need to be changes to the sentencing guidelines. Those changes that I described, expanding Zone A, expanding Zone B or C, or collapsing Zone B and C. Just moving down that line to expand them or collapse them together is not the right way to go. The reason for this is—I think in part what you said in your introductory comments—when the Sentencing Commission came up with and looked at the guidelines, they looked at the individual criminal conduct, what was the crime, and what is the appropriate punishment, and they did—

(Sound from audience)

MS. HOFFA: That must have been a really heavy thing I just said. But we can all have cocktails now, because the mood is now set. Okay.

The guidelines look at the criminal activity and they look at the crime, and they decide what is the appropriate punishment. When the guidelines were created, they based it two ways. One was on empirical studies and what were the sentences for the particular crimes throughout the country. They wanted to make sure that there was a uniform sentence for them. There were some crimes that they took out. They looked at tax evasion or corruption cases or some white collar crime cases, and thought the punishments were not serious enough and they should have jail, and they made these individual decisions for the individual crimes.

If you move the line on the grid down, you are just expanding what the sentence will be, but you're not doing it in a way that looks to what the individual criminal activity is. Really what we need is to recalibrate the offense. If you think that there are particular offenses for which the punishment is too severe, and that there should be alternatives for, then they should be changed in the guideline calculation, rather than making a wholesale approach and just moving the line down. In other words, recalibrate towards the offense, not just move the range for a variety of offenses.

I think that what we've heard during this conference is this, that the alternatives to incarceration teach us that the judges really need—and it's really what Todd says—to look at the individual defendant. What is this particular defendant about? What has he done? What skills does he have? What support does he have? What chances does he have? Is there a way that we can protect the public? Are there programs that are going to help him succeed? Are they available and can we afford them? Look at the individual.

And the point is that a judge at the time of sentencing can do that because the most important thing is this, the guidelines now are advisory, and *Booker* does allow that individual analysis to be performed in the appropriate cases for the appropriate defendants. And I think that *Booker* allows this, and section 3553(a) allows that. So the guidelines make the decision about what the punishment should be for the particular crime and, *Booker* and the section 3553(a) factors allow us to make the individual decision about the defendant and whether or not it would be appropriate to do alternatives to incarceration for that person. That's how I look at the two separately and how they work together.

I think it's really important to proceed cautiously because if we decide to change Zones A, B, and C, and move them down, we have to realize what are we doing and what kind of crimes are we going to be making these changes for. When we look at the reports that the Sentencing Commission put out for the [2007] distribution of offenders receiving sentences, we see that of everybody who got prison—35 percent were for drug trafficking, about 12 percent for firearms, 25 percent is for immigration, and then there's about another three percent for violent crimes. It looks like about 75 percent of these prison sentences really are for guns, drugs, immigration and other violent crime.

The drug cases are mostly going to be way down on the range because mostly what we prosecute in the federal system are going to be flipped into mandatory minimums. Immigration, they're going to have detainees. They're not going to be amenable to alternatives for incarceration. Guns and violent crime really aren't going to be amenable either because of the danger and the risk they pose. And so, if you were to move these lines down on the sentencing table, you're going to be affecting the white collar defendants, the tax evasion, maybe the environmental crime. But the white collar cases, when the guidelines first went into effect back in the beginning, the Commission said they weren't getting appropriate punishments, and there really is a perception that we have to be aware of.

The perception could be that what's going to happen at the end of the day is the white collar defendants are going to be getting the breaks. The people of the higher economic and social status will be getting the breaks, and the lower income status people will not be getting the breaks, and there may be a public perception of unfairness if we make these changes.

So I think it's important then to proceed cautiously before the Commission makes changes. I think the guidelines are very well thought out. They were very carefully prepared, and they show us the serious crimes for which jail is warranted. Rehabilitation of individuals is very important to the Department, as it is to all of us, and we do support it, but I think that the rehabilitation best can be done by the Bureau of Prisons and by probation officers who can address it with the programs that they have.

The ability to have individualized sentences and alternatives to incarceration already exists because of *Booker* and of section 3553(a). There really is not a tremendous need to change the guidelines, and I think that if we do, we will be sending out the wrong message to the public. I think that this has been a really important dialogue, and we need to continue this dialogue. We need to continue to

learn about these things and think about the ways that we can, throughout the entire spectrum of someone being involved in the criminal justice system, bring in the alternatives to incarceration at various stages, but I don't think moving the lines on the sentencing table down will achieve that.

COMMISSIONER FRIEDRICH: Thank you, Linda. Nora, do you have some introductory comments?

MS. DEMLEITNER: Sure, I do. Thank you. Well, first of all, I want to join both my co-panelists in thanking the Commission for inviting us and also for putting on such a stimulating conference, which I'm sure has us all tired now by the end of the second day.

COMMISSIONER FRIEDRICH: You're going to sleep. The lights are out.

MS. DEMLEITNER: Well, I'll try to stay awake. What I want to start out with is stating what I thought has been obvious, and that is that incarceration has become the automatic default in U.S. sentencing, especially in the federal system. And I think you see this in a couple of ways. The most dramatic is the name of the conference, "Alternatives to Incarceration." That tells you what we're assuming is the default. Keep in mind that historically, at some point, incarceration was an alternative to the death sentence.

Now, there are other points that support this argument. If you're looking at the pre- and the post-guidelines data, you have an increase in incarceration dramatically, not with the inception of the guidelines alone, but surely they were part of that. When you talk about probation and parole violations, the default seems to be still incarceration, though we've obviously seen that a number of states are thinking much more creatively about what to do instead of automatically sending someone back to prison.

I think, ultimately, that the problem seems to be that we've used, or are continuing to use, prison to solve a whole host of other social ills, whether it be mental health problems, or, I think lately, immigration issues. Now, if we didn't think of incarceration as the default, we may not use the word "alternative" either. We may want to think more about possibly "intermediate sanctions," and that was the term used by some of the states, where they really think about something between probation on the one hand and incarceration on the other hand. If you want to be even more provocative, you just talk about noncustodial sentences, which also changes some of the numbers we're looking at that Linda just started talking about.

This is why I think this is important—the way you are thinking about what the default is, and what the alternative is, because it limits the way we think about an issue, and it limits what we think may be acceptable as an alternative to imprisonment. Because it seems to me that a lot of time when we talk now about alternatives, we're trying to figure out what resembles prison in one way or the other. Often there seems to be some custodial component that it is quite required.

When we had an initial conversation on the phone a few weeks ago, and I started talking about day fines, there was quite an uproar on the other side of the phone that it was a preposterous idea. And obviously nobody mentioned the preposterous idea, at least in the panels I've been in in the last two days. But it was Dick Frase who just, in the panel on comparative sanctions, reminded me that, for example, when you're looking at the German offender population, you have about 60 percent of all offenders. Mind you, that's not a perfectly comparable comparison, because obviously they don't distinguish

between state and federal offenses, but 60 percent of all of their offenders get a fine only, so there's no probation component. It's a fine-only sentence, and only eight percent receive a non-suspended prison sentence that the person actually has to serve.

I think, and I'm not going that way because that means I would truly be too provocative, that what this clearly implies is what they're labeling as violent—it's got to be to some extent different than ours. In every discussion, I think that we've said that we'll exempt violent offenders. We don't even talk about them as possible targets of alternative sanctions.

I think Linda started looking at the numbers for the federal system just to give us a comparison. In fiscal year 2007, we had about 85 percent of offenders who received a straight prison sentence. Now the Commission, in its annual report, talks about the vast majority of offenders, and here they use 88 percent sentenced to imprisonment. That was curious to me, because they clearly lump the "Prison Only D Category" and the "Prison Split, C Category" together, and seemed to be announcing that as a combined number.

On the other hand, you only have about eight percent who received a straight probation sentence under the guidelines. And incidentally, when you compare that to the number from about two years previously, the percentage of people going into incarceration has increased slightly, but it has increased.

Now, I think what we have to think about when we're looking at these questions is a purpose question, which I think has been kind of floating through the discussion. The two purposes, really utilitarian purposes, that we've seen people talk about have been public safety. I think that's been a big theme. And to a lesser extent in the federal system, but surely always talked about in the state system, is the whole question of costs.

Let me just make three points on the question of purposes. I think one thing that we have not highlighted, but I think that's very obvious, is that you cannot achieve all purposes with the same sanction. And when we had the discussion about boot camps yesterday, there was an NIJ study a few years ago that indicated that the reason that boot camps really failed ultimately is because we asked too much of them at the same time. What we wanted to do is we wanted to find a sanction that would reduce recidivism, reduce the number of prison beds used, and save money at the same time.

Not surprisingly, it was not possible to do all this at the same time, so they saved money, but they kind of skimmed on the resources they put into boot camps, and therefore recidivism didn't go down the way they would have expected. Had they put the resources in, the cost savings would have been much less substantial. So I think the point really is that you don't have one alternative that will serve as a panacea, and I think Linda has started talking about this, how you really have different offender populations that you have to think very carefully about; which alternative could work for which offender population.

I think what that means is that the Commission has to create some space for itself really, and Congress does for the Commission perhaps, to allow for some of it, experimentation, different points and with different offender populations based on the empirical data that already exists from the states and then obviously can continue to be a mess so that ultimately you have kind of a set of best practices. And it seems to me that this is particularly important in a federal system where you have divergences and also

very different offender populations based on their demographic characteristics as well as the crimes that they commit.

The other point I want to make about purpose is the retributive component, which we haven't talked explicitly about, but I think it's always there. I don't want to talk about proportionality. Also, I think Linda started talking about this when she talked about white collar offenders, or the danger of them getting lighter sentences. I think what has happened is that we've ratcheted up the sentences for drugs, sex and violent offenders ever more, so it seems to be disproportionate to have a much lighter sentence for someone who creates a substantial financial harm to other people. This leads to further ratcheting up. And so you kind of have this vicious spiral that has occurred, and nobody wants to put the brakes on, especially if it looks like it's a group that should not be preferred for a whole host of reasons.

I think what you also have here, and this ultimately will bring me back to my final issue, is that all of our sentences are in these person years and it seems to be always in groups of five. I think a lot of people have given examples. They've talked about ten-, 15-, 20-year sentences, and this strikes me as especially curious in a society where everything is so quick and getting ever faster.

Here we're talking really about agriculturally based sentences that really seem to come from an agriculturally based society. On the other hand, money, which we value so much in this society, we don't think about as kind of an effective sanction that could really hurt people. These days, fines that are being used in Europe really are designed to do that. They have a retributive component based on the number of days that you're being fined, and then they have a component that's really based on your financial wherewithal by setting the amount that each individual can pay. It seems that a system that has created a very effective guideline regime in terms of prison should be able to put one together with respect to fines that has that retributive aspect.

And then finally, just one point on recidivism, which I think to some extent goes clearly to incapacitation. To some extent, I think what we have to look at is the question of individual characteristics. I think this became very clear this morning when Rick Kern was talking about the Virginia Risk Assessment System. I think probably many states are moving in that direction, and I would not be surprised if the Commission ultimately does the same thing.

But then you really have to look at individual characteristics which the Commission right now says we're not looking at. And I think we really have to reassess this, and ultimately use them presumably in that analysis because otherwise I'm not quite sure how we can claim that these sentences are incapacitative and have a public safety component to them.

COMMISSIONER FRIEDRICH: Thank you, Nora. Just briefly before I pose a couple of questions, Nora, you raised the risk assessment model and the idea that the Commission might consider going down that path and looking at some of the factors Rick mentioned. I assume you're referring to sex and age, and things like that which the Commission, following Congress's directive, has determined are not appropriate acts to consider.

As you know, Congress forbade the Commission from considering gender in any way, and age was also a discouraged factor, so that's something that would definitely require legislative reform for us to incorporate that sort of thing into any kind of risk assessment within the guidelines. But it is an interesting thought, and both you and Todd have made the point that, under the guidelines, prison does

seem to be the default sentence. Certainly, our Commission statistics bear that out to some degree. If you look at our 2007 fiscal year statistics and you look at those offenders who fall within Zones A and B, over half of them would have been eligible, potentially, for some sort of probationary sentence or sentence to straight probation.

Linda has made the point that a large percentage—I think the chair mentioned 37 percent—of federal offenders are illegally in the United States, so that may account for some of the statistics. In addition, as the chair also noted yesterday, our statistics do not include any sort of information relating to misdemeanor cases or juvenile cases, so to some extent, they distort the statistics for the whole federal system.

But nonetheless, taking those factors into account, you look at that, in over 50 percent of the cases, judges who have the ability, even pre-*Booker*, to give something other than a straight sentence of imprisonment, are giving sentences of imprisonment. Post-*Booker*, when you look at the Zone D offenders now, and you wonder whether judges are exercising the discretion to go below Zone D, what we found is in a very small percentage of cases, in perhaps five percent, judges are dropping below Zone D and they're giving some sentence other than straight imprisonment.

So my question is, "What do you think accounts for this?" Todd has suggested that perhaps the judges are not as aware. It takes more education. Do you think there are things the Commission can do on its part to better inform judges of their options? Does the onus fall on advocates? What are your views of this situation?

MR. BUSSERT: I'll defer to Nora on any academic studies, and I'm not aware of any Commission studies that have inquired into these patterns, but my kneejerk reaction when this question was presented—and somebody had talked about this the other day with me—is that it could be a few things. I think one, on some level, courts are uncomfortable in certain circumstances because they see these nonviolent drug offenders getting so much time that when they get somebody who is not a drug offender, not similarly situated in terms of background, what have you, than say a white collar offender, they may feel uncomfortable giving that person the break that the guidelines allow for. They feel I've got to do something because, I just gave this other young kid, this 19-year-old kid, a 20-year mandatory sentence, and had no discretion in that matter. Now I've got this white collar offender who is less sympathetic and so at least I can send some minor message to that person.

I think it's a mindset issue, and I think we've talked here in terms of probation issues. I think it's probably true in terms of systemic issues of where your mindset comes from. And I think Nora references this as well, when your default is incapacitation or imprisonment, then whatever the sentence is going to be, that's going to be your default thinking, that some level of imprisonment has to be imposed. And sometimes you just have judges that like send people to prison.

And I also think the interesting point about that is, and this follows up I think—well, maybe it runs counter to what Linda was saying, and that is, if we expand the zones, we're going to somehow open up the door or floodgates for all these white collar offenders to avoid prison sentences as if some type of comprehensive alternative sanction would not be punitive enough. But leaving that aside, the reality of it is simply that prison's an option everywhere on the table, so you could be Zone A and get prison. The judge has the discretion the same way the defense can make the argument under 3553(a) for a non-prison sanction, so the government too can say, "I think prison is appropriate."

It runs both ways, this idea that expanding the zones is some kind of defense notion, some kind of wild proposal. I find a lot of support in this report which is the Commission's 1990 study, this alternative working group report that's called the Corrothers White Paper. One of its proposals in looking at alternatives and putting those into the guidelines framework was to expand the zones, expand Zone A, eliminate Zone C, and expand Zone B to 24 months of imprisonment. So the Commission's looked at this.

The Commission and Commissioner Corrothers and an independent bipartisan working group looked at this issue 18 years ago and thought that the appropriate action at that time was to expand the zones. So this isn't a new idea. It's been out there for quite some time, and actually I spoke to a former commissioner who was around when this report came out and asked, "Whatever happened to it?" He said that it was politically untenable. That's what happened.

The reason that we're here today, and I think people have acknowledged this, is because the political climate is changing. [Inaudible.] What we've been talking about for the better part of a day and a half is that prison's not working. Look at all these great reentry programs we have. We get all these people coming out prison who have drug problems, illiteracy problems, vocational problems, and cognitive behavioral problems. Where was prison? Why do we need to provide all these services on the back end? Because the reality is that the funding is not there.

BOP is stretched to the "nth" degree, 37 percent over rated capacity. It's really reaching a boiling point. The question I've been thinking about for the last day is, "If we can do all this on the back end, why can't we do it on the front? Why can't we do it from the time that someone's arrested?" These problems the defendants have didn't start in prison. They carried over into prison and back in the community. I'm not saying that if we provide the services up front that somehow that's going to help people avoid prison, but we need to address these core issues. I think it puts the core in a better perspective if there's a period of pretrial supervision, meaningful services in place to then make an assessment of where that individual might end up after whatever sentence is imposed, if it's going to be a period of imprisonment, and to get a sense of where that defendant is moving in his or her life at the day of sentencing.

These two days are a very good starting point in terms of discussion, but it is just that. I think there needs to be more of this. I think BOP officials need to come in, more corrections officials. There seem to be obviously very practical questions in terms of resource allocation. Is this money going to come through the AO or the BOP? How are we going to identify people? Right now I looked at the numbers. The *State of the Bureau*, the BOP's publication, 18.5 percent of its population in 2006 is in minimum security, 39.6 percent low security.

These are the types of low-risk, moderate-risk offenders that all these state officials have been coming in and talking about, advocating short periods of confinement, intensive services, and get them back into the community because the longer they stay in, the more likely they are to recidivate. These are the people we're talking about. I'm not talking about offense types, or in terms of the drugs, or what have you, but just looking at the individuals. The BOP has a risk assessment tool. They think these people are relatively low risk. So 18.5 percent of the people can walk out of a prison camp any time and walk into your community, but by and large they don't, and these are people that I would argue—probably 90 percent—who could be returned to the communities tomorrow, and there's going to be no difference in public safety. The issue is one of retribution. It's not incapacitation. And in terms of rehabilitation and

things of that nature, I just want to just make two quick points. Statutorily, 18 U.S.C. § 3582, what Congress directs is after the courts consider section 3553(a) factors, they must recognize that imprisonment is not an appropriate means of promoting rehabilitation.

So statutorily it's not correct, and in talking about where we should be going, 28 U.S.C. § 994(k), the Commission shall ensure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care or other correctional treatment. It's wonderful BOP provides these services. They're necessary. It helps the offenders when they're reintegrating into the community, but the reality is, all these things can go for a large number of offenders. These same types of services can and should be provided in the community. You don't need to resort to confinement.

COMMISSIONER FRIEDRICH: Linda or Nora, do you have anything you'd like add?

MS. HOFFA: I was going to say, your original question was, "Why in Zone A, B, C the court imposes "so many times a jail sentence?" I just want to say that it's obviously the assistant U.S. attorney doing a fabulous job at sentencing advocacy and, and that's probably why that's happening.

I'm not going to accept a premise that prison is always a bad thing or an inappropriate sentence. I'm not going to accept that. You know, over the last 20 years, yes, our prison population has increased tremendously, but over the last 20 years, our crime rate is going down as well. There are other purposes to prison, and one of the purposes is to protect us, to protect the community from people who are dangerous. Yes, another aspect of the prison sentence is that there's punishment, and punishment is appropriate. Those are factors that are to be considered as well.

[Inaudible.] In the federal system we do prosecute very serious offenders, and so it's not fair to compare us to state systems because I do think that our federal population is very different. It is appropriate for that to happen. But yes, I do agree that there should be services so that people are ready to come out and have those life skills that they need so that they won't continue to commit crimes. I do agree with that.

But I am not going to at all accept the premise that prison at all cost in every instance is—

MR. BUSSERT: No, and I'm not trying to make that point. I really think that Steve Aos, who spoke yesterday from Washington State, has the idea of looking at these variables from an economic perspective. He gives weight to certain issues in an interesting and, I think, a very beneficial way to kind of make these determinations, because they're not easy decisions.

MS. HOFFA: Oh, and the one other thing. The report that you held up here in 1990, my point is, there's something very different from when that report was done in the last decade and that is this, what we have to remember. The guidelines are advisory and *Booker* and the section 3553(a) factors do allow the judges to make these individual decisions about defendants. So that's where, Todd, your job comes in and the defense's job comes in, to make the court aware of these various alternatives to bring people back in the community, and my job of course is going to be to focus on the nature and the seriousness of the offense and the impact on the community for this criminal activity and the impact on the victim.

So we're going to have these arguments at sentencing. But I was just going to say the difference

here when they were trying to make these changes before is, we had mandatory guidelines and the judges didn't have the discretion to try to give these alternatives to incarceration. The judges now in all instances do have those alternatives available to them, without changing the guidelines.

MR. BUSSERT: They have the discretion and —

MS. HOFFA: That's right.

MR. BUSSERT: And I'm fortunate in that I've had many instances where the courts have been willing to adopt plans that I put before them, even when the guidelines were mandatory. But I think practitioners and I would assume we see the same thing; the courts are comfortable with the guidelines. I just think as a practical matter. There are your maverick judges who are going to go and do what they want, like Judge Weinstein or Judge Gertner. You know, these are judges who are going to say, "Look, I'm going to do what I think is right in this case."

But the reality is, they look to this book first and foremost. I have heard Judge Gertner say this at several conferences, when *Booker* came down, or I think it was *Blakely*, and the judges on the district court just said, "Let's treat the guidelines as presumptively reasonable because it's a comfort zone." The Commission's research has shown, and the FJC research has shown, that the courts just want some guidance in terms of what they should do. And I think what we're seeing in the last couple of days is this evidence-based research, which has been around for 15 or 20 years. It's just more of the same. You know, community service works. Comprehensive sanctions with a lot of supervision works.

These aren't new concepts, but there's been more empirical data to support their appropriateness, so I think that's all the courts understand. At least they're very general questions that the surveys suggest. But I think the Commission's job as an agency that specializes in sentencing is to give the courts the guidance to say, and to say, "We believe it's appropriate, or at least we did think in 1990 and perhaps we think it is now" in conjunction with talking to BOP, their obligation to reduce overcrowding, to look at this and think of more creative ways. Realizing that, even if we expand the zones, Your Honor, you can still impose a period of imprisonment if that's what you deem is appropriate, but here are other options that are available to you. This is what the science is saying and we in our expertise are going to help you. And we're going to look at these every year and look at where things are going and look where the technology is changing and keep you up to date on what options should be available to you. And hopefully the funding will come to probation to help you, or defense counsel perhaps isn't doing its job in finding everything for their clients in the community when there's not a systemic option and the courts can have that at their discretion.

COMMISSIONER FRIEDRICH: Nora, would you like to add anything?

MS. DEMLEITNER: Yes. I think you started out by raising the question of why there is still so much imprisonment, so I think just expanding the zones is not necessarily an answer because then you have an expanded zone, but you don't necessarily have more usage of it. I thought Todd's attempt to explain this by saying, "Well, but the sanctions are so high for some of the drug offenses that it seems hard to justify giving a probation sentence." Maybe you're right but I think part of it is really—I think some of it is a judge may not want to impose, especially a straight probation sentence, if he or she is not sure what could happen.

It seems to me that if I were risk averse, which I probably would be, then it's much less risky for me to say, "Well, I impose at least a short-term imprisonment sentence. During that time, nothing can happen, so nobody can blame me if something were to happen afterwards." So I think in that respect a risk assessment really might be helpful in some cases to some judges and that could then carry also into Zone D where in individual cases a judge could request that.

Now, the other part. I think what is important is to put together a package that I think is acceptable to both sides in the sense that it has a retributive component to it, but I think here it's important that it's not just imprisonment, and what may help judges, is to be educated on some of the social science that, for example, indicates that short-term imprisonment can sometimes be much more negative than positive.

I think a lot of times we have some of the research that says while the short-term imprisonment is helpful in the sense of sending this real message, even a month may mean you're losing your job, you're losing your spouse who then realizes you're not doing anything particular while you are in prison. There are lots of negative consequences that can really flow from that, so one month is maybe exaggerated, but a six-month sentence may have a much worse long-term consequence than if you'd let the person out. So I think some education in that respect might be really useful.

COMMISSIONER FRIEDRICH: Todd, in those few cases where you've had success already before a judge for some type of alternative, how do you go about it? Are you suggesting specific types of community confinement or community service? Are you setting forth a package to the judge, or do you simply make the argument in favor of the type of alternative and leave it to the judge to come up with that?

And Linda, how do you respond as a prosecutor in cases when you don't object to some type of alternative?

MS. HOFFA: You mean when I agree with Todd?

COMMISSIONER FRIEDRICH: Right.

MS. HOFFA: Oh.

COMMISSIONER FRIEDRICH: Those few cases.

MS. HOFFA: —be shocked—I do.

MR. BUSSERT: Again, this is, I guess, a primer in defense-based sentencing advocacy, but what I see invariably, and I gave this talk to some local defense attorneys a couple months back, I look at other people's sentencing guidelines, especially in multi-codefendant cases, and I'm surprised at what other attorneys are doing because it's just very poor, I think, and it's very consistent. When I've seen Judge Gertner talk and then I think her comments, though she's obviously unique in terms of how she approaches things, are consistent with what I've heard other judges say what they're looking for, and that is, judges know what their discretion is. They know what the guidelines say.

Now if [inaudible] application, fine, but they don't need this information spoon fed to them. They have probation working with them, and if you're going to dispute an issue with probation's calculation, fine. But at the end of the day, I think what judges are looking for more than anything is to understand the defendant. Probation is ill equipped, I think, in this regard. They don't have the time or the resources to sit there and do a comprehensive psychosocial history of your client, the defendant, to reach out to community members and get letters, to do all these different types of things. Because what I find works best in terms of helping the court understand who my client is, is one, spending a lot of time with my client and going through the same set of questions that I think probation asked but all those follow-up questions. And what I say is, "Look, I'm going to dig under every stone, and I may turn up nothing, but we've just got to find out who you are in presenting that to the court."

And then the second thing is, and this is usually part and parcel of it, the client may have had priors. They often do, but either the prior offenses or the current offense, how did this person find themselves in this position on this day? You know, that's what the judge wants to know. How did this person get here, and how do I know he or she is not going to get here again? And so, that's your challenges as defense counsel. The final piece of the puzzle is what's the recommendation and it is a package. Community service, again, is lined up ahead of time. You find the agency. You make the placement and you get the person in. Treatment, lined up ahead of time. Again, this is always with the caveat that the person's out pretrial.

But again, I think it's more suggestive for the court that the people are performing well on pretrial supervision, that they can be amenable to some type of alternative, and the need for imprisonment isn't as great. But all these types of things, and it's really focusing in on those needs, and it's difficult sometimes. I've done it in the state system. I've done it in the federal system, and by and large, I find that courts are receptive. And by and large, I find that attorneys who say, "My judge won't do that, my judge always goes with the guidelines," that's not true.

If you really put the material before the court, it may be a little bit but I think that's even a victory for a judge who tends to stay consistent with the guidelines. And on a rare occasion, when I was back at NCIA—I don't think it's happened since—we actually had a prosecutor recommend—it wasn't a federal prosecutor; it was a state prosecutor—but recommend family contact just to put together a plan for their child because they thought this child might—a teenager would benefit from some type of meaningful community-based sanction.

So I think there's a recognition in the aggregate that if we see what the person's needs are—and this is what everyone's been talking about today for reentry purposes, the last couple of days. But putting all these resources in place and then moving forward without [inaudible] because that's where the person's going to be most successful and that's where ultimately the communities can be most invested. And I think it's going to be the best net result for society.

COMMISSIONER FRIEDRICH: Linda, how do prosecutors approach the issue?

MS. HOFFA: Well, Todd said that the court wants to understand "How did the defendant get into this place and how do we know that the defendant won't return to that place that caused this criminal activity?" And I think a prosecutor wants to know that too. So I don't think a defense attorney's efforts would be wasted on a prosecutor trying to also, in the first instance before going to sentencing, to spend time with the prosecutor and explain what the circumstances are.

The problem for us is, “How do we know this just isn’t the defense attorney putting everything forth, and the judge would feel the same way, and does the defendant really get it?” Does the defendant really understand? Has the defendant learned his or her lesson and won’t do this again? If the prosecutor had some comfort in that, you’re darn well going to convince the judge of that as well. So did you ever think about bringing the defendant in? This is not cooperation or anything like that, but to meet with the prosecutor, to meet with the victim, and to apologize?

MR. BUSSERT: Yes. I thought about it, yes. Has it happened? No. But what I say is this. This idea of restorative justice and it’s growing, I think it’s actually a great addition to the system. And again, its making the community whole. And the thing that kind of struck me when we were meeting outside earlier and there was a woman next door who is involved with another symposium. She’s a DC resident from [Sweden] and she said, what are you here for? And I said the alternatives to imprisonment. She said, what’s that? And I said alternative sanctions. She’s like, “Well, are there those? I thought they just locked them up and that was it.”

And so from a community perspective, I think that’s a feeling, especially when you’re in an urban area like D.C., and she was like, “My son’s friend who’s in and out of jail and sometimes he just goes to jail because he needs a bed, a place to stay and a roof over his head.” You know, so there’s that idea of community investment. I think restorative justice and the idea of trying to work it out federally and knowing what the federal defenders are doing in Maryland, what’s going on nationally, is a great addition to the options that are available to the court, and I think a lot of clients are interested in doing that. And they have a difficult time.

As a defense attorney, I do sometimes hesitate because getting mental health counseling up front is usually the most difficult thing. They have a difficult time expressing themselves in a way that would be considered appropriate, and then not intentionally being offensive but just phrasing things in such a way that it’s misconstrued and then everything just falls apart. Again, most clients, I think, especially when they plead guilty, they tend to be sincerely accepting responsibility.

MS. HOFFA: Is that the most dangerous moment at sentencing when they get to stand up in front of the judge and apologize for what they’ve done and you don’t know what’s about to come out?

MR. BUSSERT: No, that’s the best moment.

MS. HOFFA: That’s the best moment. It can be the best moment.

MR. BUSSERT: No, it’s always the best moment because this is what I say to my clients when it’s a close case. I say, “I have done my job, now it’s your turn.” But I say, “If the judge is going to give you the consideration we’re asking for, you need to get up there and say something and it needs to be from the heart.” I say, “Don’t write anything down. You need to be sincere and explain why you’re here.” And I said, “If he believes you or if she believes you, then you might have a chance, but if they just think that you’re trying to play the system, forget about it.”

MS. HOFFA: You’re absolutely right. The short answer to your question, though, what I would do to counter Todd is I would have the victim there on—or victims and, if it’s a really close case, probably the press, and make sure a lot of attention is being brought and always try to bring the attention

back on the criminal activity and the impact on the victim, and this is not all about the defendant. This is also about the victim.

COMMISSIONER FRIEDRICH: Let me pose one last question, and then I'll open it up to the audience. Nora, we've talked about the large immigrant population in federal prisons. Do you have any suggestions on how we as a society should deal with this population? Currently, they're ineligible for many of the sorts of programs that prisons offer and judges are obviously very reluctant to release them given the flight risk.

MS. DEMLEITNER: Well, I think this is the biggest problem. Really, the Commission can't do a whole lot because it's the Congress that has really restricted the Commission's ability to do anything in terms of talking about release. I think I just want to point to two things. What a number of the states have now started doing, but they're doing it largely for financial reasons but also for overcrowding, not that the two of them are mutually exclusive but for overcrowding reasons, is that a number of states now ever more publicly have said they'll give a sentence reduction in exchange for basically deportation, which previously the attitude had been you'll have to serve your entire sentence, because that's kind of the retributive component, and then we'll deport you. And I'm not advocating for that. I'm just pointing it out.

I think the other thing, though, is really to get Congress to focus on the fact that not every person has to be an automatic flight risk. I think there are different population groups within the noncitizen group, obviously. You have undocumented people who are probably constituting the highest flight risk just because they have the least to lose, although I think I'd make a distinction there, too. You have people who are undocumented but who have been in this country for ten years, hold a job, have a family and often have citizen members in their family group, and they may constitute a very different flight risk than the person who was caught crossing the border. That's a very different population group.

And then obviously you'll have long-term residents who hold a green card, some of whom will be automatically deportable upon having served their sentence, presumably increasing their flight risk. But then, they may have countervailing factors that decrease it. And then you have some who are not automatically deportable so they'd have the ability to fight it in an immigration court, which clearly would reduce them as a flight risk. So I think what you would want, and I don't think this is the Commission's job—I think there are other groups whose job this should be—is really to say, "You gotta go back." At least allow some models for groups and, about a decade ago or before these laws went into place, they had supervision programs which turned out to be quite successful in terms of getting people to show up for their immigration hearings.

So it's not impossible to do this, but I think right now there's absolutely no political will, and I think that's the group that's gotten really the worst end because immigrant advocates are clearly not advocating for them, and I don't think there's anybody else out there who is.

COMMISSIONER FRIEDRICH: Let me open it up for questions from the audience.

MR. BOATMAN: I'm Jeb Boatman. I'm an AUSA in Oklahoma City, Oklahoma. I have a question for anybody on the panel, but especially Linda. How do you think prosecution guidelines affect this discussion? Specifically, are prosecution guidelines one way to explain why it seems like so many of our offenders go to prison because I know a lot of offices calibrate their intake based on a quick

guidelines calculation. And a lot of times if it's a crime that can be prosecuted by both the state and the federal government, we'll decline it if it's not a crime that will ultimately result in a recommended jail time.

And also, how do you think prosecution guidelines will respond if, for instance, the zones just increased? Do you think prosecution guidelines will decline more cases and subsequently we would continue to incarcerate the same rate of people because we'll just decline the cases that won't result in jail time?

MS. HOFFA: Okay. The prosecution guidelines are decided office by office. Each U.S. Attorney's Office establishes its guidelines and about whether or not its going to accept a case to investigate and then prosecute, and obviously when our budget was cut by 20 percent, those guidelines went way up because we were losing 20 percent of our attorneys so we could prosecute fewer cases, so those guidelines will vary according to the circumstances of our budget.

I think you're right. I think that a lot of the offices have guidelines. For example, drug cases that will tie into the mandatory minimums and so therefore they know that they'll get a guaranteed sentence of jail and they have a larger, stronger leverage to make sure they can get cooperation and successfully prosecute that case and build it up larger. So you were probably right. As the guidelines change, some offices could definitely increase their guideline levels, and so the incarceration rate may stay the same for those kind of cases.

MS. WINKLER: Gail Winkler with the probation office in Houston. Linda, I heard you, but maybe I'm just confused. I remember about eight or ten years ago, the Bureau of Prisons took away the ability of the judges to sentence people directly to the halfway house because they no longer see that as a prison facility. Do you recall that? And I know that a dozen of the judges I work for are very upset with that option being taken away.

MS. HOFFA: Todd can answer that. He knows the—

MS. WINKLER: So I believe across the country, it still exists.

MS. HOFFA: What I said was correct, but Todd can explain it.

MS. WINKLER: Okay.

MS. HOFFA: You also said that a lot of judges don't know this.

MR. BUSSERT: Yes, and this was an issue. In December 2002, the Office of Legal Counsel issued a memorandum directing the BOP to eliminate the use of halfway houses. Well, the byproduct was that this is when the policy went into place. They restricted halfway house use on the back end and eliminated it on the front end. "Do not honor judicial recommendations for direct placements." This resulted in several years of litigation that was still ongoing until the passage of the Second Chance Act, [inaudible]. It was the Second, Third, Eighth and Tenth where that option had been restored. The First Circuit had upheld the BOP rule, and then the Second Chance Act passed, and as we understand it, and Linda conferred with someone—

MS. HOFFA: Regional counsel.

MR. BUSSERT: —BOP's regional counsel in—

MS. HOFFA: In Philadelphia.

MR. BUSSERT: —Philadelphia—

MS. HOFFA: Of BOP.

MR. BUSSERT: That not only has the Second Chance Act done away with the ten-percent rule on the back end, it has also made this option available to the courts in the front end. But if you read the language of the Second Chance Act, it codified—well, it's always been Bureau policy that its judicial recommendations are nonbinding as to placement, so the courts can make the recommendation for direct commitment and then it's up to the BOP in its discretion whether or not to place someone there.

QUESTIONER: Have they enacted that yet?

MR. BUSSERT: They have informally. There's a policy statement—they were supposed to issue a revised policy statement within 90 days of the passage of the Second Chance Act. They have yet to do so as I heard actually just a few minutes ago. It's pending. They have it. I've spoken to someone previously. They were working on it like if not before, but you know, definitely from the get go, so they're working on that and they have issued internal directives to allow staff to act pursuant to the new law. So you know, at least on the back end, I've seen it.

I have not heard any examples on the front end. It's actually a question I've got a call into somebody at BOP about that and also to reconfirm that because I think if they haven't done it, they need to inform the judiciary that this is now available again.

QUESTIONER:—especially when it was around the heels of the elimination of boot camps, so.

COMMISSIONER FRIEDRICH: Yes.

MS. MEYERS: Margie Meyers, Federal Public Defender, Southern District of Texas. This is really addressed to Linda. What I heard you say is that, speaking for the Department of Justice, you don't see any need to increase the zones because we can increase alternatives to incarceration, which we have heard two days of, includes interests that the Department of Justice is interested in, public safety, reducing recidivism. That we can get this to the same place, A, by changing offense levels, and B, by *Booker* variances. But in 21 years, I have never seen the Department of Justice agree to reduce an offense level, and it is also at least —

MS. HOFFA: You mean you agree to a *Booker* variance?

MS. MEYERS: No, an offense level. As a sentencing proposition, number one, and number two, on *Booker* variances. At least before *Gall* it was the policy of the Department of Justice to oppose *Booker* variances, and if what we're looking for is justice and reducing recidivism which can include alternatives to incarceration, why is it that AUSAs can't come in and either not oppose or actually agree that a *Booker*

variance is appropriate in the case? They don't in our district. And it's —

QUESTIONER: —the policy —

MS. MEYERS: Well, that's—then that's a change because McNulty and the others, and I'm curious to hear that, has that changed, that now AUSAs in fact can agree to *Booker* variances?

MS. HOFFA: In appropriate cases we can. As a matter of course, we don't.

MS. MEYERS: Other than cooperation?

MR. BUSSERT: The Committee—

MS. HOFFA: Yes

MS. MEYERS: Okay.

MR. BUSSERT: —has given its blessing.

COMMISSIONER FRIEDRICH: Yes.

MR. VIKEN: Jeffrey Viken—Federal Defender in North Dakota and South Dakota. I had the privilege of being a federal prosecutor before the federal sentencing guidelines.

MS. HOFFA: Before the guidelines?

MR. VIKEN: Before the guidelines.

MS. HOFFA: Me, too.

MR. VIKEN: Carter Administration, beginning of the Reagan Administration. Linda, unless I didn't hear you correctly, and understand you're speaking for the Department of Justice, when the commissioner asked you what you would do to deal with Todd and his approach to seeking a *Booker* variance, you said, "Well, I would support public safety. I would call the victim to bring out the rest of the picture to the judge."

MS. HOFFA: This was where I'm not agreeing with what he wants.

MR. VIKEN: Yes, I know.

MS. HOFFA: I don't agree with.

MR. VIKEN: Yes, where you're in a courtroom at a sentencing —

MS. HOFFA: Yes.

MR. VIKEN: —and you're trying to offset, the commissioner said, "How do you as a prosecutor, Department of Justice, deal with what Todd is doing to make his client a human being, to seek a *Booker* variance so that the advisory-only guidelines will permit the judge to make the sentence fit the offense and comply with having a sentence which is sufficient but not greater than necessary under section 3553(a)?"

The disturbing part of your answer, to me as a former employee of the Department of Justice, was your suggestion— fine, you, have the victim there. You said you would bring in the press.

MS. HOFFA: Oh.

MR. VIKEN: You had extra-judicial pressure on the judge to try to create a harsher sentence or a sentence that the Department of Justice apparently considers appropriate by influencing the court by having the press present. Now, it has been a few years since I was a federal prosecutor, but that was completely unacceptable thinking in my day, and I thought it still was. Could you explain that?

MS. HOFFA: I disagree with you. I don't think there's anything wrong with the public knowing what's going on in court. And in fact, the courts have been taking tremendous steps to make sure that everything that goes on is on ECF now and on Pacer and available to everyone. The court, the Judicial Conference has been really stressing transparency with what goes on in the court. I don't think there's anything inappropriate with the public knowing what goes on in court.

MR. VIKEN: But the transparency issue, Linda, was not the question the commissioner asked. It's you're in a sentencing, and what you do to balance the defense side of the equation when a judge is trying to make a decision on sentencing.

COMMISSIONER FRIEDRICH: Now, now —

MR. VIKEN: Please clarify whether you meant you were bringing the press in to put the judge in a position where he had to act in a certain way.

MS. HOFFA: Consider this. What Todd will do—and Todd will do a good job—what Todd will do is he will bring in the defendant. He will bring in the defendant's family. He will bring in the defendant's friends. He will pack the courtroom with as many people as possible to make sentencing all about the defendant and all the defendant's issues and all the defendant's problems.

MR. VIKEN: That's advocacy.

MS. HOFFA: And that's effective advocacy.

MR. VIKEN: Yes.

MS. HOFFA: It absolutely is. But remember this, the judge sitting up there, it's harder to make that decision when everybody in the courtroom is in there, 100 people, 50 people, 20 people, and they're all rambling and crying and talking about how horrible this is, how terrible this is, how this will be a travesty of justice if Todd's client goes to jail. And what I've got to do is be the voice of the victim and the voice of the five million people in the Eastern District of Pennsylvania also so that they make sure that

justice is done. And if that means that the five million people in the Eastern District of Pennsylvania are going to be heard through the daily news reporter who's sitting back in the courtroom, that's fair game, too. Because I want to make sure that the other side of the story is told and the other focus is there.

So really, he's trying to influence that judge with the 50 people wailing and crying in that courtroom. And it is fair game, I think, for me to make sure that the victim's there and the victim's family is there. Or maybe the agency that was ripped off is there and that the public is also represented, too. You know, I think that that's fair.

MR. VIKEN: But the —

MS. HOFFA: And that's advocacy.

MR. VIKEN: The manner in which you're suggesting you use the press is to tell—let the message be clear to that judge that there are community consequences for you, Your Honor —

MS. HOFFA: There are always —

MR. VIKEN: —if you don't comply with —

MS. HOFFA: Not really.

MR. VIKEN: —what the Department advocates

MS. HOFFA: Sir, these are Article III judges with life tenure. There really are not community consequences for them, but I think for them to understand and be aware of how the community will react and think and feel about this, that that's fair too. It's just fair that everybody's going to see everybody's position and viewpoint at that time, and being a judge isn't easy. I grant that. But I don't want to think that's—please don't think that that's underhanded or unfair or anything. I think it's just another perspective that everybody—that that judge has to take into consideration, and they do, they do. They do have to think about what will the community, what will the public message be, because for the Department of Justice, deterrence is important, and that's the message that has to go out to the public. You do this crime, you will be punished for it. And so, if there is a good sentence, and there is adequate deterrence, it is very good for there to be a press article about that so people know that and that message gets out.

MR. VIKEN: Well, that doesn't sound like —

MS. HOFFA: But I understand —

MR. VIKEN: That doesn't sound like sentencing advocacy to me but I understand your view. I have no problem with the transparency aspect. It's using media as advocacy at a sentencing that's disturbing, but the Departmental attitudes change all the time.

MS. HOFFA: I understand.

MR. VIKEN: They do.

MR. BUSSERT: I just want to follow up on one quick thing in terms of what I do or don't do. If I'm doing my—

(Laughter)

MS. HOFFA: Well, Todd, that's another —

MR. BUSSERT: No, if I'm doing my job well, the last thing that Linda would do is have the press there because when I get the sentence or sentence close to what I'm asking for and they're left holding the bag, asking for this extremely unreasonable sentence, they don't like those stories. And by and large, when those results occur and there's not a *de facto* courthouse reporter in attendance, those are the rare situations where there's not a U.S. Attorney press release issued that afternoon saying what a wonderful deterrent effect just happened. So that's one thing.

And secondly, I don't bring in the 50 people or the 100 people. If I'm doing my job, those 50 or 100 people have written ahead of time and told the court how they feel, and more than how they feel. Because look, judges know that family members don't want people going to prison and that spouses are upset. What the judges want to know is who is that person. So when I ask people to write letters, I tell them to explain who this is to you, a coworker, a loved one, a spouse, and what they mean to you and what kind of person are they really. Explain to the court who they are based on what you know because I'm their advocate.

I am the defense attorney. The judge is going to have that perception that I'm coming in and trying to do these things, and so I can [inaudible] in my presentation, my written presentation, which is hopefully submitted at the appropriate time, because I think most often judges go into that sentencing hearing having a sense in their mind what they want to do. And so, I think you don't win or you don't get the result that you want, I should say, on behalf of your client if you haven't submitted that ahead of time in a very meaningful way. And what you're going to get in that instance is a very strong, or it could be a very strong government response.

And then you're going to have the opportunity to reply. And that's when you're going to focus in on the hearing. Mom and dad or the aunts and uncles crying in the courtroom aren't really going to matter at all. They're going to matter to the client, and I actually I like that sometimes because it makes my clients emotional and they realize, these are the people they're going to be leaving behind if they get sentenced and that impact the judge can see, the relationship, that this is sincere, and I want my client to get up there and cry. So the 100 people, I just think it's gamesmanship, and I don't think it helps.

MS. HOFFA: Well, they do it in Philly all the time. The other thing I wanted to just say, though, is that in the Eastern District of Pennsylvania, we have a very cordial relationship with the court. We have a very good relationship with the court. We respect the court; the court respects our office; and we never make a public statement to criticize a judge.

COMMISSIONER FRIEDRICH: Any other questions?

MS. HERNANDEZ: Hi, Commissioner. You know, you started the session talking about the directive to the Commission to make the sentence of imprisonment inappropriate for non-serious, non-violent crimes.

COMMISSIONER FRIEDRICH: With the appropriateness of a sentence other than imprisonment for —

MS. HERNANDEZ: Other than imprisonment.

COMMISSIONER FRIEDRICH: —certain offenders.

MS. HERNANDEZ: So one original question is, why did the Commission decide that only zero to six is a non-serious offense in essence, because everything above zero to six is going to end up with imprisonment and would in essence be contrary to 994(j).

COMMISSIONER FRIEDRICH: I'm confused by your question. The original —

MS. HERNANDEZ: Once you get past zero to six, you're in Zone B, right? And that would —

COMMISSIONER FRIEDRICH: And that would provide for the possibility of probation with a minimum term served in community confinement or home detention or something of the like.

MS. HERNANDEZ: Oh.

COMMISSIONER FRIEDRICH: So it was a graduated system.

MS. HERNANDEZ: Well, okay. So let's go to Zone C which requires some prison time.

COMMISSIONER FRIEDRICH: Right.

MS. HERNANDEZ: So you're at an offense level 11.

COMMISSIONER FRIEDRICH: Right.

MS. HERNANDEZ: So the initial question is, where did the Commission determine or why did the Commission determine that you become a serious offender at so low a level?

COMMISSIONER FRIEDRICH: I think that the Commission based the developments of the zones, although I certainly wasn't there at the time, but my understanding is that these lines were drawn in large part to mirror existing sentencing practices. But as Linda said, there were a few exceptions, economic crimes, drugs, and others where Congress had imposed mandatory minimum penalties, and the Commission responded accordingly by raising the offense levels for drug offenses, but for the most part, I think that the zones were set according to existing sentencing practices. That's my understanding.

MS. HERNANDEZ: Except in white collar cases and you have raised it more—in white collar cases you've gone up—

COMMISSIONER FRIEDRICH: Right.

MS. HERNANDEZ: —like two or three times.

COMMISSIONER FRIEDRICH: Because Congress said quite clearly to the Commission that it believed, also, that there was an inappropriately high percentage of white collar offenders sentenced to probation. I think the legislative history of the SRA bears that out in economic crimes. Certainly since then, Congress has repeatedly given the Commission directives to raise the guidelines with respect to certain economic crimes. So to the extent in the economic crime guidelines, the offense levels have increased over time, it's in large part in response to Congress, as well as to judges who came to the Commission before Sarbanes-Oxley and said they felt that the sentences were unreasonably low. So the Commission had an economics crime package. It's been a combination of things since the initial period, but in the initial period I can't say, I wasn't there.

My understanding is it was based in large part on existing practices with a desire to provide a short but mandatory sentence of imprisonment for economic crimes.

MS. HERNANDEZ: Right. I know that the judges, the Judicial Conference came to the Commission and said, "We think white collar sentences are too low." That was viewed, certainly by the defense bar as a response to the overly severe sentences for drug cases and other offenses. And you know, one question is on what basis should the Judicial Conference be coming to the Commission and saying raise penalties when, in fact, the truth is, they could have gone up, and even in white collar offenses, when they came to the Commission and said raise penalties, they were still sentencing mostly at the low end of the white collar guideline rate, so they weren't exercising the discretion they had, and yet in response, the Commission raised penalties.

COMMISSIONER FRIEDRICH: Well, I can't speak for the Judicial Conference, but certainly it is appropriate for judges, as it is for defense attorneys and prosecutors, to come to the Commission. In fact, we're instructed by statute to listen to the views of all the stakeholders in the criminal justice system, including judges. So again, I wasn't on the Commission at the time, but presumably there was a significant percentage of judges across the country who felt that they did not have the discretion. True, in certain cases, they could depart, but perhaps in cases where departure language wasn't appropriate, they felt like the sentences were not severe enough.

MS. HERNANDEZ: But they were sentencing at the low end of the range in the white collar offenses for the most part, so they had discretion within the original ranges to sentence more severely, but they weren't. What I'm suggesting is that the Commission may want to revisit why the zones are set so low, why Zone B starts at such a low point. Whether it does that as a function of melding zone B and C or expanding Zone A, the question still remains, I think, legitimately, "Why it is that the Commission made such a policy decision?"

It seems to me that goes back to—I know the Commission is a policy body, but it ought to be making policies based on some standard, and it seems to me it's rather arbitrary to decide that offense level 6—for example, that means a fraud of \$30,000 is going to get you probably a sentence of imprisonment, which I'm willing to argue that that's not a serious offense, whereas someone else might think it is.

COMMISSIONER FRIEDRICH: Well, your point about looking at the zones and giving courts more flexibility within the zones, in addition to the Corrothers Report, there is recommendation from the Judicial Conference in the early '90s to do more of the same, so certainly the purpose of this conference is to consider issues like that.

My understanding of the history is that the way in which the Commission set the zones was based initially on existing sentencing practices, with consideration of congressional directives, which we must do. We must take into account directives that the Congress gives and that was certainly a factor in why the zones were set the way in which they were.

COMMISSIONER FRIEDRICH: I think I will say time is up, but thank you all. This has been a terrific discussion.

